



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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

16 April 2024
DATE

SIGNATURE

CASE NO: 2023/098154

In the matter between:

TR MABUZA CONTRACTORS CC

and

KANGRA COAL (PTY) LTD

MINISTER OF MINERAL RESOURCES & ENERGY

ACTING REGIONAL MANAGER:

MINERAL RESOURCES, MPUMALANGA SECTION

DEPARTMENT

MINSTER OF MINERAL RESOURCES & ENERGY

Applicant

First Respondent

Second Respondent

Third Respondent

JUDGMENT

1. The Applicant is the registered owner of an immoveable property namely Portion 4 (a portion of Portion 2) Twyfelhoek 379 IT. The property will hereinafter be referred to as “the farm”. The sole member of the Applicant is Thembinkosi Reginal Mabuza, who has authorised the bringing of this application.
2. The first Respondent is authorised to and carries out coal mining operations on a property adjacent to the farm, owned by the local community (the Yende Farmer’s Trust) in terms of agreements it has with the community.
3. The first Respondent is also the holder of an Environmental Authorisation to construct an adit (known as the “Twyfelhoek Adit” alternatively the “Üdimo Adit”) next to the Applicant’s farm. It also has a separate Water Use License (WUL) to construct infrastructure on the Applicant’s farm. It is further the holder of a mining permit in terms of the MPRDA¹ which allows it to mine under the land belonging to the Applicant.
4. The subject matter of this judgment is an urgent application in which the Applicant seeks the following relief:

“1. *The forms, service and time period prescribed by the Uniform Rules of Court are dispensed with and the application is heard*

¹ The Minerals and Petroleum Resources Development Act 28 of 2002

as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. The first respondent is directed to restore to the applicant full, undisturbed and peaceful possession of Portion 4 (a portion of Portion 2) of the Farm Twyfelhoek 379 IT, Mpumalanga Province ("the Farm"). In doing so, the first respondent is directed forthwith:

- 2.1. to cease any excavation, mining and any work incidental thereto in the area of the Farm marked with white dots on the map annexed as Annexure "A" ("the excavated area"), and in any area lying beneath the surface of the Farm delineated in that map.
- 2.2. to repair the fence that it or its officers removed or damaged on the perimeter of the Farm, represented in green on the map annexed as **Annexure "A"**.
- 2.3. to remove the gate that it or its officers installed or caused to be installed on the perimeter of the Farm, represented in yellow on the map annexed as **Annexure "A"**.

3. Except for purposes contemplated in paragraph 6, the first respondent is interdicted from conducting mining or mining related activities on, or accessing, or allowing or directing any access to, the excavated area or any other part of the Farm, including any area lying beneath the surface of the Farm, without:

- 3.1. the express authorisation of an authorised representative of the applicant; alternatively,

- 3.2 *if the first respondent has a mining right granted in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") that permits it to conduct mining or mining related activities on and/or beneath the Farm, as the case may be, first providing the applicant with 21 days written notice as contemplated in section 5A(c) of the MPRDA;*
4. *In the event of the first respondent failing or refusing to comply with any part of paragraph 2, the Sheriff of this Court is authorised to immediately take all steps that the Sheriff deems necessary to ensure the restoration to the applicant of the undisturbed and peaceful possession of the Farm.*
- 5 *It is declared that the first respondent is liable for the damage it has caused to the property of the applicant by removing parts of the fencing and installing a gate on the perimeter of the Farm, by excavating the excavated area and, to the extent that it is undertaking mining or mining related activities beneath the surface of the Farm, by conducting such activities and by diverting or impeding the flow of water in the stream on the Farm.*
- 6 *The first respondent is directed:*
- 6.1 *forthwith, and by no later than 3 days after the grant of this order, to remove the gate and reconstruct the fence on the perimeter of the Farm at its own cost;*
- 6.2 *to appoint at its own cost, and within 10 days of service of this order, an environmental consultant registered with the Environmental Assessment Practitioners Association*

of South Africa to advise on the appropriate rehabilitation to remediate all the damage described in paragraph 5;

- 6.3 to fully implement all rehabilitation measures recommended by the environmental consultant, within a further 30 days and thereafter, at its own cost, to forthwith provide the applicant with written confirmation by the environmental consultant that the recommended measures have been implemented.*

7 In the alternative to paragraph 6:

- 7.1 the applicant shall forthwith reconstruct the fence on the perimeter of the Farm and shall immediately be entitled to reimbursement by the first respondent of the costs of such reconstruction, upon presentation of the invoices relating to such costs;*
- 7.2 the applicant shall appoint an environmental consultant registered with the Environmental Assessment Practitioners Association of South Africa to advise on the appropriate rehabilitation to remediate all the damage contemplated in paragraph 5 and shall, within 90 days of this Court's order, furnish the first respondent with a statement of the costs of implementing the environmental consultant's recommended rehabilitative steps, including the costs of the environmental consultant's services ("statement of costs"). For the avoidance of doubt, the costs set out in the statement of costs shall include both the costs incurred to that date and the costs to be incurred by the applicant in finalising the recommended rehabilitative steps;*

7.3 *the first respondent is directed to pay to the applicant, within 14 days of receipt of the statement of costs, the total amount reflected in the statement of costs.*

8 *The costs of this application shall be paid by the first respondent and any other respondent that opposes the application on an attorney and client basis, jointly and severally, the one paying the other(s) to be absolved."*

5. The first Respondent's counsel has paraphrased the relief sought as follows:

- 5.1. An order restoring the *status quo ante* pertaining to both the surface and/or underground interference with the possession thereof by the First Respondent;
- 5.2. an interdict prohibiting the First Respondent from engaging in any mining on the land of the Applicant, absent compliance with the provisions of section 5A(c) of the MPRDA;
- 5.3. declarators pertaining to the liability of the First Respondent for damages suffered as a result of the spoliation.

6. At the hearing of this matter the only issue remaining in dispute was whether or not:

- 6.1. the Applicant was in possession of the soil underneath its property and/or whether such possession included the right for the minerals in such soil not to be extracted and together with that, that the extraction of the minerals through a duly granted mining right, can occur without the consent of the Applicant;

- 6.2. whether a case has been made out for the declaratory relief seeking unspecified damages to be paid by the First Respondent as a result of the alleged unlawful/illegal mining engaged upon by the First Respondent. This relief was abandoned by counsel for the Applicant in their heads of argument.
- 6.3. whether the Applicant was entitled to an interdict (whether final or interim) prohibiting the First Respondent from continuing with its mining activities including underground activities absent compliance with section 5A(c) of the MPRDA.
7. It is common cause, alternatively not disputed that on the 14th of September 2023 the Applicant discovered that the first Respondent had unlawfully broken down the perimeter fence of the Farm and installed an entrance gate through it whereby its staff and other authorised persons had entered and excavated an area on the Farm ("the excavated area"). No notice of these operations had been given to the Applicant. The Applicant immediately reported this to the first Respondent and on that same day its attorneys addressed a letter to it to cease its operations and restore the property of the Applicant. While initially denying this claim, the first Respondent later retracted and admitted this allegation but only after the Applicant had appointed a land surveyor to assess the property and the placement of the broken fence.
8. The Respondent admits that it broke down the Applicant's perimeter fence and excavated inside the farm owned by the Applicant. To this end it has undertaken that excavation on the surface of the Farm will cease and the Applicant's fence will be restored and that it will appoint a registered environmental consultant to advise on the necessary rehabilitation of the excavated area and will implement the advice that follows, at its cost. The

first Respondent admits that it was appropriate for the Applicant to approach this Court urgently for relief in this regard, and has tendered the remedial action sought by in respect of this intrusion even before the hearing of this matter.

9. It is also common cause that the first Respondent had carried out mining operations under the farm belonging to the Applicant.
10. According to the deponent to the Applicant's founding affidavit², he had discovered this when he noticed a change in the groundwater flow on the farm and began to suspect that the first Respondent was mining underground beneath the Farms' surface. Accordingly the Applicant made an application under the Promotion of Access to Information Act 2 of 2000 ("PAIA") seeking to confirm whether that was the case and to gather relevant information. This allegation is not denied by the first Respondent, but it claims that it is entitled to do so as per the terms of the permit that it possesses. It also submits that it is not obliged to give the Applicant notice of its underground mining activities by virtue of these permits. It has never provided a written notice to the Applicant as contemplated in section 5A(c) of the MPDRA, of its intention to commence mining either on the surface or underground beneath the surface of the Farm.
11. The applicant has persisted with this application as far as it pertains to the Respondent's underground operations. It contends that the Respondent should be interdicted from carrying out any under surface operations until such time as it has given notice in terms of section 5A(c) of the Mineral and Petroleum Resources Development Act 2002 as amended (the MPRDA).

² Bheki Isiah Mabuza, the farm manager employed by the Applicant

12. Section 5 and 5A of the MPRDA respectively read as follows:

5. Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof

(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

[S 5(1) subs by s 4(a) of Act 49 of 2008 wef 7 June 2013.]

(2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may—

(a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;

[S 5(3)(a) subs by s 4(b) of Act 49 of 2008 wef 7 June 2013.]

(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;

(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;

(cA) subject to section 59B of the Diamonds Act, 1986 (Act 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;

[S 5(3)(cA) ins by s 4(c) of Act 49 of 2008 wef 7 June 2013.]

(d) subject to the National Water Act, 1998 (Act 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and

(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.

5A. Prohibition relating to illegal act

No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without—

(a) an environmental authorisation;

[Commencement of s 5A(a): 7 December 2014.]

(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

(c) giving the landowner or lawful occupier of the land in question at least 21 days written notice.

[S 5A ins by s 5 of Act 49 of 2008 wef 7 June 2013.]

13. The word mine, when used as a verb, is defined in the definitions section of the MPRDA as:

“in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area”

[Definition of 'mine' substituted by s.1(m) of Act 49 of 2008 (wef 7 June 2013).]

14. It is clear from the relevant sections of the MPDRA (section 5 read together with 5A) that a landowner (in this case the Applicant) was entitled to 21 days written notice of any intention to mine the land and that this includes any underground mining carried on by the Respondent.
15. But what of a failure to give such notice? Does it mean, as the Applicant has contended, that the Respondent is obliged to discontinue any operations it is carrying out until such time as it has complied with the notice? Or is he only entitled to claim damages as a result of such failure?
16. Section 5A was introduced by section 5 of Act 49 of 2008³. It inter alia replaced the provisions of section 5(4), which was repealed by the same act.
17. Prior to its repeal section 5(4) read as follows:

No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without-

(a) an approved environmental management programme or approved environmental management plan, as the case may be;

(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-

³ Mineral and Petroleum Resources Development Amendment Act 49 of 2008

operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

(c) notifying and consulting with the land owner or lawful occupier of the land in question.

18. In the matter of Meepo v Kotze⁴ it was held that section 5(4) required notification to and consultations with a landowner not only before but after the granting of the mining rights in question.

19. In the matter of Joubert and Others v Maranda Mining Co (Pty) Ltd⁵ it was held:

[12] Furthermore, in terms of s 5(4)(c), once the permit is granted no mining activities may be commenced by the permit holder unless it has notified and consulted with the owner or occupier of the land in question. In Meepo v Kotze and Others 2008 (1) SA 104 (NC) at 114D - E the view was expressed that the legislature provided for due consultations between a landowner and the holder of or applicant for a permit in order to alleviate possible serious inroads being made on the property rights of the landowner. Consultation is the means whereby a landowner is apprised of the impact that prospecting (or, I would add, mining) activities may have on his land. I am in respectful agreement in

⁴ 2008 (1) SA 104 (NC) at paragraph [16]

⁵ 2010 (1) SA 198 (SCA) at paragraphs at paragraphs [12] to [14]

this regard with this view, even though that case was concerned with access in relation to a prospecting right.

[13] Furthermore s 27(7)(a) of the MPDRA provides: .

(7) The holder of a mining permit -

(a) may enter the land to which such permit relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure which may be required for purposes of mining .'

Clearly in terms of this section the holder of a mining permit has a right to enter the land in respect of which the mining rights have been granted for purposes of exploiting its rights. The right to enter the land solidifies, in my view, once the mining permit holder has complied with the provisions regarding notification and consultation with the owner of the land, or occupier and/or other parties affected by the permit.

[14] In the present case there is no dispute that the respondent had complied with all the requirements set out in s 27(1) - (5) before the grant of a mining permit and in s 5(4) after the grant of the permit."

20. Section 5A(c) no longer requires a rights holder to consult with the owner of land, but only to give such owner 21 days written notification of his intention to carry out mining operations on the land in question. The

purpose of the notification it would appear is to allow a landowner to take the necessary steps to mitigate any damages he may suffer.

21. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*⁶ it was held as follows:

[63] These different notice and consultation requirements are indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights. It is not difficult to see why: the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen. This is so irrespective of whether one regards a landowner's right as ownership of its surface and what is beneath it 'in all the fullness that the common-law allows', or as use only of its surface, if what lies below does not belong to the landowner, but somehow resides in the custody of the State.

[64] The purpose of the notification and subsequent consultation must thus be related to the impact that the granting of a prospecting right will have on the landowner or lawful occupier. The community is the landowner of the farms at stake in this application and therefore I will restrict further discussion to the position of landowners.

[65] One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. Under the common law a prospecting right could only be

⁶ 2011 (4) SA 113 (CC) at paragraphs [63 to [66]

acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard. Failure to reach agreement at this early consultation stage might result in the holder of the prospecting right having to pay compensation to the landowner at a later stage. The common law did not provide for this kind of compensation, presumably because the opportunity to provide recompense for use impairment of the land existed in negotiation of the terms of the prospecting contract.

22. While Bengwenyama dealt with section 16 of the MPDRA (which deals with holders of prospecting rights in respect of another's property), section 23 (which deals with mining rights) has similar provisions, and the provisions of section 54 (which deal with compensation) relate to the holders of mining rights too.

23. From my reading of the papers in this matter, the consultation process in section 23 appears to have been complied with even though no agreement appears to have been reached between the parties. According to the first Respondent it has been carrying on underground mining activities with the knowledge of the Applicant for several years now, even though it may be without its consent.

24. In my opinion, even though the consultation requirements prior to any mining activity being undertaken has been removed by section 5A(c), the notification requirement still remains and a 21 day period has now been fixed for such notification. This provision, in my opinion, should be widely construed and interpreted to give as much protection to the owner of land as possible. In my view, this would extend to underground mining operations too. The notification requirement is thus peremptory.
25. Section 54 of the MPDRA, titled "Compensation payable under certain circumstances" reads as follows:

"54 Compensation payable under certain circumstances

(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-

(a) refuses to allow such holder to enter the land;

(b) places unreasonable demands in return for access to the land; or

(c) cannot be found in order to apply for access.

(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)-

- (a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;*
- (b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;*
- (c) set out the provisions of this Act which such owner or occupier is contravening; and*
- (d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.*

(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.

(4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act 42 of 1965), or by a competent court.

(5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2 (c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.

(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.

(7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context.

26. Coming back to the facts of the present case, it is clear that no notification was given to the Applicant prior to the Respondent carrying out underground mining operations in respect of the land in question. There has thus been no compliance with the provisions of section 5A(c) of the MPDRA.

27. According to the Respondent it has been carrying on underground mining operations for some time prior to the launch of this application. Can it be expected to stop all its operations until such time as it has notified the Applicant? This may be highly disruptive and prejudicial to the Respondent and to the rights of those it employs.
28. The answer to this question can be found in the provisions of section 54(7). The Applicant can use the provisions of this section to claim any damages from the Respondent it may have suffered. This section, in my opinion, would apply with even greater force to those instances where no prior notification was given.
29. In motion proceedings where a final interdict is sought it is trite that an applicant must establish⁷:
- (a) a clear right;
 - (b) unlawful interference with that right, actually committed or reasonably apprehended; and
 - (c) the absence of any other satisfactory remedy.
30. In motion proceedings where an interim interdict is sought it is trite that an applicant must establish⁸:

⁷ Van Deventer v Ivory Sun Trading 77 (Pty) Ltd 2015 (3) SA 532 (SCA) at paragraph [26]

(a) a prima facie right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) the balance of convenience favours the granting of an interim interdict;

(d) the applicant has no other satisfactory remedy.

31. Thus in both applications for final and interim interdicts an applicant for relief has to show the absence of another satisfactory remedy. In my opinion section 54(7) read together with the other provisions of section 57 provides this alternative remedy.

32. I agree with the submission made by Counsel for the first Respondent that the declaratory order sought by the Applicant cannot be granted in motion proceedings where such liability is disputed. This much was also conceded by counsel for the Applicant in their heads of argument. There is no undisputed evidence to back up the claim that the disturbance in the ground water availability on the Applicant's farm is in any way linked to the underground mining activities of the first Respondent. This can only be established by the presentation of cogent expert evidence in due course. Utilisation of the dispute resolution procedures in section 57 would inter alia give the Applicant an opportunity to do so.

33. In the premises the application is dismissed with costs.

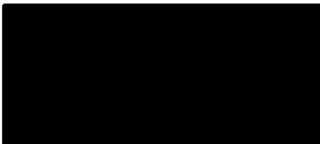
⁸ NCSPCA v Openshaw 2008 (5) SA 339 (SCA) at paragraph [20]

34. The following order is made:

34.1. The Application is dismissed.

34.2. The first Respondent shall pay the Applicant's party and party costs of this application upto the stage that it tendered the remedial action pertaining to its unauthorised activities on the surface of the farm namely Portion 4 (a portion of Portion 2) Twyfelhoek 379 IT. Such costs to include costs of two counsel, including senior counsel, where so employed.

34.3. The Applicant shall pay the first Respondent's party and party costs pertaining to the hearing of this matter, such costs to include costs of Senior Counsel.



CAJEEAJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

DATE OF HEARING: 18th October 2023

DATE OF JUDGMENT: 16th April 2024

LEGAL REPRESENTATIVES OF PARTIES

For the Applicant: Adv. P Lazarus SC
 Adv. Daniel Linde

For the First Respondent: Adv. GJ Scheepers SC