

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **2023-106309**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

DATE 30 NOVEMBER 2023

SIGNATURE

In the application of:

MINING OIL SOLUTIONS (PTY) LTD

Applicant

and

VIMASCO MINING AND CONSTRUCTION (PTY) LTD

First Respondent

ECONOMIC FREEDOM MINERAL RESOURCES (PTY) LTD

Second Respondent

IN RE:

VIMASCO MINING AND CONSTRUCTION (PTY) LTD

First Applicant

ECONOMIC FREEDOM MINERAL RESOURCES (PTY) LTD

Second Applicant

and

BOTSHELO COMMODITIES (PTY) LTD

First Respondent

MARYKE LANDMAN N.O / MARI HAYWOOD N.O

Second Respondent

(In their capacity as provisional liquidators for
AAM Mechanised Mining Solutions (Pty) Ltd)

SUSANNA CAROLINA PRETORIUS N.O

Third Respondent

SUSANNA CAROLINA PRETORIUS

Fourth Respondent

**SOUTH AFRICAN POLICE SERVICES:
MARIKANA POLICE STATION**

Fifth Respondent

MINING OIL SOLUTIONS (PTY) LTD

Sixth Respondent

**ALL OTHER UNKNOWN ENTITIES AND/OR PERSONS
OPERATING THROUGH OR UNDER EITHER THE FIRST,
SECOND OR SIXTH RESPONDENTS**

Seventh Respondent

This judgment and order is prepared and authored by the Judge whose name is reflected as such, 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 handing down is deemed to be 30 November 2023.

JUDGMENT (LEAVE TO APPEAL)

RETIEF J

INTRODUCTION

[1] The applicant, the sixth respondent in the main application, seeks leave from this Court to appeal the whole judgment (in so far as judgment was delivered) and the order granted on 17 November 2023 to the Supreme Court of Appeal [SCA], alternatively to the Full Court of this Division. In so doing, the applicant raises a number of grounds together with an unconditional and irrevocable tender of the delivery of the items listed in Annexure “A”, an annexure referred to in prayer 2.1 of the order.

[2] The tender is followed by a concession and admission that the items referred to in Annexure “A” belong to the first and second respondent [respondents], the applicants in the main application.

[3] The applicant’s tender and admission appear to validate the necessity for the respondents launching the main application and, the basis for this Court to have granted the relief. It too, as may appear below, may very well neutralizing the grounds relied on in this application by the applicant in this for leave to appeal. Clarity on this issue will be dealt with in more detail hereunder.

[4] To clarify and by way of background, the main application came before this Court on an urgent basis, and it was dealt with as such. The respondents in the main application sought final interdictory relief for, *inter alia*, the return of a chrome wash plant situated on a property in Marikana in the Northwest Province. Such claim premised on their ownership of the chrome wash plant.

[5] The applicant was the only respondent cited in the main application against whom relief was sought, that filed a notice of opposition and papers.

[6] For the sake of clarity during the hearing, this Court highlighted that the description of the identifiable parts which made up the chrome wash plant, which the respondents sought the return of, needed to be correctly identified and listed. In so doing this Court referred the respondents’ Counsel in argument to the items listed in the Plant Rental Agreement dated 1 February 2018 between Botshelo Commodities (Pty) Ltd and AAM Mechanised Mining Solutions (Pty) Ltd [the agreement]. The agreement and its terms remained an uncontested issue.

[7] The list of the items making up the chrome wash plant were recorded in Annexure ‘A’. No objection was raised in argument during the hearing to such items being recorded in an annexure nor for its purpose and, as it now stands, the applicant tenders the return of and concedes ownership of the items listed in Annexure “A” in favour of the respondents.

[8] Having regard to the above, it came as no surprise that the Counsel for the applicant in his opening address and as the argument developed, conceded that the applicant does not *per se* take issue with the order granted, but that the nub of concern with the order lay in the clarification of the word “*plant*” referred to in the body of the order. In amplification, the enquiry: was the word “*plant*” confined to the items listed in Annexure “A” referred to in prayer 2.1 of the order? If so, the grounds raised as against this Court’s finding including the aspect of ownership miraculously fall away.

[9] It now, together with the tender and concession in the applicant’s application for leave, became abundantly clear that the purpose for which leave to appeal any ‘erroneous decisions’ made by this Court on the papers before it to the SCA, alternatively to the Full Court of this Division, was not solely initiated on the basis of erroneous decisions, but rather for clarification purposes. Clarification and/or a possible ambiguity giving rise to possible uncertainty is not the basis nor is it the intended purpose of uniform rule 49(1)(b).

[10] In consequence, the intended purpose for this Court to entertain and apply the section 17(1)(a)(i) test set out in the Superior Courts Act 10 of 2013 [section 17 test] becomes irrelevant. As too, and as correctly pointed out by the respondents’ Counsel, the necessity for the hearing and preparation of this application.

[11] The applicant’s Counsel appreciating this consequence tried to salvage the position by tendering a withdrawal of the application with attorney client costs, albeit on certain conditions (dealt with below). This tender was later withdrawn, the respondents seeking a dismissal and attorney own client costs.

[12] I now deal with the only remaining issue for the sake of clarity and with costs.

CLARIFICATION OF THE WORD “plant” IN THE COURT ORDER

[13] Paragraph 2.1 of the Court order clearly and concisely states the following:

“2. *First and/or the Sixth Respondent and/or the Seventh Respondent are interdicted, with immediate effect, from:*

2.1. *operating or using the Applicants’ chrome wash plant, consisting of (own emphasis) the items set out in **Annexure “A”** attached hereto, which is situated at Portion 139 of farm 342, Registration Division J.Q., Marikana, North-West (“**the property**”), (“**the plant**”) in any way whatsoever; and”*

[14] From the above it is clear that the chrome wash plant consists of the items in Annexure ‘A’ (the what), the chrome wash plant described is situated on the described property (the where) and furthermore, that the description of chrome wash plant, consisting of the items in Annexure “A” on the property describes “*the plant*” (the how made-up).

[15] Not only does common sense dictate that the use of the word “*plant*”, which is repeated in the body of the order, is confined to the what, the where, by the how made-up, but the manner and use of a word to mean a descriptive phrase instead of repeating the descriptive phrase is an accepted and commonly used method. This method prevents ambiguity. To illustrate the point yet further in the same order, the use of the word “*property*” is used and repeated instead of using the full property description. No complaint or ambiguity regarding the word “*property*” has been raised. Having made the point this Court is perplexed why the applicant’s grounds of appeal do not specifically deal with the nub of the complaint, namely: “*In so far as the plant at prayer.....includes items not in Annexure “A” then the Court has*”. This is a factor to consideration for costs.

[16] The use of the word “*plant*” as described and confined to in Annexure ‘A’ was the Court’s intention with the use of the word throughout the order. The respondents’ Counsel confirmed the same understanding in argument, and as such, has taken the

sting out of any confusion raised by the applicant's Counsel from the bar. Any confusion now eliminated and settled. The word "*plant*" in the entire body of the order refers to the description at prayer 2.1 of the order.

COSTS

[17] The application before this Court is an application for leave to appeal. Yet, on the papers, it was *sui generis*. By this is meant, an application for leave to appeal incorporating a tender and concession of the merits in respect of the ownership determination in the main application and grounds raised which were at variance with such tender and concession by persisting with this Court's errors. Compounded with the application was a concession in argument that the applicant did not take issue with the order provided that the word "*plant*" was confined to the description at prayer 2.1 of the order. The absurdity of this application now becomes apparent.

[18] The respondents' Counsel to my mind correctly argued that the application was brought without merit in light of the tender and concessions, was an abuse of the process if confined to clarification of a word in an order which was clear on the face of it and a waste of the Court's time. The applicant's Counsel did not specifically reply to the contentions made, aforesaid.

[19] Expanding on the consequences, the respondents now seek attorney own client costs and invited the Court to consider the reasoning between attorney client and attorney own client costs dealt with in ***Fidelity Bank Ltd vs Three Woman (Pty) Ltd [1996] 4 All SA 368 (W)*** [Fidelity matter] in which Cloete J, after having considered a number of cases, discussed and accepted the difference in the recovery and category of attorney own client costs before a taxing master as opposed to attorney client costs- referring to the latter as an extreme award by the Court. Applying certain factors in the exercise of his discretion, Cloete J in the Fidelity matter, considered the plaintiff's conduct in the proceedings and determined them to be dishonest, he too found the bank witnesses dishonest and considered the delay in process.

[20] I have accepted that to exercise a discretion judiciously, it occurs if applied as case specific and exercised having regard to all the facts. The factors listed by Cloete J demonstrate disfavour, appeared to be centred around a parties dishonesty in conduct and in their evidence.

[21] Although I find that the applicant has abused the intended purpose of the procedure, relied on unfounded grounds which were at variance with the tender and concession, they have done so, by openly "*coming out of the blocks*" so to speak. This is evident from the content of application itself read as a whole and from the concessions made by Counsel in his opening address. The 'absurdity' of it all in the end, and what transpired during argument, does not equate to dishonest conduct as described by Cloete J. Moreover, no credibility finding was made nor required, nor appropriate in the circumstances.

[22] This Court appreciates that the matter has an acrimonious history but will not allow the consequence thereof to cloud its judgment nor influence the exercise of its discretion. A sound cost tender, although rejected and later withdrawn was made by the applicant.

[23] Having regard to the above and having regard to the papers filed, it flows that this Court applying the section 17 test, is of the opinion that the appeal would not have a reasonable prospect of success and in consequence leave is denied.

The following order follows:

1. The application for leave to appeal is dismissed;
2. The applicant to pay the respondents' costs on a scale as between attorney and client, including the employment of two Counsel.

L.A. RETIEF
Judge of the High Court
Gauteng Division

Appearances:

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Matter heard: 29 November 2023

Date of judgment: 30 November 2023