



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A125/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
DATE	SIGNATURE

SA SOUTWERKE (PTY) LTD

Appellant

And

CAMEL ROCK TRADING 520 CC

Respondent

THE COURT:

1] This appeal comes before us by way of special leave from the Supreme Court of Appeal (SCA), against the whole of the judgment and order granted on 24 August 2021 by Ranchod J in favour of the respondent (Camel Rock). The order of the SCA is dated 11 February 2022.

2] It is not disputed that the appellant's (SA Salt) appeal has in fact lapsed. As a result of that event, and the subsequent ones that will be set out below, Camel Rock then brought an application for a declaratory order that the appeal has lapsed. SA Salt responded by filing a counter-application for a stay of that application until its application for condonation and re-instatement of the appeal was adjudicated. Thus, this hearing is not just in respect of merits – it is also to determine whether or not the condonation should be granted and the appeal reinstated.

3] At the commencement of the hearing before us, the parties were informed that they should address us on all the issues and that we would consider the issue of condonation in a composite hearing, including the merits, on the trite principle that prospects of success is one of the considerations in the grant or refusal of condonation.¹ We are also mindful of the fact that the interests of justice is a consideration in the discretion of whether or not to reinstate the appeal.²

BACKGROUND

4] The order appealed against was delivered by Ranchod J on 24 August 2021 and reads as follows:

- [1] The application for condonation by the second respondent -SA Salt in these proceedings- for the late filing of its supplementary affidavit dated 7 June 2019 is granted.*
- [2] Leave is granted to the second respondent to file a supplementary answering affidavit.*
- [3] Leave is granted to the applicant (CAMEL ROCK) to file a supplementary replying affidavit.*
- [4] The decisions of the first respondent to dismiss applicant's appeal against the rejection of applicant's prospecting right application of 29 September 2009 (NC30/5/1/2/2081PR) is reviewed and set aside.*
- [5] The decision of the first respondent to dismiss applicant's appeal against the refusal of applicant's prospecting right application of 11 December 2009 (NC30/5/1/2/2164PR) is reviewed and set aside.*

¹ Melane v Southern Insurance Co. Ltd 1962 (4) SA 1 (AD)

² Mosselbaai Boeredienste (Pty) Ltd t/a Mosselbaai Toyota v OKB Motors CC t/a Bultfontein Toyota [2023] ZASCA 91 at par [11]

- [6] *The decision of the first respondent to grant a mining right to second respondent on Portion 148 (a portion of Portion 59) of the farm Kalahari West 251, district Gordonia, Northern Cape Province is reviewed and set aside.*
- [7] *The decision referred to in para 4, 5 and 6 of this order are substituted with a decision to refuse the application of the second respondent for a mining right and to grant the applicant a prospecting right on Portion 148 (a portion of Portion 59) of the farm Kalahari West 251, district Gordonia, Northern Cape Province.*
- [8] *The second respondent is ordered to pay the costs of the application, such costs to include the costs of two counsel, including the costs of the application for condonation by it for the late filing of its supplementary affidavit dated 7 June 2019."*

5] The main dispute between the parties involves whether or not a prospecting right³ or a mining right⁴ should have been granted by the Minister of Minerals and Energy in terms of the Minerals and Petroleum Resources Development Act No 28 of 2002(MPRDA). The subject matter of the dispute is a property more fully described as the Farm Kalahari 251, District of Cordonia, Northern Cape Province where salt extraction by SA Salt has taken place since the early 1980's specifically on Portion 146 and Portion 148 of the farm which is also known as Vrysoutpan. The order granted by Ranchod J relates to Portion 148, which is the smaller of the two portions.

6] SA Salt has extracted salt from portions 146 as well as 148 of Vrysoutpan for 30 years, but its authority to do so lapsed on 27 October 1992. It took SA Salt another eight years to apply to the Department of Minerals and Energy (DMA) for a mining permit which it eventually did on 3 November 2000. That consent took another ten years to grant and was eventually given on 19 August 2002.

7] On 28 April 2004 another mining permit with number MP169/2003 was issued to SA Salt. This was valid for a period of 12 months and therefore lapsed on 27 April 2005. It is important to note that the permit specifically states that it was granted in respect of both Portions 146 and 148 Vrysoutpan. Despite the fact that its mining

³ For Camel Rock

⁴ For SA Salt

permit expired on 27 April 2005, SA Salt continued to mine salt after this date and failed to evacuate the property.

8] On 13 July 2005, a company known as Saamwerk Soutwerke (Pty) Ltd (Saamwerk) submitted an application to the DME for a mining permit in respect of only Portion 146 Vrysoutpan and was advised by the Deputy Director General of DME that its application had provisionally been approved. On 16 August 2006 SA Salt then addressed a letter to the DME informing it that it was the holder of another permit - permit number MR 169/2004 - in respect of both Portions 146 and 148 Vrysoutpan. As it turned out later, this allegation was patently false, a fact which was known to SA Salt at the time it made the allegation.

9] Between the period of 20 August 2006 when Saamwerk requested SA Salt to terminate its mining activities as it intended to commence its mining activities on 1 September 2006, and March 2007, SA Salt not only doubled-down on its allegations, it also informed the DME that it was the holder of an old order right in terms whereof it was entitled to mine Portions 146 and 148 for a period of 5 years and that, as a result of this, it contended that the DME had erroneously granted a mining permit to Saamwerk. This was another falsehood concocted by SA Salt to subvert the true facts.

10] As a result of all of the above, Saamwerk turned to the courts for assistance. The result of the litigation has been reported in two separate judgments: the first is **Saamwerk Soutwerke (Edms) Bpk v Minister: Mineraal- en Energiesake & Others**⁵ and the other is reported as **SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd & Others**.⁶ Interestingly enough, although the Minister initially defended the initial application brought by Saamwerk, it ended up withdrawing its opposition and consenting to the relief sought by Saamwerk. Importantly, both the court *a quo* and the SCA found that permit MP169/04 was a falsified document.⁷

⁵ Case no 292/2007 (29 January 2010) The litigation was in Northern Cape High Court, Kimberley where Saamwerk sought an order declaring that SA Salt's mining authorisation pertaining to both Portions 146 and 148 was void or had lapsed. It was heard by Lacock J and judgment was delivered on 29 January 2010-

⁶ [2011] 4 All SA 168 (SCA) is the appeal in which the above decision was confirmed by the SCA- the reference to the judgment of Lacock J is at par [21] at 176

⁷ Para [21] of the SCA judgment, although the High Court specifically found that the permit had been forged (as confirmed by the SCA in para [39])

11] Whilst the above cases were winding their way through the judicial system, on 29 September 2009, Camel Rock applied for a prospecting right for salt on Portion 148 Vrysoutpan. On 2 October 2009 the regional manager of the DME decided to reject (or rather not to accept) Camel Rock's application on the basis that there was an "*existing right*" in respect of Portion 148 as contemplated in s 16(2)(b), read with s 16(3) of the MPRDA. The "*existing right*" was a reference to SA Salt's application for a mining authorisation which it lodged on 23 March 2007 and stood to be granted in the event that Saamwerk's litigation was not successful as SA Salt would no longer have any mining right over both portions.

12] Camel Rock failed to appeal against the regional manager's rejection decision of its September 2009 application within the 30 (thirty) day period allowed for a s 96 appeal. It only did so five months later on 1 March 2010, together with an application for condonation for the late filing of that appeal. This was however only after it had lodged an identical application for a prospecting right on 11 December 2009, one day after judgment had been handed down by Lacock J in Kimberley in favour of Saamwerk. SA Salt also lodged an application on the same day as Camel Rock (11 December 2009), but for a mining right on Portion 148.

13] Both Camel Rock's and SA Salt's applications were accepted by the regional manager⁸ on 18 December 2009 as competing applications. Processing of those applications continued in terms of the acceptance decisions. When Camel Rock decided to appeal against the rejection of its first application of September 2009, it did not abandon the acceptance of the second application by the regional manager. SA Salt's mining right application was refused on 21 October 2011 on the basis that the land concerned formed part of a military area. This was patently incorrect as the area concerned was in fact not part of military area. SA Salt appealed against the refusal on 15 December 2011 and its appeal was upheld which resulted in its mining right application being granted on 26 April 2013.

⁸ In terms of s 16 and s 22 of the MPRDA

14] Camel Rock's prospecting right application (2164PR), lodged in December 2009 was refused on 8 February 2012 for the same reason as the initial refusal of the SA Salt application, namely that the land was a military area. Camel Rock appealed against this refusal on 12 March 2012 and on 10 February 2014 Camel Rock also appealed to the Minister against the DG's decision to grant SA Salt a mining right.

15] The three pending appeals were all finally decided by the Minister on 25 November 2015 and the parties were advised of the outcomes on 15 December 2015. The Minister refused Camel Rock's appeals⁹ and confirmed the grant of the mining right to SA Salt. SA Salt's mining right was notarially executed on 22 December 2015, and it was registered in the Minerals and Petroleum Titles Registration Office on 12 May 2016 under MPT18/2016. SA Salt says it thereafter started exercising its mining right.

16] As a consequence of this appeal outcome, Camel Rock then instituted review proceedings in this court in which it sought inter alia the following relief:

"1. That the First and Second Respondents,¹⁰ or any interested party, show cause why the decision of the First Respondent to dismiss Applicant's appeal against the rejection of Applicant's prospecting right application of 29 September 2009 (NC30/5/1/2/2081PR), should not be reviewed and set aside.

2. That the First and Second Respondents, or any interested party, show cause why the decision of the first respondent to dismiss Applicant's appeal against the refusal of Applicant's prospecting right application, of 11 December 2009 (NC30/5/1/2/2164PR) should not be reviewed and set aside.

3. That the First and Second Respondents, or any interested party, show cause why the decision of the First Respondent to grant a mining right to Second Respondent on Portion 148 (a portion of Portion 59) of the farm Kalahari Wes 251, district Gordonia, Northern Cape Province, should not be reviewed and set aside.

⁹ The basis of Camel Rock's refusal was that SA Salt held a mining right for the same mineral and land

¹⁰ These being the Minister and SA Salt respectively

4. *That the First and Second Respondents, or any interested party, show cause why the decisions referred to in prayers 1 to 2 above should not be substituted with a decision to refuse the application of SAS for a mining right and to grant the Applicant a prospecting right on portion 148 (a portion of portion 59) of the farm Kalahari Wes 251, district Gordonias, Northern Cape Province."*

17] As stated, it is the outcome of that application against which this appeal lies.

18] Before we deal with the merits of the appeal itself, the application for condonation and re-instatement of the appeal must be dealt with.

THE CONDONATION APPLICATION

19] It is, by now, trite that when considering an application for condonation and re-instatement of an appeal, there are two main considerations the appeal court will weigh:

- (a) the degree of non-compliance with the rules and, together with this the explanation provided therefor; and
- (b) the prospects of success on appeal.

20] As was explained in **Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC**:¹¹

"[11] Where special leave is sought, as in this case, the existence of reasonable prospects of success is insufficient, '[s]omething more by way of special circumstances is needed'.¹² The principles underlying an application for condonation, in the context of a reinstatement of an appeal is that the court has a discretion which must be exercised judicially. The Constitutional Court has held that:

'...that standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the

¹¹ (1216/21) [2003] ZASCA 91 (9 June 2003) at para [11]

¹² Per fn 5 of Mosselbaai Boeredienste "including: '...that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of great importance to the parties or the public.' " (citations excluded)

reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'

It is trite that strong prospects of success can often overcome a poor explanation for any delays. Differently stated, strong prospects of success may trump an unsatisfactory explanation for the delay."¹³

The timeline

21] Before the issue of prospects of success is traversed, it is apposite to comment on SA Salt's failure to adhere to the time periods set out in Rule 49, starting with the fact that with the SCA granting leave to appeal on 11 February 2022, the Notice of Appeal was to be filed by 11 March 2022 – it was not. In fact, it was only filed on 11 May 2022 some two months later. It also bears mentioning that the late Notice of Appeal was not accompanied by an application for condonation.

22] As a result, on 20 May 2022 Camel Rock's attorneys sent an email to SA Salt's attorneys informing them that the appeal had lapsed. Despite this, no application for condonation was forthcoming.

23] By this stage, and working on the assumption that by filing its (late) Notice of Appeal¹⁴ SA Salt intended to prosecute its appeal, SA Salt was required to file an application for a date of hearing within sixty days and simultaneously therewith, file an appeal record¹⁵ - the sixty day period expired on 5 August 2022.

24] Rules 49(6)(a) and 49(7)(a) provide:

"49(6)

(a) Within 60 days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within 10 days after the expiry of the said period of 60 days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by

¹³ Also *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 702 E; *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at para [20]

¹⁴ And using that date as a launch pad for the further steps taken by SA Salt

¹⁵ In terms of Rule 49(7)(a)

either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

(b) The court to which the appeal is made may, on application of the appellant or cross appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

(7)

(a) At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)(a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal...”

25] However, SA Salt had already sought a date of hearing for the appeal on 2 June 2022 – what it failed to do was comply with any of the other requisites of Rule 49(7). On 7 June 2022 SA Salt then set this appeal down for hearing – it did so without an application for condonation for the late filing of the Notice of Appeal, without filing security for costs of the appeal in terms of Rule 49(13)(a) and without filing the required Power of Attorney. Security for costs was eventually provided during late September 2022. The Power of Attorney was filed on 1 July 2022 – some 20 days late.

26] I emphasize, once again, that at no stage during the course of any of the above steps, had SA Salt attempted to file an application for condonation.

27] In the meantime, Camel Rock took two distinct steps:

- (a) on 2 June 2022 it brought an urgent application in the Northern Cape Division (Kimberley) under case no 1080/22; and
- (b) on 22 August 2022 it brought a formal Declaratory application in this court.

The proceedings in June 2022

28] In that application Camel Rock applied for an order - on the premise that this appeal had lapsed - that SA Salt be ordered to cease its mining activities on Portion 148 and vacate the property and remove all its assets, equipment and belongings, within 72 hours of the order. This application was opposed by SA Salt and was heard by Stanton AJ on 21 June 2022. On 23 June 2022 he dismissed this application. According to SA Salt, this order only came to its knowledge on 8 September 2022 as

"46.1 Neither Stanton AJ's registrar, nor the registrar of the Northern Cape Division of the High Court, Kimberley ("the Kimberley registrar") informed the applicant's attorneys of record in Kimberley...that judgment would be handed down on 23 June 2022.

46.2 The Kimberley registrar signed and date stamped the order on 18 July 2022..."

29] According to SA Salt, reasons for the above order have not yet been provided.

The Declaratory application

30] Subsequent to the above order, Camel Rock brought the present Declaratory application in which it seeks the following relief:

- "1. Declaring the decision of the second respondent¹⁶ on 7 June 2022 to allocate a date for the hearing of an appeal under such case number to be ultra vires and void and setting aside such decision.*
- 2. Directing the second respondent to remove the appeal from the roll on 26 July 2023.*
- 3. Declaring that in terms of Rule 49(6), read with Rule 49(7)(d) of the Uniform Rules of Court, the first respondent's appeal against the Order of Ranchod, J (dated 24 August 2021) has lapsed.*
- 4. The first respondent is ordered to pay:*

¹⁶ The registrar of this court

- 4.1 *the costs of the application, including the costs of two counsel, one of whom is a senior counsel;*
- 4.2 *CRT's costs of the appeal to date, including the applications for leave to appeal in the High Court, Gauteng Division, as well as in the Supreme Court of Appeal, including the costs of two counsel, one of whom is a senior counsel."*

31] In response, SA Salt filed not only an answering affidavit, but also a counter-application and this on 4 October 2022. Prayer 1 of that application reads as follows:

- "1. *That the main application be stayed until the final determination of the first respondent's application for condonation and declaratory relief/ reinstatement of the appeal by the full court of this division of the High Court under case no A125/2022...*"

Prayer 2 of that application is stated in the alternative and is, essentially, an application for condonation and reinstatement of this appeal.

32] Attached to the answering affidavit is Annexure AJB1 and this is no less than the very application for condonation that could (and should) have been filed in May 2022. It too is dated 4 October 2022.

33] When pressed on the issue of why the condonation application was not filed at the first opportunity after SA Salt was informed that the appeal had lapsed, the response was that the Kimberley application had to be finalised first. The argument was founded on the premise that had the Kimberley application been successful, that would have put pay to the present appeal. But this argument simply does not pass muster as, not only was the Kimberley application only launched 10 days after SA Salt was informed that its appeal had lapsed, but because SA Salt actually took steps in the prosecution of this appeal between the date judgment was reserved in Kimberley on 21 June 2022 and 8 September 2022 when it avers the order was brought to its attention.

34] Importantly, Annexure AJB1 is a self-standing application – it is titled "*Appellant's Application for Condonation and Declaratory Relief/ Reinstatement of the*

Appeal.” The Notice of Motion is dated 3 October 2022 and, in effect, it seeks condonation for the following:

- (a) SA Salt’s failure to timeously file a Notice of Appeal;
- (b) SA Salt’s failure to timeously file the Power of Attorney;
- (c) SA Salt’s failure to comply with Rules 49(7)(d), (49(7)(a)(ii) and 49(7)(a);
- (d) SA Salt’s failure to timeously furnish security for the costs of the appeal; and
- (e) the registrar’s failure to enforce the provisions of Rule 49.

It also seeks an order that the appeal be reinstated.

35] By filing the application for condonation, in effect what has occurred is that Camel Rock’s Declaratory application has been overtaken by events. That should have put paid to it for an obvious reason: were the condonation application to succeed, that would put an end to the declaratory application. However, the former was persisted with (although not vigorously argued) and at the end of the day comes down to little more than a costs argument.

Should condonation be granted?

36] In **Aurecon South Africa (Pty) Ltd v City of Cape Town**¹⁷ it was held that the relevant factors in an enquiry regarding condonation generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay which must cover the whole period of delay; the importance of the issue to be raised and the prospects of success. The onus is on the applicant to satisfy the court that condonation should be granted. The discretion to be exercised is one in the true sense and is exercised upon a consideration of all the circumstances of the case, which in **Mosselbaai Boeredienste** was stated to include the interests of justice. Furthermore, good prospects of success on the merits may compensate for a poor explanation of the delay.¹⁸ Thus, should the prospects of success on appeal be strong, condonation will be granted despite a party’s explanation being unreasonable.¹⁹

¹⁷ 2016 (2) SA 199 (SCA) at para [17]; PAF v SCF 2022 (6) 162 (SCA) at paras [15] and [21]

¹⁸ United Plant Hire (Pty) Ltd v Hills and Others 1976 (SA) 717 (A) at 720E-G

¹⁹ United Plant Hire (supra) at 722C; Mabesete and Others v Booie and Another (CA 149/2021) [2023] ZAECKMHC 54 (2 May 2023)

37] The explanation proffered by SA Salt for its delay is the following:

(a) although the SCA order was given on 11 February 2022, it only came to its attorney's²⁰ attention on 16 February 2022 and on 17 February 2022 he asked his Pretoria correspondents to assist in the preparation of the appeal record and the steps necessary to prosecute the appeal;

(b) the Pretoria correspondent understood this to mean that they were only required to assist in the preparation of the appeal record. On 9 March 2022 Mr van den Heever received the quotation for the preparation of the appeal bundles;

(c) however, it appears that his work took him away from the office and then he contracted COVID-19.²¹ According to the explanation provided, he was in other courts with other matters, consulting with counsel and attending the trials in these matters;

(d) in fact, it appears from his affidavit that between 17 February 2022 when he sent the initial instruction to his correspondent, and 20 April 2022 when he eventually followed up on this instruction, Mr van den Heever paid no attention to this appeal at all.

38] On 22 April 2022, Lesego Maphetle of SA Salt's attorney of record, attended the appeals office at this court only to be informed that the clerk dealing with appeals was on leave until 3 May 2022. She was also informed that a notice of appeal with its annexures (and complying with Rule 49(6)) should be filed, uploaded to CaseLines and an email sent to the Civil Appeals registrar; and that the registrar would then provide a case number which must correspond with all documents. The registrar would also then provide a directive which had to be followed.

39] However, none of this was communicated to Mr van den Heever until he sent a letter requesting an update on 4 May 2022 – this was some 2 weeks later and 3 weeks after his letter of 20 April 2022. This time lapse is nowhere explained.

²⁰ Mr van den Heever

²¹ According to his affidavit he became ill at the end of March 2022 and was eventually booked off by a medical practitioner from 11 to 15 April 2022

40] On 5 May 2022 counsel was instructed to draft a Notice of Appeal – why this instruction was not given after 11 February 2022 already is also not explained. The Notice of Appeal was sent to Mr van den Heever on 10 May 2022 and filed on 11 May 2022. It was uploaded to CaseLines on 12 May 2022.

41] Given that Camel Rock was of the view that the appeal had lapsed, and its demand that SA Salt vacate the property, it is hardly surprising that this resulted in the Kimberley application. Furthermore, given that that application failed and that SA Salt had still failed to bring a formal application for condonation, it is also hardly surprising that the Declaratory application was launched on 22 August 2022. It took that to move SA Salt enough to finally decide to launch the condonation application.

42] This leads then to the issue of why the application was not launched after the letter of 20 May 2022. As stated, the argument was that SA Salt was awaiting the outcome of the Kimberley application before taking steps to prosecute its appeal. But this argument completely loses sight of the fact that, on its own version, SA Salt only became aware of the order on 8 September 2022. Yet, in June 2022 it applied for a date of hearing for this appeal; on 1 July 2022 it filed its power of attorney in respect of the appeal, on 26 July 2022 it set the appeal down and on 23 August 2022 it filed the appeal record. Only 2 events occurred subsequent to 8 September 2022: the filing of security for costs of the appeal and the present application for condonation.

43] Thus the argument proffered supra is simply untrue when viewed against the backdrop of the above events, and it falls to be rejected.

44] Furthermore, whilst we may (at a stretch) consider that there has been an explanation given for the delay until the filing of the Notice of Appeal, there is simply a failure to fully explain all the further delays in the prosecution of this appeal. There is also a complete failure to explain why the provisions of Rule 49(7)(a)(i) or (ii) were not followed.

45] It has been stated on many occasions that “[a]n attorney who is instructed to prosecute an appeal is...duty bound to acquaint himself with the procedure prescribed

by the Rules of Court to which a matter is being taken on appeal.²² It is also by now trite that an application for condonation must be made as soon as possible after a party becomes aware of its failure to comply with the rules.²³ Neither of these principles were paid much heed by SA Salt.

46] Thus, the application for condonation is without merit. However, as weak as the application may be, it may be saved by good prospects of success on the merits, which now fall to be considered.

PROSPECTS OF SUCCESS

47] The facts leading up to the review application have been set out supra and are not repeated. What is important to note is that when Camel Rock instituted review proceedings against the Minister's decisions on 8 June 2016 the "*existing right*" - which was the basis for the regional manager's decision to reject Camel Rock's September 2009 application - was the same right which Lacock J set aside on 10 December 2009. It was SA Salt's mining permit MP169/2004 pertaining to both Portions 146 and 148. Lacock J issued a declaratory order on 10 December 2009 that SA Salt's mining permit MP169/2004 was void and SA Salt was not permitted to mine on the farm and was to forthwith cease all mining activities on the farm. Lacock J found that it was common cause the MP169/2004 was not only void, but also a forgery and that it was improbable that the management of SA Salt was not aware that it had been forged. The learned judge stated that SA Salt had mined illegally for more than five years on the land in question.

48] This finding of Lacock J was confirmed by the SCA²⁴. The SCA found that the only valid permit issued to SA Salt was MP169/2003, which had expired on 27 April 2005. As a consequence, SA Salt had continued mining for at least five years without a valid permit.

²² Moaki v Reckett and Coleman (Africa) Ltd and Another 1968 (3) SA 98 (A) at 101G; PAF v SCF (supra)

²³ PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 800A-C

²⁴ As stated in paragraph 10 supra

49] The upshot of the aforesaid was that, when Saamwerk applied for a mining permit on 13 July 2005, and it was accepted by the DME on 5 September 2005, SA Salt's permit MP169/2003 had already expired. The permit was therefore not a barrier to Saamwerk obtaining a mining right. However, SA Salt asserted its rights under the forged permit MP169/2004 to thwart Saamwerk's mining right. In consequence, the SCA held SA Salt liable in damages to Saamwerk for the period of its unlawful mining.²⁵ The SCA concluded²⁶ that SA Salt and the Department were complicit in forging MP169/2004, and SA Salt's reliance on MP169/2004 was fraudulent. This caused Saamwerk to be deprived of the right to mine at Vrysoutpan and liability for damages was imposed on SA Salt for this reason for the period 6 September 2008 to 25 June 2011.

50] In our view, these findings against SA Salt regarding its unlawful activities on the portions of the farm were relevant considerations at the time when SA Salt and Camel Rock applied for their respective mining rights and prospecting rights on 26 September 2009 and 11 December 2009. Which considerations are material considerations depends on the facts. According to De Ville: *[It] appears axiomatic that a court will hold a factor to be relevant only when it is material to the decision to be taken.*"²⁷ In our view, these considerations were material to the decision of the Minister.

51] These considerations however were not disclosed to the Minister at the time he assessed the competing applications. The Minister therefore failed to take into account material considerations militating against the granting of mining rights to SA Salt.

52] The importance of the SCA judgment is that adverse factual findings had been made in respect of SA Salt, which were relevant to its assertions during both September 2009 and December 2009. In our view, there was in fact no valid competing interest when Camel Rock applied for its prospecting right on 26 September

²⁵ Para [15] of the SCA judgment [2011] ZASCA 109

²⁶ Para [51]

²⁷ p 180, JR De Ville, Judicial Review of Administrative Action in South Africa, 1st rev 2005

2009. Therefore, in terms of the provisions of the MPRDA the director was obliged to accept Camel Rock's application.²⁸ In contrast, it was not accepted due to the existence and assertion of an invalid competing right based on MP169/2004. Further, as at 11 December 2009, when both Camel Rock and SA Salt applied on the same day for their respective mining rights and prospecting rights on the same property, SA Salt failed to disclose to the Minister that it had been holding over unlawfully on the property based on the forged permit, as a result of which it was held liable in damages to Saamwerk for a period commencing in September 2008 and running up to 25 June 2011. Had the Minister taken these facts into account, he would have refused SA Salt's application forthwith. His failure to do so renders the decision to dismiss Camel Rock's application and to grant SA Salt's mining right reviewable. This is confirmed when one has regard to facts known to the DME in September 2009 and when consideration is had to the fact that on 16 September 2014 the DG obtained an opinion from Senior Counsel regarding the issue. The advice to both him and the Minister was that the Regional Manager should have accepted Camel Rock's application and that the decision to reject it cannot be justified. Counsel's advice to the Minister was that he should overturn the decision not to accept Camel Rock's application and its appeal be upheld.

53] This advice was, however, not followed by either the DG or the Minister.

54] It was also argued by SA Salt that, even if it could be said that the above facts should be accepted, Camel Rock's application for a prospecting licence cannot be granted as it does not pass muster. The argument is that Camel Rock's bald assertions that it had complied with all the requirements of a prospecting right simply are untrue as there are a number of serious defects in its application.

55] But, when viewed on the facts of this case, Camel Rock's application was not rejected by the DME because it was defective or deficient – it was rejected for the reasons set out supra. It also cannot be ignored that its December application²⁹ was accepted and considered on its merits. One would have expected that were it

²⁸ In terms of s 16(2)(a) – (c) of the MPRDA

²⁹ ie the first application it submitted

defective, the DME would have informed Camel Rock that this was the reason it was rejected, or the Minister would have refused the appeal on that ground. Neither of these were the case.

56] Furthermore, the Minister did not oppose the review application. Given Prayer 4³⁰ of the Notion of Motion, one would have expected the Minister to have filed an affidavit that the relief could not be granted – this too did not occur. As was stated by Ranchod J³¹:

“...It is apparent from the papers that the applications submitted by the applicant were never rejected or refused by the Minister because of non-compliance with the Act or any of the Regulations. From the record it appears that all necessary, relevant records and documents for evaluating and approving CRT's³² applications were before the DME when it had to consider them, as well as the other officials, including the Minister when considering CRT's applications...”

57] Given all of the above, we are of the view that there are no prospects of success on appeal. As the appeal was bound to be dismissed on its merits, there is no basis for granting condonation and reinstatement of the appeal.

CONCLUSION

[58] Given that there are no prospects of success on appeal, and given the extreme shortcomings in the application for condonation, it must fail.

COSTS

59] Whilst the costs of the application for condonation and appeal must follow the result, there being no reason to deviate from the usual rule, it is the costs of the Declaratory application that must now be decided. Whilst that application, in its pure form, was not argued, it cannot be ignored that it provided the impetus to SA Salt to get out of its blocks. The result was the condonation application of which the counter-

³⁰ The substitution relief sought

³¹ Judgment a quo at para [87]

³² Camel Rock

application was a fore-runner in any event. The application for a declaratory order was taken over by events. In terms of Rule 6(6) we make no order on the application, save for the costs. CRT is entitled to its costs up to filing of the counter-application.

THE ORDER

60] The order is the following:

1. The application for condonation and reinstatement of the appeal is dismissed with costs, including the costs of two counsel.
2. Camel Rock Trading is entitled to its costs of the application for a declaratory order up to date of filing of the counter-application.

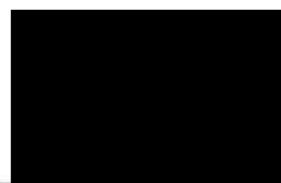


N KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree



B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA



I agree

E LABUSCHAGNE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be _____ 2023.

Appearances:

For appellant	Adv D van Loggerenberg SC, with him Adv JL Gildenhuys Sc
Instructed by:	Hannes Gouws & Partners Inc
For respondent:	Adv CDA Loxton SC, with him Adv A Mooij
Instructed by:	Wessels & Smith Inc
Date of hearing:	26 July 2023
Date of judgment:	_____