IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 2715/2016

Date Heard: 10 August 2017

Date Delivered: 29 August 2017

In the matter between:

EAST CAPE GAME PROPERTIES (PTY) LIMITED	Applicant
and	
DUDLEY GRAYAME BROWN	First Respondent
JOHNATHAN DUDLEY BROWN	Second Respondent
METRO QUARRIES (PTY) LIMITED	Third Respondent
MINISTER OF MINERAL RESOURCES	Fourth Respondent
NELSON MANDELA METROPOLITAN MUNICIPALITY	Fifth Respondent

JUDGMENT

EKSTEEN J:

[1] The application (the main application) relates to the first to third respondents entitlement to mine sand on portion 105 of the Farm Kragga Kamma 23 (the property) pursuant to mining permits issued in terms of section 27 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA). As against the first respondent the applicant contends that he has continued mining on the property after the lapsing of his permit. The “use rights” granted by the fifth respondent in respect of the property in accordance with the Cape Land Use Planning Ordinance, 15 of 1985 (LUPO) lies at the heart of the dispute with the second and third respondents. No relief is sought against the fourth and the fifth respondents.

The relief claimed

[2] In the main application the applicant seeks an interdict in the following terms:

> "1. That the First Respondent be interdicted:
>
> 1.1 from conducting mining operations for the removal of sand or any other substance on the immovable property, … whether through the agency of the Third Respondent or in any other manner;
>
> 1.2 from entering upon the Property whilst so interdicted, or from causing any other person or entity to do so, save for the purposes of fulfilling any component of this Order, and then only with prior written authority from the Applicant.
>
> 2. That the Second and Third Respondents be interdicted:
>
> 2.1 from using the Property for the purposes of the mining or removal of sand or any other substance therefrom, and from causing any other person or entity to do so on their behalf, unless and until the Property is zoned in a manner permitting mining in which event this interdict will lapse;
>
> 2.2 from entering upon the Property whilst so interdicted, and from causing any other person or entity to do so, save for the purposes of fulfilling any component of this Order, and then only with prior written authority from the Applicant."

[3] In the alternative the applicant seeks to interdict the second and third respondents from conducting mining operations on the property or removing sand or other materials therefrom other than in compliance with the relevant mining permit. For the reasons which are set out later herein it is not necessary to consider this relief.

[4] The application has been vehemently opposed. Answering and replying papers were duly filed and the applicant proceeded, as it was entitled to do, to enrol the matter for hearing. This prompted the belated lodging of a counter application. The primary relief sought in the counter application is, remarkably, an order dismissing the main application. In the alternative, however, the counter application seeks an order in the following terms:

1. Staying the respondent's (applicant in the main application) main application pending:

    1.1 the final outcome of the review application to be instituted by the first to third applicants not later than 29 May 2017 in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) for the review and setting asides and/or correcting the decision of the Nelson Mandela Bay Metropolitan Municipality or its predecessor, being the third respondent (the fifth respondent in the main application) made in terms of LUPO in which the zoning of the property was determined ("the zoning decision"); and

    1.2 the final determination by the Minister of Mineral Resources, being the second respondent (the fourth respondent in the main application) of the application in terms of section 47 of the Mineral and Petroleum Resources Development Act 28 of 2000 in respect of mining permit number EC442015 held by the second applicant (the second respondent(in the main application) in respect of the property.

2. Ordering the suspension of the zoning decision and/or the issue of the zoning certificate, pending the final outcome of the review application referred to above.

[5] The counter application is also opposed. Answering and replying affidavits were duly filed in the counter application and prior to the hearing thereof the applicant in the main application gave notice of its intention to move to strike out the entire counter application, alternatively to strike out portions of the founding and replying affidavits therein. I shall revert below to consider these various applications to the extent that it is necessary in resolving the dispute. For purposes of this judgment the parties in the various applications will be referred to as in the main application.

Background

[6] The applicant purchased the property from the first respondent's father in 2011. The declared intention of the applicant in acquiring the property was in due course to seek the rezoning of the property for purposes of residential development.

[7] At the time of the purchase of the property there was a sand mine on the property where the first respondent conducted mining activities in accordance with a permit duly issued in terms of section 27 of the MPRDA (the first permit) on a small site (the first site). The property measures 86 hectares in extent and the maximum area of the first site demarcated under the permit amounts to 1.5 hectares. The first permit was due to expire in December 2015 and accordingly posed no difficulty to the applicant's intentions with the property.

[8] The contract concluded between the applicant and the first respondent's father recorded at the time that the acquisition of the property is "subject to all third party rights to the quarry". It is not in dispute that the reference to the quarry is intended to refer to the sand mine. As set out earlier herein the only "rights" which existed at the time was the first permit. It is common cause that the first permit has now lapsed. There is some dispute on the papers as to precisely when the first respondent's rights under the first permit terminated, however, nothing turns on this dispute.

[9] In the latter part of 2014 the second respondent too applied for a mining permit (the second permit) on the property. The second permit was duly authorised for the mining of sand on a demarcated area on the property (the second site). The second site was 2,5 hectares in extent. Early in 2015 the applicant and the first respondent entered into an agreement which recorded, *inter alia*, that the applicant wished to take over the existing and future mining activities of the first and second respondents and, on completion of such mining activity, to rezone the land and develop the property for residential purposes. There is some dispute between the parties as to whether the first permit was in existence at the time, however, the agreement records that the first respondent held a mining permit at the time for which an application for final renewal had been lodged. The second respondent's application for approval of the second permit was pending at the time. In terms of the agreement the applicant would take full control of the physical mining and rehabilitation activities and would pay the first and second respondents a royalty for sand mined within the mining area.

[10] The applicant commenced to fulfil its obligations under the agreement and continued to mine sand for a period in accordance with the agreement. Although there is some dispute between the parties as to the reasons for the termination of this agreement it is common cause that the agreement was terminated during or about January 2016.

[11] During 2015 one Watson, the deponent to the founding affidavit in the main application, acquired the shares in the applicant. At the termination of the said agreement he instructed attorneys to advise him in respect of the rights held by the first and second respondent. An application in terms of the Promotion of Access to Information Act, 2 of 2000 was delivered to obtain documentation from the Department of Mineral Resources. Copies of the first and second permits together with the applications for the granting of such permits and the approved Environmental Management Plans in respect of the respective permits were obtained in accordance with the said legislation. It emerged from the documentation in respect of the first permit that the first permit had lapsed and that the first respondent had no mining rights under the permit.

[12] The main application was launched on 5 August 2016. As against the first respondent the applicant contended that the first respondent was still mining on the first site notwithstanding the lapse of the first permit. In respect of the second respondent it is contended that the property is zoned agricultural zone 1 in terms of the applicable zoning scheme of the fifth respondent. Notwithstanding averments contained in the answering papers in the main application it was common cause in

argument before me that mining is not permitted as a primary or a consent use on property zoned agricultural zone 1 in terms of the applicable zoning scheme. In the circumstances, notwithstanding the grant of the mining permit it would be unlawful to mine on the property unless and until the property is zoned so as to permit mining. (See **Maccsand (Pty) Ltd v City of Cape Town and Others** 2012 (4) SA 181 (CC).) Hence the launching of the main application.

The main application as against the first respondent

[13] The dispute in the main application as against the first respondent turns on the narrow issue as to whether the first respondent continued mining on the first site pursuant to the first permit after the lapse of the first permit and the lodging of the main application. I have alluded earlier to the dispute which exists between the parties in respect of the date of the lapsing of the final extension of the first permit. The final extension of the first permit for a period of one year occurred in December 2014 and the first permit accordingly lapsed in December 2015. The first respondent alleges, however, that he was first notified of the final extension of the first permit during April 2015. He accordingly alleges that the permit lapsed in April 2016. The dispute is immaterial as the application for an interdict was launched in August 2016. Clearly the first respondent can only be interdicted from a continuing infringement which existed, or was anticipated, at the time of the launching of the main application.

[14] The first respondent, although contending that the first permit only came to an end in April 2016, denies that he has at any time continued mining activities in terms of the first permit on the first site after April 2016. The foundation for the applicant's

contention is to be found in a report drawn by Dr Clark, who carried out an inspection of the property in order to ascertain whether the mining activities were being conducted within the terms of the mining permits. She noted what she considered to be mining activities on the first site which was clearly conducted after the lapse of the permit. The first respondent does not deny that activity was conducted on the first site after the lapse of the permit but avers that it related to the rehabilitation of the site which he was obliged to carry out after the lapse of the permit in terms of the Environmental Management Plan approved for the site. To that extent there is a factual dispute between the parties in respect of the first respondent's activities at the time that the main application was launched.

[15] It is now well settled that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. (See **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at 235E-G; and **Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (AD) at 634H-I.) In **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**, *supra*, however, Corbett JA proceeded to state at 634I-635C:

> "The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact … If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)*(g)* of the Uniform Rules of Court … and the Court is satisfied as to the inherent credibility of the applicant's factual

> averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks … Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ….”

[16] I do not consider the averments on behalf of the first respondent to be so far-fetched or clearly untenable as to be rejected merely on the papers. It seems to me that a real, genuine or *bona fide* dispute of fact has indeed been raised in respect of the activity of the first respondent. Neither party has requested that oral evidence be heard in respect of the prayers as sought against the first respondent and I do not think that the dispute can be resolved on the papers. In these circumstances I do not consider that it can be held, accepting the approach set out in the authorities to which I have referred, that the first respondent has conducted any mining activity since April 2016. The application as against the first respondent can therefore not succeed.

The main application as against the second and third respondent

[17] In respect of the second and third respondents the applicant alleges that the property falls within that portion of the fifth respondent’s area of jurisdiction which prior to the establishment of the fifth respondent in December 2000 fell under the jurisdiction of the erstwhile Western Districts Council. It contends that the property is zoned for agricultural zone 1 purposes as reflected in the records of the fifth respondent. The scheme regulations published in accordance with section 8 of LUPO in December 1988 provides that the primary use of property zoned agricultural zone 1, is “agriculture” with the secondary or consent uses being “additional dwelling

units, farm store, farm stall, intensive feed farming, riding school, nursery, service trade, tourist facilities".

[18] "Mining" is specifically provided for elsewhere in the zoning scheme regulations only on property zoned "industrial zone 3". "Mining" is therefore not permitted on any property not zoned "industrial zone 3". Applicant accordingly contends that the mining activities conducted by the second respondent, and the third respondent on behalf of the second respondent, in terms of the second permit, is unlawful.

[19] In support of the factual allegation that the property is zoned "agricultural zone 1" the applicant's founding affidavit records that a copy of an informal town planning enquiry issued by the fifth respondent which reflects the said zoning of the property "is attached" to the affidavit. It was in fact not annexed. The applicant contends that this omission occurred due to a *bona fide* oversight. The oversight has no impact on the application for the first to third respondents delivered a notice in terms of the provisions of rule 35(12) of the Uniform Rules of Court ("the rules") prior to the filing of the answering affidavit to request a copy of the informal town planning enquiry. It was duly provided. The respondents were accordingly in possession of the informal enquiry at the time that the answering affidavit was filed.

[20] It is necessary to consider the respondents' stance as set out in the answering affidavit to the allegations of zoning. In the answering affidavit on behalf of the respondents the respondents state:

"24.1 **Firstly**, the Applicant's entire application is based on the premise that Portion 105 is zoned "*Agriculture 1*", in fact it accepts that this as a *fait accompli*. This, however, is incorrect:

24.1.1 I am advised that in motion proceedings the Applicant is required to set out its case together with the relevant supporting documentation in its founding affidavit. This is necessary to afford the Respondents an opportunity to consider their position and to respond thereto. There is no documentary evidence whatsoever supporting the Applicant's allegations regarding the zoning of Portion 105.

24.1.2 …

24.1.3 ...

24.1.4 The First to Third Respondents' attorneys also made enquiries with the Fifth Respondent as to the correct zoning of the Portion 105, but have not received any response yet. …;

24.1.5 I also point out that because mining operations had been conducted on Portion 105 for a number of years by my father, I was under the impression that the use of Portion 105 for mining was permitted;

24.1.6 The Applicant cannot deny this ….

24.1.7 It is also clear from clause 13.3 of the Agreement of Sale which the Applicant concluded with my father, that the rights of third parties to mine the sand quarries were preserved.

24.1.8 … I reiterate that the Applicant does not place any documentary evidence before the court to substantiate the allegation that Portion 105 is zoned Agriculture 1 and the First, Second and Third Respondents deny that re-zoning is required for the conduct of mining operations thereon.

….

24.1.12 This I am advised will constitute an abuse of this honourable Court's process as the Applicant effectively asks the court to grant an order that will constitute a contravention of the provisions, and that will frustrate the objectives, of the MPRDA

…

24.1.13 My legal advice is further that the use of land for mining enjoys preference over other uses. In this regard I respectfully refer the honourable Court's attention to the provisions of sections 5(3) and 27(7) of the MPRDA which grants to the holder of a mining permit, the express statutory right to use the land to mine and for purposes incidental to mining.

24.1.14 …

24.1.15 …

24.1.16 As a precaution, and although I had no confirmation of what the zoning of Portion 105 was, I had previously requested the Applicant to apply for a change of the zoning to permit mining to the extent that it was not permitted. The Applicant, however, refused. Because the Applicant itself and through the Third Respondent proceeded to mine the first quarry in 2015, I was under the impression that at the very least, the use of Portion 105 for mining purposes was permitted.

24.1.17 … the First to Third Respondents deny that the zoning of Portion 105 and at the very least those portions where the quarries are situated does not permit mining …"

[21] In response to this challenge, the applicant called upon the fifth respondent to designate an official to provide an affidavit for purposes of the main application confirming the correct zoning of the property to be "agriculture 1". The fifth respondent adopted a somewhat peculiar stance to this request. It refused to permit any official to provide an affidavit in respect of the correct zoning by virtue thereof

that it had not entered an appearance in the main application and were accordingly not embroiled in the application. They did, however, provide a certificate signed by the Executive Director: Human Settlements. The certificate is dated 17 November 2016 and headed zoning certificate. The certificate records:

> "**PORTION 105 OF THE FARM KRAGGA KAMMA NO. 23**
>
> It is hereby confirmed that the above property is zoned Agricultural Zone 1 in terms of the Section 8 Zoning Scheme.
>
> The permitted land uses and development parameters are as stipulated in the attached Section 8 Zoning Scheme."

[22] The applicant accordingly annexed the certificate to its replying affidavits as further confirmation of the facts set out in the founding affidavit.

[23] The position adopted by the respondent that the use of land for mining enjoys preference over other uses is clearly misguided. Ms **Higgs**, who appeared on behalf of the respondents, did not persist in this argument. The issue has authoritatively been decided by the Constitutional Court in the matter of **Maccsand** *supra*. The sole basis of the opposition to the main application, ignoring for the moment the counter application, is that the applicant has failed to make out a case that the property is zoned "agricultural zone 1" as the applicant has annexed no documentation to the main application to establish this fact.

[24] The counter application was delivered in February 2017, nearly three months after the replying papers. In the founding affidavit to the counter application the

respondents put up a very different case to that which was contained in the answering affidavit in the main application as a basis for its main relief, namely that the main application should be dismissed. To this extent the counter application is clearly an abuse of the court process. A party seeking to oppose relief sought by way of application is required to do so in its opposing papers.

[25] In the founding affidavit to the counter application, however, the respondents' state:

> "[I]n the event that this counter-application is dismissed, with leave of this Honourable Court, I ask that this affidavit be accepted as a duplicating affidavit and I respectfully request permission of this Honourable Court to file this affidavit. The First to Third Applicants do not have an option but to deal with the new evidence that (the Applicant) only sought to introduce in its replying affidavit. … The issues realised by (the Applicant) for the first time in its replying affidavit, in particular the alleged zoning of Portion 105, required extensive research from our attorneys of record as (the Applicant) failed to lodge the necessary supporting documentation to its replying affidavit."

[26] I am unfamiliar with the term "duplicating affidavit" but I can only assume that the respondents intended to seek the leave of the court to file the founding affidavit in the counter application to serve also as a fourth set of papers in the main application. I shall refer to this affidavit as respondents' fourth affidavit for purposes of the main application. The grounds advanced for doing so is the allegation that the zoning certificate ought to have been contained in the founding papers and that the interest of justice required that the fourth affidavit be received. I pause to record that no condonation was sought for the filing thereof when the application was argued. By virtue of the conclusion to which I have come and without making any finding as

to its admissibility for purposes of the main application I shall nevertheless have regard to its content.

[27] In the fourth affidavit the first respondent, on behalf of the respondents, contends that he started mining sand on the property when his father retired in approximately 1997. Sand mining, he alleges, has continuously been conducted on the property by his father since at least 1974. On this ground it is alleged that the factual utilisation of the property as on 1 July 1986 (when LUPO came into force) was that it was used for purposes of operating a sand quarry.

[28] The significance of these averments are to be found in the provisions of LUPO. When LUPO came into force as aforesaid, all property which fell within the jurisdiction of local authorities was broadly divided into two categories. Section 7 of LUPO provided that any town planning scheme in terms of the Townships Ordinance 1934, which in the opinion of the administrator was in force immediately prior to the commencement of LUPO, would be deemed to be a zoning scheme which was in force in terms of LUPO. Section 8 of LUPO provided for the administrator to make scheme regulations as contemplated in section 9 of LUPO which would be in effect from the date of the commencement of LUPO in respect of all land situated in the Province of the Cape of Good Hope to which the provisions of section 7 do not apply. It is common cause that the property was not governed by section 7 of LUPO. The scheme regulations published in 1986, and amended in 1988, therefore apply to the property.

[29] Section 14(1) of LUPO provided that with effect from the date of the commencement of LUPO all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof as determined by the council concerned. Section 14(3) of LUPO proceeded to provide that when land is deemed to be zoned as contemplated in subsection (1) the most restrictive zoning permitting of utilisation of the land concerned either in conjunction with a departure or not, as the council concerned may determine, shall be granted.

[30] The process envisaged by section 14 of LUPO is a two-step procedure. In the first instance the local authority is required to objectively and factually determine what the actual use of the property was as at 1 July 1986. This is a purely factual enquiry. Once it has factually "determined" the "utilisation" of the land as at the relevant date in terms of section 14(1), it is required to "grant" a zoning selected from the zones provided for in the scheme regulations "permitting the utilisation of the land concerned" which is "the most restrictive zoning" in terms of section 14(3). (See **Hangklip Environmental Action Group v Minister Agriculture, Environmental Affairs and Development Planning, Western Cape and Others** 2007 (6) SA 65 (C) at 72E-G.) This may involve the exercise of a discretion.

[31] On the strength of the averments contained in this fourth affidavit the first to third respondents contend that the granting of a zoning certificate in respect of the property pursuant to section 14 of LUPO which does not permit mining would therefore be unlawful and consequently reviewable.

Application of the legal principles to the main application

[32] In order for the applicant to succeed in obtaining an interdict it is required to establish a clear right, an injury actually committed or reasonably apprehended and the absence of a satisfactory alternative remedy.

[33] It is equally well-established that in application proceedings affidavits fulfil the functions of both pleadings and evidence in the matter. An applicant is required to make out his case in his founding papers and where he states a bald allegation of fact this is done at the applicant's own risk since he will usually not be permitted to set out a more complete case in reply. (See for example **Riddle v Riddle** 1956 (2) SA 739 (C) at 748; and **Van Aswegen v Pienaar** 1967 (1) SA 571 (O).) It may also be necessary for the applicant to refer to documents in his affidavit. If the existence or content of such document is admissible and essential to his case, he should attach the document as an annexure to his affidavit unless he has reason to believe that the facts contained in it will not be disputed. (See **Gemeenskapsontwikkelingsraad v Williams and Others (2**) 1977 (3) SA 955 (W).) The requirement of completeness in the founding affidavits must yield to circumstances, for example, when a denial of a fact set out in the founding affidavit could not reasonably have been expected. (See **Park Gebou-Beleggings en Wynkelders Beperk v Rogers and Hart (Pty) Ltd** 1954 (3) SA 109 (T); **Morgendaal v Ferreira** 1956 (4) SA 625 (T); and **Ebrahim (Pty) Ltd v Mohamed and Others** 1962 (1) SA 90 (N).)

[34] On behalf of the applicants it is contended that they could never have expected the respondents to deny the actual zoning of the property as it had always

appeared to be common cause. It is necessary to consider the background which emerges from the annexures annexed to the founding affidavit in the main application as expounded upon in the further affidavit filed by the applicant in reply to the respondents' fourth affidavit. The first respondent applied for the first permit in approximately 2009. He engaged one Van As to prepare an Environmental Management Plan which was approved by the Department of Mineral Affairs. The first respondent counter signed the Environmental Management Plan approved on 22 July 2009. He declared:

> "I, DG Brown, the undersigned, have studied and understand the contents of this document in it's entirety …" (*sic*)

[35] In the body of the Environmental Management Plan it records:

> "Current zoning is agriculture and since mining is seen to be a temporary change of land use, no application for change of land use is required, the repealed Minerals Act 50 of 1991 and the current MPRDA 28 of 2002 has replaced the previous Physical Planning Act."

[36] On 5 February 2013 the applicant's attorney wrote to the first respondent and again informed him that the property was zoned for agricultural purposes only and referred him to the Constitutional Court authority in **Maccsand** *supra* which contradicts the understanding of the first respondent set out in his Environmental Management Plan of 2009. The letter of the applicant's attorney was responded to by the said Van As on behalf of the first respondent on 12 February 2013. Van As did not deny the zoning of the property but rather stated:

> "This property as well as the abutting property have been mining areas since the late nineties and has (sic) been identified as a strategic farm for mining based on the quality of sand and dwindling good sand reserves in Port Elizabeth."

[37] Further letters were forwarded to the first, second and third respondents on 29 March 2016 by the applicant's attorneys in which their attention was drawn in each case to the zoning of the property and the unlawfulness of the mining. The zoning was never disputed.

[38] In these circumstances I do not consider that the applicant could possibly have anticipated that the respondents would deny the zoning. (Compare the authorities set out earlier.)

[39] I have set out the basis for the denial in the answering affidavit in the main application earlier herein. It is, in my view, no more than a bald denial unsupported by any factual basis. The respondents did not contend that the property is zoned otherwise nor that the zoning which does exist entitles mining to be conducted on the property. The averments in the applicant's founding affidavit remain largely uncontested. In these circumstances I do not consider that the introduction of the zoning certificate in the replying affidavit introduces new matter and it certainly does not expand on the case made in chief. It was perfectly permissible in the circumstances of the present case for the applicant to respond to the answering affidavit by annexing the zoning certificate in reply.

[40] It appears moreover from the content of the respondents' fourth affidavit that the respondents have misconstrued the import of the zoning certificate. It does not

confer any new rights which did not previously exist but constitutes merely a verification of the correctness of the averment contained in the founding affidavit, namely that the property is zoned as agricultural zone 1 as reflected in the records of the municipality.

[41] At the hearing of the matter Ms **Higgs** submits that the zoning certificate provided is of no assistance to the applicant and has no evidential value. The argument is founded on the manner in which the zoning certificate was acquired. On 14 November 2016 the applicant's attorneys wrote to the fifth respondent as follows:

> 'We represent East Cape Game Properties Pty Ltd which has filed an application in the local High Court for an interdict prohibiting the Respondent from continuing with mining activities on our client's land, namely, Portion 105 of the Farm Cragga (*sic)* Kamma No 23 on the basis that mining is in contravention of the zoning. The property is zoned agricultural.
>
> The Respondent disputes the zoning. Prior to the proceedings we enquired from the Municipality as to the zoning. We were given the attached informal Town Planning Enquiry Certificate, a copy of which is attached for your information. It confirms the zoning is "Agricultural".
>
> We require an Affidavit from the official heading up the Planning Department confirming the property is zoned "Agricultural".'

[42] On this basis it is contended that the relevant official of the fifth respondent who issued the zoning certificate confirming the actual zoning of the property reacted merely to the instruction of the applicant to certify that the property was zoned "agricultural". There is no merit in this submission. As recorded earlier the certificate is signed by the Executive Director: Human Settlements. It is apparent from the

correspondence which I have referred to that the certificate was required for purposes of litigation. The submission by Ms **Higgs** suggests that I am to assume that the official of the fifth respondent misrepresented the actual zoning of the property at the instance of the applicant knowing full well that it was to be presented to this court as evidence. There is no basis in logic or in law for me to do so.

[43] The municipal records recording the zoning of properties as granted pursuant to section 14 of LUPO are, in my view, public documents. Section 14(1) requires of "the council concerned" to determine the actual use of land as of 1 July 1986 and section 14(3) requires of "the council concerned" to determine and grant an appropriate zoning as set out earlier. A recordal thereof is therefore done by a public official in the exercise of a public duty for public purposes. By virtue of the provisions of section 18(1) of the Civil Proceedings Evidence Act, 25 of 1965 it is accordingly admissible in evidence on its mere production and an extract therefrom purporting to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, shall be admissible in evidence. Mr **Ford SC**, who appeared on behalf of the applicant, submits that the zoning certificate issued constitutes such an extract. In my view, the submission is sound and it was not challenged on behalf of the first, second and third respondents. The applicant is entitled to rely on it.

[44] In these circumstances I am satisfied that the applicant has indeed established that the property is reflected in the zoning scheme records as being zoned "agricultural 1".

[45] On behalf of the respondents the first respondent deposed to the affidavits. He alleges in the fourth affidavit that the granting of a zoning certificate in respect of the property pursuant to section 14 of LUPO which does not permit mining, which was conducted on the property in 1986, would be unlawful and consequently reviewable. He proceeds to state that there is no evidence before the court that the factual utilisation of the property had objectively been established or that it had even been considered by the municipality. This, Ms **Higgs** argues, the applicant was obliged to provide as no valid decision in respect of the "granting" of a zoning could be taken in terms of section 14(3) of LUPO unless the factual enquiry had previously been determined. (See in this regard **Hangklip Environmental Action Group** *supra* at 72G-H.)

[46] In this respect I am of the view that the first to third respondents misconstrue the legal position. Where an official act has been executed, as is the case in the present matter, the maxim *omnia praesumuntur rite esse acta* finds application. It is presumed in such circumstances that any condition precedent to the validity of the official act has been complied with and that the official (or body of officials) was qualified to perform the act in question and complied with the necessary formalities. (See *LAWSA* vol 18 (3rd ed) para [242] and the authorities referred to therein.) Once the applicant has established, as I have found that it has, that the property is zoned "agricultural 1" then it is presumed that every necessary preceding step was complied with before the zoning was granted. (Compare **R v Hotz** 1959 (1) SA 795 (T); and **S v Malaka** 1966 (1) SA 117 (T) at 120F-G.) In these circumstances, in order to set up a dispute of fact the first to third respondents are required to put up facts to show the contrary. (Compare **S v Malaka**, *supra.)*

[47] The case made in the fourth affidavit is set out earlier herein. The first respondent contends that his father had mined sand on the property during the 1970's and 1980's. He therefore contends that sand mining has continuously been conducted on the property and was so conducted in July 1986. For this reason he contends that in 1986 the property was "used" for mining.

[48] These averments, however, are problematic for two reasons. First, they are directly in conflict with the alleged history of the property which emerges from the first to third respondents' own papers. I have referred earlier to the Environmental Management Plan approved in respect of the first permit. In the Environmental Management Plan approved in respect of the first permit which, as recorded earlier, was signed and confirmed by the first respondent, it was recorded:

> "Mining on the Farm Kragga Kamma 23 started in 1996 and a small section of land was opened up for this purpose. At the start mining activities were very low-keyed since the contractor on site represented only a small section of the building industry. …
> … Two sites showed potential and the management programme for these areas were compiled and eventually approved early in 2004 …. Unfortunately, the quality of sand of Quarry A was not acceptable to the building industry and Quarry B was developed. The contractor had to revert to the original mine area approved in 1996, once the mineral was removed from Quarry B."

[49] This version accords with the letter of Mr van As dated 12 February 2013 to which I have referred earlier herein where Van As confirmed that the mining activities on the property commenced in the 1990's.

[50] There is a further difficulty, I think, with the allegation by the first respondent. The first respondent makes merely a bald allegation that mining activities have been conducted on the property continuously from the 1970's to date. The allegation is unsupported by any documentary evidence or any primary facts.

[51] In order to set up a *bona fide* dispute of fact the respondent is required to set out primary facts, not merely secondary facts. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Secondary facts, in the absence of primary facts on which they are based, are nothing more than the deponents own conclusions. (See **Die Dros (Pty) Ltd and Others v Telefon Beverages CC and Others** [2003] 1 All SA 164 (C) para [28]. See also *Harms: Civil Procedure in the Superior Court* B-47.) The first respondent does not take the court into his confidence by disclosing the extent of any sand mining which may have occurred on the property as at 1986. The extent of the property is reflected earlier in this judgment. It is 86 hectare in extent. The first permit permits mining on approximately 1.5 hectares while the second permit demarcates an area of approximately 2.5 hectares. These represent only a very small portion of the property. Even accepting that sand was extracted from the property in 1986 there is no allegation as to the volume of sand extracted, the magnitude of the surface area involved or the lawfulness of the extraction. No photographic or documentary support is put up. The first respondent does not tell us what the remainder of other property was used for and what the extent of such activities were as at 1986. In the circumstances there is no evidence placed before the court which would enable the court to determine what the fifth respondent would

have observed in its factual enquiry in 1986 nor what the primary use of the property was at the time.

[52] In these circumstances I do not think that the bald averment made in the counter application raises a real, genuine or *bona fide* dispute of fact. The applicant has accordingly made out a clear right and an injury actually committed. The applicant has no alternative remedy which would satisfactorily address the difficulty raised in para (2) of the notice of motion in the main application. Much is made in the papers of section 47 of the MPRDA. The MPRDA, so it is alleged by the respondents, provides an alternative remedy where the holder of a mining permit: (a) is conducting mining operations in contravention of the MPRDA; or (b) breaches any material term or condition of such permit; or (c) is contravening the approved environmental management program. This alleged remedy is raised in respect of paragraphs (3) and (4) of the notice of motion in the main application. They find no application to the relief sought in paragraph (2).

[53] In all the circumstances I am satisfied that the applicant has made out a proper case for the relief which it seeks in para (2) of the notice of motion as against the second and third respondents.

[54] The alternative relief sought in prayers (3) and (4) in the notice of motion is pursued only in the event that I refuse the relief sought in prayers (1) and (2). The relief sought in prayers (3) and (4) relates only to the second and third respondents and accordingly, on a proper interpretation of the papers, it seems to me, that prayers (3) and (4) arise only in the event of my refusing the relief in prayer (2). For

the reasons set out earlier I consider that the applicant is entitled to the relief set out in prayer (2), unless the respondents succeed in the counter application.

The counter application

[55] The relief sought in the counter application is set out earlier herein. For the reasons discussed above the principle relief sought, namely that the main application be dismissed cannot succeed.

[56] In the first alternative the first and third respondents seek an order staying the main application pending the final outcome of a review application to be instituted by the first to third respondents in terms of PAJA for the review and setting aside of and/or correcting the decision of the Nelson Mandela Bay Metropolitan Municipality or its predecessor made in terms of LUPO in which the zoning of the property was determined. This relief proceeds on the assumption, as its foundation, that the granting of use rights in terms of the zoning scheme under LUPO constitutes administrative action as envisaged in PAJA. I shall accept, for purposes of this judgment, that it does indeed constitute administrative action. Administrative action and the consequences thereof remain valid and binding until it is set aside by a court in proceedings for judicial review. It exists in fact and it has legal consequences that cannot simply be ignored. (See **Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others** 2004 (6) SA 222 (SCA) at 242A-C). The zoning which in fact occurred is therefore binding until such time as it is set aside by a court in proceedings for judicial review. This, no doubt, prompts the first to third respondents' prayer that I order the suspension of the zoning decision pending the final outcome of the review application. For the reasons set out in paragraphs 46-52

above I am of the view that the respondents have not made a case which would justify the latter relief.

[57] A contravention of or a failure to comply with provisions incorporated in a zoning scheme in terms of LUPO constitutes a criminal offence (see section 39(2) as read with section 46(1) of LUPO). For as long as the zoning allocated to the property stands any mining activity on the property would constitute a criminal offence. What the first to third respondents seek in the counter application is that the court should sanction such criminal activity pending the resolution of the review application. This a court cannot do.

[58] Once I have found, as I have, that the applicant has established the requirements for the interdict which it seeks then, it seems to me that the scope for refusing the relief is very limited indeed, if it exists at all. This is particularly so where the conduct in issue would amount to criminal conduct (see **United Technical Equipment Co. (Pty) Ltd v Johannesburg City Council** 1987 (4) SA 343 (T) at 347. See also **Hotz and Others v University of Cape Town** 2017 (2) SA 485 (SCA) [29]; and **Lester v Ndlambe Municipality and Another** 2015 (6) SA 283 (SCA) [23] and [24]).

[59] The court does not have a general discretion to stay proceedings beyond the recognised grounds, being abuse of process of the court or *lis pendens* (compare **Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others** 2010 (2) SA 289 (SCA) [16]-[19]; and **Abdulhay M Mayet Group (Pty)**

Ltd v Renasa Insurance Co. Ltd and Another 1999 (4) SA 1039 (T) 1048. In the **Abdulhay** case *supra* Van Dijkhorst J at 1048H-1049A stated:

> "I accept that I have a discretion to stay these proceedings pending the respondents' application in terms of s 14 of the Act, but at best for the respondents this discretion is to be exercised sparingly and in exceptional circumstances. *Fisheries Development Corporation of SA Ltd v Jorgensen and Another*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1340D-1341A. There are no exceptional circumstances in this case. The law of trade marks will fall into desuetude should every infringer be allowed to defend himself by saying: I know that I am acting unlawfully, but bear with me; there is a possibility that my actions may become lawful. The proper course for such infringer would be to comply with the law and desist from infringing until the application to legalise such use is successful. I refuse a stay of proceedings."

I agree with these comments and I find them to be apt in the present matter. I therefore refuse to stay the proceedings in the main application.

[60] The provisions of section 47 of MPRDA are irrelevant to the zoning issue for the reasons set out earlier herein. It is accordingly unnecessary to consider the provisions of section 47. To the extent, however, that it is raised as an internal remedy available to the applicant, as a third party to the mining permit, it is misplaced. The argument was considered in the Supreme Court of Appeal in the matter of **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) and Others (Bengwenyama-ye-Maswazi Royal Council Intervening)** [2010] 3 All SA 577 (SCA) [20] where Mpati P held:

> 'I agree with the court a quo that section 47 of the Act does not provide for an internal process which is "available to affected third parties to have administrative decisions reviewed." I agree too that the section is an empowering provision in terms of which the Minister can take action if the holder of a prospecting right exercises his or her right in contravention of the provisions of the Act.'

In the circumstances I am satisfied that the applicant is entitled to the main relief which it seeks as against the second and third respondents. The counter application can, for the reasons set out above, not succeed. It falls to be dismissed with costs, including the costs of two counsel.

The application to strike out

[61] By virtue of the conclusion to which I have come it is not necessary to decide the application to strike out for purposes of the main application. Its relevance is limited to the issue of costs incurred in bringing the application. For this reason I set out briefly my views in respect of this application. In the main the applicant sought to strike out the entire counter application including the notice of counter application and the affidavit in support of the counter application on the grounds that it is irrelevant. I have recorded earlier that I have concluded that the counter application cannot succeed. I do not, however, consider that that necessarily rendered it irrelevant. Had there been merit in the counter application it would indeed have had a material impact upon the outcome of the application. I would therefore be disinclined to strike out the entire counter application this ground.

[62] In the alternative, however, the applicant sought an order that the whole of the fourth affidavit (the duplicating affidavit) be struck out on the grounds that it is irrelevant and that it constitutes an additional affidavit to those provided for in rule 6 of the Uniform Rules of Court.

[63] Rule 6(5)(e) provides for the filing of a fourth set of affidavits with the indulgence of the court. It is required of the court to exercise a discretion as to whether to permit a fourth set of affidavits and a party cannot take it upon herself/himself to simply file further affidavits without first having obtained the leave of the court to do so. (See for example **Standard Bank of SA Ltd v Sewpersahd and Another** 2005 (4) SA 148 (C) at 153H; **Sealed Africa (Pty) Ltd v Kelly** 2006 (3) SA 65 (W) at 67B-E; **Hano Trading CC v JR 209 Investments (Pty) Ltd and Another** 2013 (1) SA 161 (SCA)2013 (1) SA 161 (SCA) at 165A-C.)

[64] It has also been held that where further affidavits are filed without the leave of the court the court may rightly disregard such affidavits as *pro non scripto*. (See **Standard Bank of SA Limited v Sewpersahd and Another** *supra* at 153H-154J.) As set out earlier herein, and by virtue of the conclusion to which I came on the merits, I have had regard to the fourth set of affidavits. I consider, however, that there was merit in the applicant's application to strike out the "duplicating affidavit" for purposes of the main application.

[65] The applicant sought to strike out paragraph 8.12, 8.21 and 8.31.1 of the founding affidavit in the counter application on the basis that it constitutes inadmissible hearsay evidence, argument and speculation and is accordingly

irrelevant. Ms **Higgs** acknowledged that these paragraphs constitute hearsay and conceded that these paragraphs were inadmissible. In the circumstances I would have been inclined to strike out these paragraphs on these grounds.

[66] The applicant further sought to strike out the contents of paragraph 8.29 and 8.30 of the supporting affidavit on the basis that the content thereof are irrelevant. The paragraphs deal with the contract concluded between the applicant and the first to third respondents authorising the applicant to mine the sand on the property to which I have referred earlier. The contract was introduced by the applicant in its founding papers and dealt with extensively therein. In these circumstances, but for the fact that I would have been inclined to strike out the entire “duplicating” affidavit I would be disinclined to hold that these paragraphs are irrelevant.

[67] Finally, the applicant sought to strike out paragraphs 11 and 12 together with annexure CAR5 and paragraph 34.2 of the replying affidavit in the counter application. These paragraphs introduce new matter making out a case at variance with that set out in the founding affidavit in the counter application. These averments ought to have been contained in the founding papers and their introduction in the replying papers is prejudicial to the applicant. I would therefore have been inclined to strike out these paragraphs. In these circumstances the applicant is entitled to the costs of the application to strike out, including the costs of two counsel.

[68] In the result, I make the following order:

1. The main application against the first respondent is dismissed with costs.

2. The second and third respondents are interdicted:

   2.1 from utilising the property for the purposes of mining or removal of sand or any other substance therefrom, and from causing any other person or entity to do so on their behalf, unless and until the property is zoned in a manner permitting mining, in which event this interdict will lapse;

   2.2 from entering upon the property whilst so interdicted, and from causing any other person or entity to do so, save for the purpose of fulfilling any component of this order, and then only with the prior authority of the applicant.

3. The second and third respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the applicant's costs of the main application as against them, including the costs of two counsel.

4. The respondents' counter application is dismissed with costs, including the costs of two counsel.

5. The first to third respondents are ordered to pay the applicant's costs occasioned by the application to strike out, including the costs of two counsel.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Adv Ford SC and Adv Richards instructed by Rob McWilliams Attorneys, Port Elizabeth
For 1st, 2nd & 3rd Respondents:	Adv A Higgs instructed by Webber Wentzel, Sandton, Johannesburg c/o BLC Attorneys, Port Elizabeth