



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE NO: 2935/17

HEARD ON: 22/02/2019

DELIVERED ON: 28/06/2019

In the matter between

MISTY FALLS 45 PTY) LTD

1st Applicant

KITSO MANGANESE (PTY) LTD

2nd Applicant

And

ACCESS WORLD (PTY) LTD

1st Respondent

FNM TRADING (PTY) LTD t/a NEXUS

2nd Respondent

LOGISTICS

TRANSET SOC LIMITED

3rd Respondent

MOSEBENZI JOSEPH ZWANE

4th Respondent

DEPARTMENT OF MINERAL RESOURCES NC

5th Respondent

ALMENTA LOGISTICS (PTY) LTD

6th Respondent

JUDGMENT

PAKATI J

[1] The applicants, Misty Falls 45 (Pty) Ltd ("Misty Falls") and Kitso Manganese (Pty) Ltd ("Kitso"), seek a final interdict against, Access

World (Pty) Ltd ("Access World"), FNM Trading (Pty) Ltd t/a Nexus Logistics ("FNM Trading"), Transnet SOC Limited ("Transnet"), Mosebenzi Joseph Zwane ("Mr Zwane"), Department of Mineral Resources NC ("DMR"), and Almenta Logistics (Pty) Ltd ("Almenta"), the first to sixth respondents respectively, in the following terms:

'1. Until such time as they have approval from the Department of Mineral Resources, the First, Second, Third And Six Respondents be and are hereby interdicted and restrained from conducting any operations (the "Operations") on the property situated at the Remaining Extent of the Farm Lohatlha 673, District Kuruman, Northern Cape Province, Measuring 1726.5624 hectares (the "Property"), including:-

- 1.1 the packing or processing of minerals;*
- 1.2 the loading of minerals onto locomotives;*
- 1.3 the transportation of minerals from the Property;*
- 1.4 The utilisation of the railway siding.*

2. Should any of the First, Second, Third and Sixth Respondents obtain approval from the Department of Mineral Resources to conduct their Operations, such Respondents shall be obliged to:-

2.1 obtain the approval of the First Applicant, and the persons appointed by the First Applicant (the "Nominees") in terms of Section 3.1 and 4.1 of the Mine Health and Safety Act 29 of 1996 (the "MHSA") prior to commencing such Operations; and

2.2 comply with any lawful instructions given by the First Applicant, the Second Applicant or the Nominees.

3. The First Applicant or the Nominees shall have the right to:-

- 3.1 conduct safety stoppages for any vehicle or person traversing the Property at any time;*
- 3.2 conduct safety audits for any person conducting Operations on the Property;*
- 3.3 instruct any of the First, Second, Third and Sixth Respondents to immediately cease the Operations for reasons of safety, and to only recommence the Operations once the First Applicant is satisfied that such Respondent(s) have corrected their offending actions.*

4. The First, Second and Sixth Respondents shall pay the costs of the application.'

- [2] The first, second and sixth respondents oppose the application. The third respondent filed a notice to abide on 01 February 2018. No relief is sought against the fourth and fifth respondent. They are

cited herein for any interest they may have in the outcome of the application.

BACKGROUND FACTS

- [3] Misty Falls is a holder of a mining right over the entire property situated at the Remaining Extent of the Farm Lohatlha 673, District Kuruman, Northern Cape ("the property"). It appointed Kitso as its mining contractor. Misty Falls mines with manganese and iron ore. Beverley Ann Baker and Frans Johannes Christoffel Wessels act as its mine managers and/or representatives (Nominees) to ensure compliance with its obligations in terms of the Mine Health and Safety Act ("MHSA")¹. There is a railway siding located on the property which connects to the main railway line in Lohatlha. It allows for transportation of minerals and goods around South Africa. There is also a servitude registered over the property in favour of Transnet regarding the siding.
- [4] As the owner of the mining right and employer Misty Falls is obliged to comply with *inter alia*, sections 2 (1) (a) (i), 5 (1) and (2), 7 (1) (b), of the MHSA which provide:

'2 Employer to ensure safety

- (1) The employer of every mine that is being worked must-
- (a) ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped-
 - (i) to provide conditions for safe operation and healthy working environment...'

5. Employer to maintain healthy and safe mine environment

- (1) *As far as reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees.*
- (2) *As far as reasonably practicable, every employer must –*
- (a) *Identify the relevant hazards and assess the related risks to which persons who are not employees may be exposed; and*
 - (b) *Ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.'*

¹ Act 29 of 1996

7 Employer to staff mine with due regard to health and safety

- (1) *As far as reasonably practicable, every employer must-*
 (b) *Institute the measures necessary to secure, maintain and enhance health and safety.'*

The applicants insist that they comply with the health and safety obligations imposed upon them.

- [5] The applicants contend that during 2016 Access World brought minerals mined from elsewhere onto the property, process them and load them onto locomotives at the siding and transport them to elsewhere in South Africa. This was done without an environmental authorisation or reconnaissance permission, prospecting right, permission to remove, mining right, exploration right or production right, the argument goes. According to the applicants this is contrary to the MHSA, Mineral and Petroleum Resources Development Act ("PRDA")², and National Environmental Management Act ("NEMA")³. Misty Falls alleges that it had to contribute additional amounts to its environmental rehabilitation fund. The operations conducted by Access World were potentially dangerous as it includes use of heavy duty and hazardous machinery which, if not operated in a safe manner, could result in fatalities or serious injury.
- [6] FNM Trading, Transnet and Almenta also conducted similar operations as Access World without requisite approval and authorisation of the MPRDA, DMR and NEMA. These operations were conducted without regard to the health and safety requirements, so argue the applicants. The conduct of the first, second, third and sixth respondents had a potential to expose Misty Falls and its nominees to liability in terms of the MHSA.

² Act 28 of 2001

³ Act 107 of 1998

- [7] The applicants allege that the respondents leased land from Maremane Communal Property Association, the owner, and yet in terms of the title deed the following is provided: *"No person may, without the written approval of the Minister of Land Affairs, sell, exchange, donate, lease or otherwise dispose of the property."* Notably, this condition applies in the title deed of Portion 8 of the Farm Gloucester 674. A similar condition that is applicable to the Remainder of the Farm Lohatlha 673 records:

'It is recorded that the State and the **MAREMANE COMMUNAL PROPERTY ASSOCIATION** agree that the **MAREMANE COMMUNAL PROPERTY ASSOCIATION** shall not, after registration of transfer of the said Subject Land into the name of the **MAREMANE COMMUNAL PROPERTY ASSOCIATION** encumber, sell or otherwise dispose of the Subject Land or any portion thereof without prior written consent of the Minister. It is recorded that in this instance, the Minister shall have the right of first refusal. The Minister shall have 45 working days to indicate in writing his intentions.'

Clearly lease is not applicable in this clause.

- [8] The respondents confirm that Almenta has a lease agreement with Maremane Communal Property Association, the registered owner of the property. The lease agreement entitles the respondents to store, put into containers manganese and iron ore. According to Almenta the leased area is 40 000 square metres.
- [9] Access World constructed two five thousand square metre concrete platforms at or near the siding in order to do loading and transportation. This conduct was, according to the applicants, in contravention with MHSA and constitutes mining operations.
- [10] Almenta argues that its operation constitutes receiving cargo from the mines in the area *via* tipper trucks and the cargo would be tipped and stockpiled using a front-end loader to stack. When the cargo has to be exported Almenta requests a train from Transnet of empty containers to be railed from Port Elizabeth to the Lohatlha siding. When the said train arrives at the siding Almenta collects the empty containers from Transnet siding to the site *via* flatbed truck.

The containers would be packed using bobcats. Sometimes a client may request a third party to assay the cargo on packing. Almenta would then move the container *via* a reach stacker to its six metre platform scale, weigh and trim it to the required weight and seal the container. It would then be removed from the scale via a reach stacker. The full container would be moved back to Transnet siding for rail to Port Elizabeth *via* a flatbed truck. Sometimes the cargo is tested chemically before being packed onto the container or loaded back onto the trucks for transportation through other means.

- [11] FNM Trading insists that its operation does not constitute mining but provides storage and handling services to third parties. As in the case of Access World and Almenta, FNM Trading stockpiles ore on its leased land, loads the ore onto shipping containers, and onto trains at the siding. Thereafter they transport the shipping containers around the country.

- [12] According to Almenta the site is fenced and enclosed with separate access controls and gates. It comprises health and safety signage, a septic tank, a twenty four metre weighbridge, a six metre platform scale with civis, a three metre container office for weighbridge, electricity, and a twelve metre building with six metre office space and ablution facilities for staff. Before Almenta occupied it, it had two paved stock pads, civis for a twenty four weighbridges and six metre container office. Its office is one kilometre from the area of the excavations and the mining operations of Misty Falls. The road access from the mine is six kilometres and the two sites are separated by a Transnet railway line and a multi-user road for the mine and other mines in the Northern Cape that use bulk mega rail allocation. The respondents allege that none of the applicants' mined material is packed or loaded by Almenta and the applicants' trucks transport their own material to Bloemfontein. Almenta's

operations have therefore nothing to do with the applicants' activities, the argument goes.

- [13] The respondents submit further that the applicants have not disclosed to the court that they previously used Almenta's packing facilities to load and transport their mined product, thus having full personal knowledge that the respondents were not mining or processing. According to the respondents this was a material non-disclosure. The respondents contend that the applicants object to Almenta's packing and loading business because they were no longer able to use Almenta's loading and railing facilities. A letter of complaint dated 30 November 2017 emailed at 11:36 AM by the applicants to DMR *inter alia*, records:

'...I reiterate that neither Misty Falls 45 (Pty) Limited nor Kitso Mining (Pty) Limited has any affiliation whatsoever with the companies operating at the siding. They have in fact refused to accept our freight and we are now forced to truck material to Bloemfontein at great cost.

We have complied fully with the Section 54 instruction insofar as we are able in that we have notified the affected parties verbally and in writing and informed the SAPS of their continued illegal and blatant contravention of Section 91 of the Act. They continue to operate despite our warnings for them to cease operations and allege that the Department of Mineral Resources has no authority over them.

I feel it is necessary to state that it is our opinion and the opinion of our legal counsel that we as the employee as defined in the Act have complied fully with the Act and neither Misty Falls 45 (Pty) Limited, Kitso Mining (Pty) Limited nor their employees can be held liable for any current or future transgressions of the Act in the siding area for so long as the offending companies continue to operate without our express permission. '

- [14] The respondents contend that this application was brought soon after this letter, in a misguided attempt to close down Almenta's loading and packing business.
- [15] The issue is whether the applicants' obligations under and in terms of the Mine Health and Safety Act, 29 of 1996, extends to the operations of Access World, FNM Trading and Almenta. The applicants argue that they are obliged in terms of the MHSA to

ensure health and safety over the entire mining area irrespective of whether or not the operations are conducted by the applicants. They allege further that the activities of the respondents fall under the definition of mining and therefore are governed by the MPRDA and the MHSA. The respondents argue that Almenta's operations have nothing to do with the mining and mining operations of the applicants. They argue further that the MPRDA and MHSA place no responsibility on the applicants for the safety of Almenta's employees as its business is packing and loading.

- [16] The applicants state that Almenta and Access World admitted that their actions and operations were governed by the MHSA, and that they would comply with the Act. They referred to an alleged admission which they say was made by the respondents that the community closed the access road to Almenta's site due to dust caused by its operation. They also referred to a letter addressed by FNM Trading to the applicants who they allege expressly and explicitly admitted being bound to comply with the provisions of the MPRDA, MHSA and the applicants' code of practice.
- [17] In response the respondents state that the said admission was taken out of context. The applicants failed to mention in their Heads of Argument that they took it upon themselves to try and force their way with trucks and the police which contributed to the community's action. This resulted in the community demanding that Kitso's products should not be permitted onto Almenta's site, which Almenta did. At present Almenta refuses to accept any products from the Lohatlha mine onto the property for and on behalf of the applicants.
- [18] The applicants raised health and safety issues with the DMR. To this end an inspection was conducted on the property which led to the DMR issuing a section 54 notice to Kitso. All the respondents were

ordered to cease with their operations with immediate effect pending a full risk assessment and an action plan was developed to ensure that the operations comply with the MHSA. The notice stated that the DMR had *'reason to believe that the loading of manganese ore material onto trains and other activities happening in this area, may lead to accidents and or may endanger the health and safety of persons involved in these activities and other persons not employed by the mine who may be in the vicinity of the area.'*

[19] The applicants allege that the respondents did not comply with the section 54 notice, and then delivered a statement to the Dingleton Police Station regarding the respondents' non-compliance. This notice was ultimately uplifted on 13 December 2017 after two meetings were held between DMR and the representatives of the applicants and the respondents. According to the respondents the meeting held on 06 December 2017 wherein the DMR advised them that the notice had been uplifted occurred one day after the founding affidavit was signed and a week before the application was served. The applicants failed to disclose this to court by filing a supplementary affidavit.

[20] Significantly, the instructions in terms of section 54 of the MHSA were directed to Kitso and not the other respondents. Section C of this notice dated 13 November 2017 records:

'Section C: Instruction(s)'

1. Halt all loading of manganese ore material as well as any other activities within this dedicated loading/siding zone with immediate effect.
2. Conduct a full risk assessment on this site to include all activities taking place.
3. Inform all affected parties of the Section 54 Compliance Instruction issued to Kitso Mine.
4. Once the risk assessment has been conducted, present an action plan as well as a management system, to ensure that all activities conducted on the loading/siding zone complies with the Mandatory COP's as well as relevant SOP's of Kitso Mine as per the Mine Health and Safety Act, governing the mining licence in question.

5. The presentation should involve the Health and Safety committee and the other interested parties that may use this area.'

[21] The respondents insist that their operations have nothing to do with the applicants as they conduct operations in terms of the lease agreement with the land owner. They contend that the applicants have no right to enforce any obligations on them under and in terms of the MHSA. Instead their obligations fall under and in terms of the Occupational Health and Safety Act, 85 of 1993 ("OHSA"), which obligations they comply with.

THE RELEVANT LEGISLATION

[22] Section 5 of the MPRDA provides that no person may prospect for or remove, mine or explore for and produce any mineral or commerce with any work incidental thereto without a mining right. This applies to Misty Falls who has a mining right on the property. Almenta is not conducting any of the activities mentioned in this section and therefore requires no mining right. The MPRDA defines mining area thus:

'(a) in relation to a mining right or a mining permit, means the area on which the extraction of any mineral has been authorised and for which that right or permit is granted;

(b) in relation to any environmental, health, social and labour matter and any residual, latent or other impact thereto, including-

- (i) Any land or surface adjacent or non-adjacent to the area as contemplated in sub-section (1) but upon which related or incidental operations are being undertaken;
- (ii) Any surface of land on which such road, railway line, power line, pipeline, cable way or conveyor belt is located, under the control of the holder of such a mining right or a mining permit and which such holder is entitled to use in connection with the operations performed or to be performed under such right or permit; and
- (iii) All buildings, structures, machinery, residue stockpiles, or objects situated on or in the areas as contemplated in sub-sections (ii) (a) and (ii) (b).'

[23] Section 1 of the MPRDA defines mine is as follows:

'Mine means when-

- (a) Used as a noun-
 - (i) Any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;
 - (ii) Any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource; and
- (b) Used as a verb-

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'

[24] In terms of section 102 of the MHSA mine is defined as follows when-

- '(a) Used as a noun-
 - (i) any borehole, excavation, in any tailings or in the earth, including the portion of earth that is under the sea or other water, made for the purpose of searching for or winning a mineral, whether it is being worked or not; or
 - (ii) any other place where a mineral deposit is being exploited, including the mining area and all buildings, structures, machinery, mine dumps, access roads or objects situated on or in that area that are used or intended to be used in connection with searching, winning, exploitation or processing of a mineral, or for health and safety purposes or
 - (iii) a works; and:
- (b) Used as a verb, the making of any excavation or borehole referred to in paragraph (a) (i), or the exploitation of any mineral deposit in any other manner, for the purpose of winning a mineral, including prospecting in connection with the winning of a mineral.'

[25] In terms of section 1 of the MPRDA mining operations mean any operation relating to the act of mining and matters directly incidental thereto. Processing is defined as:

'...Processing, in relation to any mineral, means the winning, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof.'

[26] In terms of section 102 of the MHSa processing is:

'...the recovering, extracting, concentrating, refining, calcining, milling, screening, washing, reduction, smelting or gasification of any mineral and "Process" has a similar meaning.'

[27] In relation to '*mining operation*' **DALE, SOUTH AFRICAN MINERAL AND PETROLEUM LAW ISSUE 24** at paragraph 42.8 referred to above Dale adds:

'As was held in Commissioner of Taxes vs Nyasaland Quarries and Mining Co Limited 24 SATC 579 at 583, in the context of fiscal legislation, the intention of the legislator in enacting the definitions of mine and mining operations is to give those expressions an extended meaning which would cover the processing by the mining company of the mineral into its pure form.

...On an analysis of the phrase "including any operation or activity incidental thereto" in the definition of mine as a verb it appears that any such operations or activities which are directly or indirectly incidental thereto will be included, and then by reference to the definition of mining operations, additionally to the direct and indirect operations and activities covered by the definition of mine as a verb will be matters directly related to such directly or indirectly incidental operations and activities.'

[28] At 45.2 Dale adds:

'As pointed out in the commentary on the definition of mine as a verb in paragraph 42.8 above, that definition also expressly includes any operation or activity incidental thereto, so that although the intention of the legislature may have been to attribute a broader meaning to the term mining operation than to the term mine, in fact the distinction is difficult to discern, particularly since the definition of mining operation restricts such matters to those "directly" incidental thereto. As there submitted, the correct interpretation is probably that mining includes any operation or activity incidental thereto and additionally the term "mining operation" includes matters directly incidental to such incidental operations or activities. Both terms would, it is submitted, include prospecting in connection with mining as also processing of the mineral or metal into its pure form, but neither term would include use of the mineral in manufacturing process.'

[29] According to the applicants the definition of mining area is not limited to the actual area that is being mined. They also state that the MPRDA and MHSa should be read conjunctively. This is so because the respondents' misconception is that the applicants' obligations in terms of the MPRDA and MHSa extend only to its mining operation and only on the land that is currently being mined

which is incorrect, the argument goes. The applicants insist that the respondents' operations constitute mining. For this assertion they rely on *United Manganese of Kalahari (Pty) Ltd v Commissioner, SARS 2018 (2) SA 275 (GP)* at paras 3 and 4 where it was held that minerals that have been mined and processed axiomatically have to be stockpiled, packaged and transported in order to complete the mining process. The applicants say that the respondents admit that they weigh ore and seal it, sometimes it is assayed and thereafter transported from the property on the siding *via* locomotive. They further argue that whether the respondents mine or conduct a mining operation is irrelevant, what matters is that their operations constitute a potential hazard to the health and safety of persons whether they are employees or non-employees within the mining area.

- [30] The applicants also rely on section 5 (2) (b) of the MHSA which obliges them as employer to "*ensure that persons who are not employees, but who may directly be affected by activities at the mine, are not exposed to any hazards to their health and safety.*" To the extent that there were persons who may be affected by any activities within the mining area and to "mine" (in the broader context), the applicants were obliged to ensure that such persons "are not exposed to any hazards to their health and safety." This, according to the applicants, applies irrespective of whether the operations are conducted by the applicants or a third party.

- [31] DALE *supra* made reference to **Albertonse Stadsraad v Briti BK**⁴ when dealing with the definition of mine as a noun thus:

'In *Albertonse Stadsraad v Briti BK* the court interpreted the word mine as a verb as defined in section 1 of the Minerals Act. The Appellant had alleged that use of certain clay by the respondent constituted mining, requiring the appellant to have held a mining authorisation as contemplated in the prohibition in section 5 (2) of that Act. On the facts, the court held that the clay had already been mined; and

⁴ 2003 (5) SA 157 (SCA)

that the further processing thereof for purposes of rendering it ready for use and the transport of it to a manufacturing plant did not fall within the definition of mine.¹⁵

- [32] In **TERRA BRICKS AND ANOTHER V REGIONAL MANAGER, LIMPOPO REGION, DEPARTMENT OF MINERALS AND ENERGY AND OTHERS**: Case Number 5246/05 (TPD) delivered on 12 April 2007 Fourie AJ stated at page 12:

'The meaning of the definition is clearly not the whole of the mining area. Only if part of the mining area or buildings etc. are used or intended to be used in connection with searching, winning, exploiting or processing of the mineral, do they form part of the mine. I am of the view that this phrase qualifies both mining area and the buildings situated in or on the mining area. On the basis set out above, I am of the view that the brick making activities are not activities aimed at searching or winning a mineral or exploiting a mineral deposit. The clay is searched for, where and exploited at the clay quarry.

...

The next question is whether the activities at the brick factory are not possibly connected with "processing" of a mineral processing. The word "process" is defined in the Minerals Act to mean "in relation to any mineral the recovery, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof.

...

I am of the view that upon interpretation of the definition of processing it includes only processes which are aimed at winning a mineral in its pure form and that a distinct process which is aimed at the manufacturing of a new product such as bricks, no longer constitute processing of a mineral as contemplated in the definition.'

- [33] At page 19 the learned Judge added:

'3. It is declared that the brickmaking activities conducted on the aforesaid abandoned area do not constitute a 'mine' or 'mining' in terms of the statutes aforementioned.'

- [34] *In casu* Almenta's operations involve receiving cargo from local manganese mines *via* tipper trucks onto site as alluded to earlier. The truck is weighed and the cargo stockpiled. Once a client decides to export the cargo, Almenta requests a train from Transnet of empty containers to be railed to the Lohatlha siding where after the
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empty containers would be packed on the train with the cargo and railed to Port Elizabeth.

- [35] Regarding Occupational Health and Safety Act Dale at page 58 para 44.1.1 states:

'In terms of Section 1 (3) of the OHSA, that Act does not apply in respect of a mine, a mining area or a works, as defined in the Minerals Act, excepting so far as the Minerals Act provided otherwise or in respect of any person present on or in any such mining area....Accordingly, the reference in Section 1 (3) of Occupational and Health and Safety Act to a mining area as defined in the Minerals Act is now to be construed as a reference to the definition of mining area in Section 1 of the MPRDA. Section 103 of the Mine Health and Safety Act 29 of 1996 in turn provides that the Occupational Health and Safety Act is not applicable to any matter in respect of which any provision of the Mine Health and Safety Act is applicable. As appears from its long title, the Mine Health and Safety Act provides for the protection of the health and safety of employees and other persons at "mines."

- [36] Misty Falls refers to **MINISTER OF MINERAL RESOURCES AND OTHERS V SISHEN IRON ORE CO (PTY) LTD AND ANOTHER⁶** where the Court held:

'[116] Another powerful consideration is that the requirements stated in s 23 for the grant of a mining right, and the obligations imposed on right-holders stated in s 25, do not seem right. Section 23 refers, in the singular, to 'the mining work programme' and 'the prescribed social and labour plan' which any successful applicant for a mining right must have.

[117] No provision is made for the case where the applicant's mining work programme or social and labour plan must be reconciled with an existing right-holder's programme or plan in respect of the same mine. Section 23 also requires that any successful applicant, in order to be successful, have the ability to comply with the Mine Health and Safety Act, s 3 of which refers, in the singular, to 'the employer' of any mine. Again, no provision is made for more than one employer in a given mining area. Finally, s 25 imposes an obligation upon all right-holders to comply with 'the approved environmental management programme' they submitted upon application in terms of s 39. No provision is made to reconcile the environmental management programme submitted by an applicant with the existing programme of an existing right-holder.

[118] For these reasons, the MPRDA simply does not contemplate two right-holders in respect of the same mineral and land. The only case where an applicant's programmes and plans will be automatically consonant with those of

⁶ 2014 (2) SA 603 (CC at paras [116], [117] & [118])

the existing right-holder is where they are one and the same: in other words, where the applicant is the existing right-holder.'

- [37] The applicants argue that the Constitutional Court in the matter *supra* recognised that the holder of a mining right, and thus the 'employer', in terms of the MPRDA and MHSA, was solely responsible for implementing the necessary health, safety and environmental policies for the entire mining area, irrespective of whether another person was conducting an operation thereon. They state that this was echoed in **THETA MINING (PTY) LTD AND ANOTHER V SCARLET SUN (PTY) LTD AND OTHERS**⁷.
- [38] Minister of Mineral Resources matter *supra* is distinguishable from the instant case. This is so because it deals with co-holders of rights having mining rights for the same property. There were two mining right holders mining for the same mineral on the same piece of land, thereby having two employers, two mining work programmes and two social labour claims which would all be incompatible. Nowhere in this case is there an obligation imposed upon the holder of a mining right in respect of a third person which is not mining and does not hold a mining right. As alluded to earlier, Almenta's activities do not fall within the obligations imposed by MHSA upon the mining right holder notwithstanding that such activities may physically be within the mining area.
- [39] 'Theta Mining (in para 36 above) also finds no application *in casu*. In this matter there were six contractors mining on the farm using dumper trucks, front end loaders and excavators. It is clear that the holder of the mining right, Scarlet Sun, was responsible for the activities of these contractors who were part and parcel of the mining activities and they would be directly affected by the mining operations being conducted by the mining permit holder.

⁷ [2016] ZANCHC 83 (25 November 2016)

[40] Section 5 (2) (b) of MHSA is applicable only to the employer of a mine and the provision is peremptory in that it states that the 'employer' shall ensure that persons who are not employees, but who may be directly affected at the mine, are not exposed to any hazards to their health and safety. The employees of Almenta are not directly affected by the activities at the applicants' mine which is a kilometre away from Almenta's site and its employees are not exposed to hazards to their health and safety. No provision in the MHSA that imposes an obligation upon a mine employer or owner in respect of everyone situated on the property. There are no blasting or other activities involved on the site of both Almenta and Misty Falls which would have a negative effect upon each other. There is also no dust emanating from the mine. The access road from the mine to Almenta's site is six kilometres and the two sites are separated by a Transnet railway line, the SA flog site, and a multi-user road for the mine as well as other mines in the Northern Cape. In any event the applicants do not allege that their mine affects the health and safety of Almenta's employees. My underlining

[41] In my view, considering what has been stated herein MHSA does not impose an obligation on the applicants in relation to the activities of Almenta. On the facts, manganese has already been mined when Almenta packs it and loads it and needs no further processing thereof for purposes of rendering it ready for transport. That does not fall within the definition of mine. The applicants' argument that the respondents made some admission that their operations were governed by the MPRDA and MHSA cannot stand in the face of paragraph 11.1 of the replying affidavit which states: "*I admit that the Sixth Respondent's operation has nothing to do with the mining operations conducted by the applicants.*" The applicants further confirm the version of the respondents that the OHSA is applicable to the respondents' activities.

[42] Moreover, it is strange that the applicants failed to disclose that the section 54 notice was withdrawn after a meeting by the parties on 06 December 2017 before the application was launched. The notice was also not attached to the founding affidavit but to the respondents' answering affidavit. The question that arises is, if the notice was not mistakenly and/or wrongly issued why was it uplifted after the meeting of 06 December 2017 before the application was launched?

[43] Southwood J in **BERT BRICKS PTY LTD AND OTHERS v INSPECTOR OF MINES**⁸, referring to a section 54 notice held:

'It seems that not one of the officials properly applied his mind to the operation of the MHS Act and that there was a gross abuse of the provisions of the Act. This is most disturbing. This litigation has resulted in a waste of State's funds (taxpayers' money and a waste of the Court's time...).

[44] Moreover, Werkmans Attorneys, on behalf of Almenta addressed a letter dated 16 November 2017 to the applicants' attorneys which reads:

- '1. We refer to your e-mail of yesterday.
2. We confirm that we act on instructions of Almenta Logistics Proprietary Limited ("our client").
3. Our client's position remains that it is not subject to the Mine Health and Safety Act, 1996 and its activities are governed by the Occupational Health and Safety Act. Our client's activities do not constitute mining nor mining operations and our client's operations do not form part of the mining area for purposes of the definition thereof both in the Mineral and Petroleum Resources Development Act 28 of 2002 and the Mine Health and Safety, 1996.
4. Our client is therefore not subject to the jurisdiction of the Mine Health and Safety Inspectorate.
5. Our client is therefore denies the allegations in paragraph 4 of your e-mail under reply that the notice is also relevant to our client. Our client further vehemently denies that it holds possession through Kitso Mining. Our client has no contractual nexus with Kitso Mining and derives its possession of the land through a lease with the landowner which has nothing do with Kitso Mining or Misty Falls 45 Proprietary Limited.
6. We further note that the Section 54 notice is directed to your client and not to our client. It should further be noted that the Section 54 notice is addressed to Kitso Mining. As far as our understanding is concerned Kitso Mining is not the employer under the Mine Health and Safety Act as it is not a mining right holder

⁸ Case No. 15347/2011 at para [12]

but merely a mining contractor and therefore the Section 54 notice addressed to Kitso Mining is at the outset fatally flawed.

7. In regard to paragraph 5 of your e-mail under reply you make reference to paragraph 3 of our letter of demand. We cannot recall having sent you a letter of demand and your reference to paragraph 3, if it is reference to our letter of 11 October 2017, is unclear as paragraph 3 is split into paragraph 3.1 to 3.7 but none of them constitute a demand. Furthermore your reference to the fact that the DMR has ordered our client to do anything is misdirected. Kitso Mining was given the order not our client.

8. In the circumstances our client will not be ceasing its operation by 16h00 today for the reasons set out above. It should be noted that in any event the notice refers to 16 November 2016 which has long past.

9. In regard to paragraph 8 of your letter under reply our client denies the allegations contained therein and any action instituted by your clients will be defended.

10. The failure by us to deal with any other allegations or contentions in your letter under reply does not amount to an admission of the correctness thereof.

11. In the interim all of our client's rights remain reserved.'

[45] I fail to comprehend why the applicants proceeded with this application if the DMR did not find anything wrong with the respondents' operations. If the applicants fully comply with MHSA as they allege why they would bring this application because they have done nothing wrong and would not be punished for the transgressions of other entities.

[46] Almenta is a third party conduction packing, loading and transporting operations and it does not need a mining right. It therefore does not make sense why the respondents would require approval from the DMR prior to conducting their operations. Their operations have no impact upon mining operations by the applicants and therefore their conduct falls neither under the MPRDA nor MHSA. It is not clear why the applicants require giving consent to Almenta who operates under a valid lease. The applicants do not rely on any authority giving them a right to do so, be it MPRDA or MHSA. There is no allegation that the respondents have contravened any provision of the law. In my view, the respondents' employees have no connection with the applicants' mining activities as they not directly affected by the applicants' mining activities.

[47] The applicants failed to take this Court into its confidence by telling it that they, at some stage, utilised the services of the respondents through the applicants' agent, Fujax Minerals Proprietary Limited. This service was terminated when the community stopped them after ancestral bones were found and the DMR was called in. The applicants were forced to close their operations until the site had been rehabilitated in September 2017. After this incident the community prohibited Almenta to offer services to the applicants, as alluded to earlier. Immediately thereafter the applicants suddenly sought an interdict against the respondents thereby stopping them from continuing with their business.

[48] The allegations by the applicants that Access World's operations constitute mining makes no sense taking into account that it does not operate on the property but Almenta. The applicants should be aware that Almenta is not involved in winning, searching, exploiting or processing of any minerals especially having used its services on previous occasions. Adv Redman, for the applicants, withdrew prayers 2 and 3 of the notice of motion dated 06 December 2017 and filed the same day, during argument.

COSTS

[49] Mr Redman submitted that costs should be costs in the application. The applicants were not *mala fide* when approaching court but were exercising their right. He later stated that no relief is sought against Access World. He requested that costs be granted on a scale as between party and party.

[50] Mr Hartfort, for the first and sixth respondents, submitted that Access World was incorrectly joined in these proceedings and is entitled to the costs order. The matter should be dismissed against it entirely. He added that the applicants were expected to have withdrawn the application against Access World earlier. He urged

me to order costs against the applicants on a scale as between attorney and client. In respect of the sixth respondent he submitted that since that applicants abandoned prayers 2 and 3 of the notice of motion he requests for a costs order for the abandoned relief. Ms Geldenhuys for the second respondent submitted that based on the case that the respondents had to meet as set out by the applicants in their founding affidavit the applicants failed to make out a case for the relief sought. He urged me to dismiss the application with costs on a scale as between attorney and client.

[51] The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.⁹

[52] An award of attorney and client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have.¹⁰ The grounds upon which the court may order a party to pay an opponent's attorney-and client costs include the following: that the party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious, or frivolous motives or in the conduct of the case. The court's discretion in this regard is not restricted to such conduct but it includes all cases in which special circumstances or considerations justify the granting of such order.¹¹

[53] The respondents argued further that this application is an abuse of process and should be dismissed with costs on a scale as between attorney and client, I agree. Prayer 4 of the notice of motion requests a costs order against the first, third and sixth respondents.

⁹ Beinash v Wixley [1997] 2 All SA 241; 1997 (3) SA 721 (A) ; see also Norwich Union Fire Insurance Society Ltd v Tut 1960 (4) SA 851 (A) at 854C-E

¹⁰ Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 183-184

¹¹ Rautenbach v Symington 1995 (4) SA 583 (O) at 588A-B

The first respondent had to prepare its case throughout. It cannot now be argued that the applicants seek no relief against it. Moreover, taking into account the facts of this case and the manner in which the applicants handled it, an order of costs on a scale as between attorney and client will be justified in the circumstances.

In the circumstances I grant the following order.

- 1. The application is dismissed.**
- 2. The applicants, Misty Falls 45 (Pty) Ltd and Kitso Manganese (Pty) Ltd, are ordered to pay costs of the application on a scale as between attorney and client.**

BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicant: Adv N Redman (SC)
Instructed by: VAN DE WAAL INC.

On behalf of the Respondents: Adv C Hartford (SC)
Instructed by: DUNCAN & ROTHMAN INC.

On behalf of the Respondent: Adv J Gildenhuys (SC)
Instructed by: HAARHOFFS INC.