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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No. 1619/2020
Heard: 10/02/2022
Delivered: 14/03/2022

In the application between: -

QCK LEZMIN 4791 CC

Applicant

(First Respondent in proceedings *a quo*)

LORE TRADE AND INVESTMENTS (PTY) LTD

Second Applicant

(Second Respondent in proceedings *a quo*)

DULOSTYLE (PTY) LTD

Third Applicant

(Third Respondent in proceedings *a quo*)

and

SIKHOVA IMPORTERS CC

First Respondent

(First Applicant in proceedings *a quo*)

RE: HARD ROCK MINING (PTY) LTD

Second Respondent

(Second Applicant in proceedings *a quo*)

JUDGMENT: APPLICATIONS FOR LEAVE TO APPEAL

Moses AJ

INTRODUCTION

1. This is an application for the leave to appeal my judgment and orders dated 12 November 2021, by the abovestated applicants respectively on the grounds set out in their respective notices of application for leave to appeal.
2. The application was, by agreement, between the parties and the directive of this Court, heard and agreed virtually on 10 February 2022. Judgment was reserved pending this judgment.
3. At the end of the said hearing, Mr Wagener, who appeared for all three applicants, hereafter the First -, Second and Third Applicants, referred this Court to certain case law and authorities which have a bearing on part of my aforesaid judgment that "...it is trite that even a bona fide possessor of spoliated property can, in a particular case, be ordered to restore the possession so spoliated." This finding was based on two reported judgments referred to by this Court, namely **Malan v Dippenaar 1969(2) SA 59(O) at 65G to 66A**, and **Painter v Strauss 1951(3) SA 307(O)**.
4. Since these authorities were not referred to and/or listed in his heads of argument submitted at the time, Mr Wagener undertook to furnish this Court with the said list, which he did, and which is appreciated by this Court.

5. Mr Van Twisk, who appeared for the applicants in the application *a quo* and for them as the respondents opposing these applications, also requested a copy thereof for his consideration and reply upon receipt thereof, which he did, and which is also appreciated.
6. The grounds upon which the applicants based their respective applications for leave to appeal are meticulously set out in their respective notices of application for leave to appeal and amplified in the comprehensive heads of argument by Mr Wagener on behalf of the three (3) applicants, filed of record. Hence it is not necessary to repeat it herein.
7. Mr Van Twisk had also filed his comprehensive set of heads of argument on behalf of the respondents, as well as a supplementary note regarding the additional list of authorities submitted by Mr Wagener.
8. I have carefully considered the grounds listed by the applicants in support of their applications for leave to appeal as well as their written and oral submissions advanced on their behalf by Mr Wagener. I have also carefully considered the written and oral submissions advanced by Mr Van Twisk on behalf of the Respondents. I return to these hereunder.
9. Before I do so, I consider it apposite to start with the threshold test for an application for leave to appeal to succeed which is that the applicants must demonstrate that there is a reasonable prospect of success on appeal. **See section 17(1)(a) of the Superior Courts Act 10 of 2013 – The Superior Courts Act.**
10. It is trite that section 17 (1)(a) of the Superior Courts Act introduced a different and higher threshold since its inception to be granted leave to

appeal than before its enactment when that threshold was a reasonable prospect that another Court might come to a different conclusion. **See Van Heerden v Cronwright & Others 1985 (2) SA 341 (T) 343H. See also Smith v S 2012 (1) SACR 56 (SCA) paragraph [7].** It is in this context that I deal with the respective applications for leave to appeal.

THE FIRST APPLICANT'S APPLICATION FOR LEAVE TO APPEAL

11. Ad paragraph 1 thereof

It is contended herein essentially that this Court erred in failing to consider all of the evidence that was before the Court and to which particular reference was made by counsel for this Applicant during argument. This is a wide and general statement. The judgment of this Court demonstrates, to my mind that all the relevant evidence including the references made by counsel, were taken into account and properly considered. Hence, I would not grant leave to appeal on this ground and is accordingly dismissed.

12. Ad paragraph 2 thereof read with the second paragraph 5 thereof

12.1 It is contended herein that this Court erred in failing to deal with the pertinent argument that the Applicants *a quo* – the Respondents herein, did not make out a case for spoliation. Again, it must be pointed out that the said judgment reflects a careful consideration and scrutiny of this “pertinent argument,” and the act of spoliation, and for the reasons set out therein could not, and did not find in favour of the then respondents, more particularly the First Applicant herein.

12.2 Mr Wagener in his written heads of argument (**paragraph 17 to 26.4**) and in his oral submissions to this Court, emphasised the disputed versions of access and denial of access to the property and submitted that, in essence, based on the Plascon – Evans rule, that dispute be

resolved in favour of the Applicants, more particularly the First Applicant herein.

12.3 These submissions lose sight of the objective fact on the papers, that the gates providing access to the property, including the mining area were locked, and remained locked and were never unlocked and/or opened by the First Respondent, the First Applicant herein, and/or the other Respondents *a quo*. This evidence is undisputed. On the papers before Court, the then Applicants – the Respondents herein – were only given permission to access the property subsequently to remove their machinery and equipment from the property. Thus, whether or not the locks were changed, the fact of the matter is that the gates remained locked, despite the various efforts made by and on behalf of the Respondents herein, including phone calls, WhatsApp messages, involvement of the Second Respondent's Mr Mompoti, the Second Applicant herein, to mediate, unsuccessfully so. What else is that but a physical denial of access to, and possession of the property?

12.4 To my mind these grounds do not demonstrate a reasonable prospect of success on appeal and hence it also must be dismissed.

13. **Ad paragraph 3 thereof read paragraph 5 thereof**

13.1 Herein it is contended that this Court erred in granting and ordering that the First Respondent, the First Applicant herein, is to restore possession of the property to the Applicants – the Respondents herein – under circumstances where the First Respondent – the First Applicant herein – “was not in possession of the mine” and as such is/was “incapable of restoring possession of the property to the Applicants” – the Respondents herein.

13.2 These contentions were not raised by the First Applicant *quo* First Respondent, neither on the papers, nor during argument at the hearing of this matter. On the facts as set out in the judgment, this First Applicant is/was at all relevant times the owner of the property, including the mining area and made common cause with the Second Applicant herein, *quo* Second Respondent, in opposing and denying the Respondents, *quo* Applicants, access to, and possession of that land including the mining area. Furthermore, the First Applicant herein made common cause with both the Second Applicant herein and the Third Applicant herein, when the latter two entered into a separate agreement, which on the facts and objectively exists, as a result whereof the Third Applicant herein was granted access to, and occupation and possession of that mining area amidst a contractual and access dispute amongst the parties at the time.

13.3 In the circumstances this ground also does not demonstrate, to my mind, a reasonable prospect of success on appeal, and is accordingly dismissed.

14. **Ad paragraph 4 thereof**

14.1 Herein it is contended that this Court erred in ordering the Third Applicant herein, *quo* Third Respondent, to restore possession of the property to the then Applicants in circumstances where there was no allegation or evidence that the Third Applicant herein in fact dispossessed the said Applicants – the Respondents herein – of their possessions of the property.

14.2 I refer in this regard to what is stated in the abovestated **paragraph 13.2**, the contents thereof are repeated herein. The evidence shows, or

correctly pointed out by Mr Van Twisk on behalf of the Respondents herein (**in their paragraph 4.2 of the written heads of argument**), that the Second and Third Applicants herein concluded the said new joint venture agreement regarding the property despite the fact that Mr PF Cloete is/was a director of the attorneys of the Third Applicant – *quo* Third Respondent, as well as a director of the said Third Respondent, which attorneys were at all relevant times privy to the dispute regarding the said Applicant (the Respondents herein) access to and possession of the property. The Applicants herein, *quo* the Respondents, refused to produce and discover this agreement to the Respondents herein. However, that that agreement objectively exists, is not disputed on the papers.

14.3 It is also not correct to state that there was no allegations or evidence that the Third Respondents – the Third Applicant herein, in fact dispossessed the then Applicants of their possessions of the property, if regard is being had to prayer 2 of the Notice of Motion and paragraph 3 of the founding affidavit.

14.4 In the circumstances I find that this ground for leave to appeal also does not pass the test of demonstrating a reasonable prospect of success on appeal, and is accordingly dismissed.

15. **Ad paragraph 6 thereof**

15.1 Herein it is contended that this Court erred in failing to find that the Applicants – the Respondents herein – abandoned the property, alternatively erred in finding that they may have abandoned the property and erred in failing to find that the *mandament van spolie* was not available to the Applicants – the Respondents herein – under

circumstances where they were not factually in possession of the property.

15.2 In this regard similar considerations as set out in my paragraph 12 and 13 hereinabove apply.

15.3 In the circumstances I find that there is no reasonable prospect for success on these grounds, and it is accordingly dismissed.

16. **Ad paragraph 7 thereof read with paragraph 9 and 10 thereof**

16.1 Herein it is contended that this Court erred in the failing to find that the Applicants' *mandament van spolie* was actually a disguised enforcement or assertion of alleged and disputed contractual rights.

16.2 I have dealt with and referred to the basic legal principles in respect of spoliation (**paragraph 13 p 14 of the Judgment**) and set out the reasons why, to my mind, the contractual disputes which evidently exist amongst the parties, more particularly the disputed cancellation of the SUA and the JVA, could not be adjudicated upon by this Court, having been seized with a spoliation application (**paragraphs 77 – 80, p 50 of the Judgment**).

16.3 I am also in agreement with the Respondents' submissions in this regard (**paragraphs 8.2 to 8.6 and paragraphs 10.1 to 10.3 of their written heads of arguments**).

16.4 In the circumstances I find that these grounds do not demonstrate reasonable prospects of success on appeal and fall to be dismissed.

17. Ad paragraph 8 thereof

17.1 In this paragraph it is contended that this Court erred in finding that the equipment and machinery in the Property was a manifestation of the Applicants' possession (the Respondents herein) of the Property and should instead have found that the mere placement thereof on the Property does not create such a presumption or that the Applicants (the Respondents herein) were merely disposed thereof.

17.2 In this regard I am in agreement with the Respondents that the undisputed fact that the equipment and machinery were brought onto the Property is undisputed evidence that it was obviously brought to the prospecting area so as to conduct prospecting thereon which is furthermore evident, *inter alia*, from the tests conducted in the area which undoubtedly shows that the machinery and equipment were obviously a manifestation of possession of the prospecting area.

17.3 In the circumstances and to my mind there is no basis on which another Court would on this ground come to another conclusion, and accordingly falls to be dismissed.

18. Ad paragraph 11 thereof

18.1 The contention herein essentially is that this Court erred and misdirected itself in allowing further and additional evidence in reply without an application and in not affording the Respondents (the Applicants herein)

on opportunity to answer thereto, alternatively erred in failing to strike out new and argumentative and/or irrelevant matter and facts in the replying affidavit.

18.2 In this regard, Mr Wagener referred this Court again to the approach to replying affidavits adapted by the Supreme Court of Appeal with reference to the cases he had cited in his written heads of argument. He submitted, *inter alia*, that the Applicants herein were prejudiced as a result, and had to incur unnecessary costs in the circumstances.

18.3 He conceded, on a question by this Court, that the Respondents *a quo* – the Applicants herein, could have applied to file a further affidavit(s) in response to the allegations and matters raised in the replying affidavit, but did not so apply. According to him a Court would grant such an application only in exceptional circumstances, lest the floodgates for such further affidavits be opened.

18.4 I have carefully considered these submissions as well as those advanced on behalf of the Respondents herein and came to the conclusion that there is a reasonable prospect of another Court coming to a different conclusion on the facts of this case.

18.5 In the circumstance I find that leave to appeal on this ground ought to be granted.

19. **Ad paragraph 12 thereof**

19.1 Herein it is contended that this Court erred in failing, in accordance with the Plascon – Evans principles to consider the common cause and the

uncontested facts with specific reference to the cancellation of the relevant agreements and the Respondents' (the Applicants *a quo*) inability to rely on the cancellation of the agreements as an act of spoliation.

19.2 I refer in this regard to what is set out in my Judgment, more particularly **paragraphs 56.14 to 56.41** thereof, and additionally, point out two aspects:

- a) firstly, there was not, nor could there have been any "cancellation" of these agreements: it was alleged cancellations which were always disputed. As such it was still to be subjected to another Court dealing with the contractual disputes, if so instituted, between/amongst the parties; and
- b) secondly, the Applicants *a quo* – the Respondents herein, did not rely on this "cancellation" as "an act of spoliation"; it was the Respondents *a quo* – the Applicants herein – that relied on the alleged cancellation of the SUA and JVA as a basis to deny the Applicants *a quo* – the Respondents herein – access to and possession of the property, including the mining area.

19.3 In the circumstances there is, to my mind, no reasonable prospect of success on appeal on this ground, and it falls to be dismissed accordingly.

THE SECOND APPLICANT'S APPLICATION FOR LEAVE TO APPEAL

20 **Ad paragraphs 1 to 1.7 thereof**

- 20.1** Herein it is contended essentially that this Court erred in granting the cost order against the Second Applicant *a quo* – the Second Respondent – and should have granted a cost order in favour of the Second Applicant in as much as the only relief sought against it was in terms of prayer 3 of the Notice of Motion, which was abandoned by the Respondents herein.
- 20.2** I refer in this regard to the facts and reasons as set out in this Court's Judgment. It is also not totally correct to state that the only relief sought against the Second Applicant was/is that contained in prayer 3 of the Notice of Motion, in as much as prayer 4 thereof sought costs against it in the event of opposing the application, which it did.
- 20.3** Moreover the Second Applicant herein was the deponent to the answering affidavit, the founding affidavit in the respect of the Application to strike out and, for the reasons set out in the judgment, made common cause with the First – and the Third Applicants herein (*quo* First Respondent and Third Respondent) in opposing the totality of the application launched by the Respondents herein. Hence the Court was alive to all the issues involved and gave appropriate weight to all those factors and grounds enumerated in paragraphs 1.1 to 1.7 of the application for leave to appeal.
- 20.4** With regards to the contention that this Court erred in failing to make a cost order against the Second Respondent herein, in favour of the Second Applicant herein, the relevant factors include, *inter alia*, the following: (as more fully appear from the Judgment):
- a)** The Respondents herein were acting at all relevant times in circumstances where there was an understanding with the Second Applicant herein, that the Second Respondent herein was at all relevant times the envisaged entity/company to be

formed and incorporated in terms of the JVA, until this application was launched by the then Applicants – the Respondents herein;

- b)** Mr Mompati, on behalf of the Second Respondent – the Second Applicant herein, deposed to the answering affidavit, and on behalf of the First – and Third Applicants herein;
- c)** The said Mr Mompati knew, at all relevant times, about this incorporation of the then Second Applicant – the Second Respondent herein;
- d)** The said Mr Mompati, in his aforesaid capacity, then entered into another JVA with the Third Respondent – the Third Applicant herein, under circumstances where they were aware at the relevant times, of the contractual disputes and the dispute regarding access to, and possession of, the mining area; and
- e)** The said Mr Mompati, in his stated capacity on behalf of the Second Respondent – the Second Applicant herein, together with the First – and Third Applicants herein, refused to provide the Respondents herein access to and/or a true copy of the said JVA with the Third Applicant herein.

20.5 In the circumstances, to my mind, I am not persuaded that there is a reasonable prospect of success on appeal on these grounds, and accordingly it falls to be dismissed.

21. With regards to the third ground as enumerated in paragraphs 3 to 3.5 of the Second Applicants Application for leave to appeal in (striking out application), similar considerations apply as with regards to the First Applicant set out in paragraph 18 above. In the circumstances the Second Applicant is granted leave to appeal on these grounds.

THE THIRD APPLICANT'S APPLICATION FOR LEAVE TO APPEAL ON THIS GROUND

22. Ad paragraph 1 to 1.6 thereof

22.1 In this paragraph it is contended that this Court erred in granting the relief sought in prayer 2 of the Notice of Motion against the Third Applicant herein in the respects set out in the abovementioned paragraphs, which overlap with the contention raised in paragraph 4 of the First Applicant's Notice of Application for Leave to Appeal.

22.2 I refer in this regard to what I have stated in paragraph 14 above where I have dealt with the contention insofar as it relates to the First Applicant, which similarly apply to the Third Applicant herein.

22.3 However, having considered the First Applicant's "List of Further Authorities" as well as Mr Van Twisk's supplementary note pursuant thereto, I am of the view that another Court might come to a different conclusion on the facts of this case and that the Third Applicant herein would have a reasonable prospect of success on appeal in the circumstances. In the event the Third Applicant is granted leave to appeal on this ground.

23. Ad paragraph 2 thereof, including paragraphs 2.1 to 2.5

23.1 In this paragraph it is contended that this Court erred in not granting a cost order against the Second Respondent herein to pay all costs of the application that relates to the said Second Respondent's involvement in the disputes and failed to exercise its discretion in a judicial manner by

failing in the respects specified in paragraph 2.1 to 2.5 of the Notice of Application for Leave to Appeal.

23.2 In this regard, I am in agreement with the submissions made by and on behalf of the Respondents herein, in their paragraphs 14.2 and 14.3 of their written Heads of Argument, and also refer to what is stated in paragraphs 20.3, 20.4 and 20.5 above, which are similarly applicable in respect of the Third Applicant herein.

23.3 In the circumstances this Court is not persuaded that there is a reasonable prospect of success on appeal and this ground accordingly falls to be dismissed.

24. Ad paragraph 3 thereof

24.1 Herein it is contended that this Court erred in dismissing the striking out application launched by the Respondents *a quo* – the Applicants herein, which overlap with the contention raised in paragraph 11 of the First Applicant's Application for Leave of Appeal.

24.2 For the reasons set out in paragraph 18 above, I am similarly of the view that another Court might come to a different conclusion in the circumstances of this case and hence that a reasonable prospect of success on appeal exists. I would accordingly grant the Third Applicant leave to appeal on this ground also.

CONCLUSION

25. Having carefully considered these applications for leave to appeal as well as counsel's written and oral submissions, the following orders are made:

25.1 The First Applicant is granted leave to appeal only on the grounds set out in its paragraph 11 of its Application for Leave to Appeal, to a Full Bench of this Division.

25.2 The Second Applicant is granted leave to appeal only on the grounds set out in its paragraph 3 of its Application for Leave to Appeal, to the Full Bench of this Division.

25.3 The Third Applicant is granted leave to appeal only on the grounds set out in its paragraph 1 and 3 of its Application for Leave to Appeal, to a Full Bench of this Division.

25.4 The costs of the applications for leave to appeal to be costs in the appeal.



J J Moses
Acting Justice
Northern Cape Division

For the Applicants: Adv. SD Wagner SC
(oio. Van Der Wall Inc.)
For the Respondents: Adv. M van Twisk
(oio Haarhoffs Inc.)