

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



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

**Case No: 2933/17
Heard on: 23/03/2018
Delivered on: 11/05/2018**

In the matter between:

FIREBIRD MINING (PTY) LTD

APPLICANT

And

HANS KANON PLASE (PTY) LTD

FIRST RESPONDENT

DIDIMALA DIAMONDS CC

SECOND RESPONDENT

THE MINISTER OF MINERAL RESOURCES

THIRD RESPONDENT

THE DIRECTOR –GENERAL:

DEPARTMENT OF MINERAL RESOURCES

FOURTH RESPONDENT

ACTING REGIONAL MANAGER: MINERAL

REGULATION AND ADMINISTRATION:

NORTHERN CAPE REGIONAL OFFICE:

DEPARTMENT OF MINERAL RESOURCES

FIFTH RESPONDENT

Summary: Interim interdict granted- return date for final interdict- first and second respondents not opposing the granting of the final interdict paras 2.1 – 2.4- oppose the granting of costs para 2.5 of the rule nisi only.

JUDGMENT: FINAL INTERDICT

MAMOSEBO J

[1] The applicant, Firebrand Mining (Pty) Ltd, is seeking confirmation of the following interim order granted by my sister Williams J against the first and second respondents on 07 December 2017:

- 1.1 First and second respondent and all those who hold possession under First respondent of the farm Trentham, more fully described as Portion 2 (a portion of portion 1) (Trentham) of the Farm Number 225 Barkley West (“the property”) are ordered and directed to cease all mining operations on the property forthwith;
- 1.2 First and second respondent, and all those who hold possession under first respondent of the property, are interdicted and restrained from in any way conducting any further mining operations on the property;
- 1.3 First and second respondent are directed to, within ten (10) days of the issue of this order, submit to applicant an inventory of all diamonds mined on the property by them or under their control or at their behest, such inventory to include a full description and the weight of each and every such diamond mined;
- 1.4 First and second respondents are ordered and directed to deliver to the applicant any diamonds that they have in their possession which were mined on the property.
- 1.5 First and second respondents are jointly and severally ordered to pay the costs of this application on the scale as between attorney and own client: Provided that should any other respondent oppose the application, such respondent pay the costs on the party and

party scale jointly and severally the one paying the other to be absolved *pro tanto*.

- [2] That the relief set out in 1.1 and 1.2 above were ordered to operate as an interim interdict pending the finalisation of this application.
- [3] No relief is sought against the third to fifth respondents as they were only joined to the proceedings because of their interest in the matter.
- [4] Mr Pieter Frederick Swart, the Regional Manager in the Department of Mineral Resources in the Northern Cape Region deposed to an explanatory affidavit on behalf of the third to fifth respondents. He confirmed that they do not oppose the application and that the affidavit was merely filed to assist the court. He further confirmed that the applicants are the rightful holders of a mining right on the said property.
- [5] The first and second respondents are not opposing the granting of the final interdict as prayed for and only sought to oppose the awarding of costs against them.

The first and second respondents' answering affidavit

- [6] I first heard the parties on the late filing of the answering affidavit before dealing with the issue of costs. The first and second respondents filed an answering affidavit deposed to by Mr Frederick Snyman only in respect of costs. Adv Van Heerden SC, appearing for the applicant, urged me not to accept the affidavit since it was filed way out of time, after the applicant had already filed its heads of argument, and therefore not in accordance with the Uniform Rules of Court. Counsel further argued that the affidavit is riddled with hearsay evidence and has dealt with

information contained in the correspondence between the attorneys that was specifically marked ‘without prejudice’.

- [7] Adv Van Tonder, for the respondents, submitted that the first and second respondents had assumed that they could file the answering affidavit at any time since no time lines were specified for filing after the interim order was granted. Counsel further argued that the applicant must bear the costs because it failed to curtail proceedings, it demonstrated improper conduct and caused unnecessary litigation; and that the applicant was well aware that the respondents had stopped operating on its mine when it approached court. Even though no condonation for the late filing of the affidavit was sought, argued counsel, the respondents will still oppose the application on the founding papers.

- [8] Rule 6(4)(d) of the Uniform Rules stipulates:

“(d) Any person opposing the grant of an order sought in the notice of motion shall –

- (i) Within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application, and in such notice appoint an address within 15 kilometres of the office of the registrar, at which such person will accept notice and service of all documents, as well as such person’s postal, facsimile or electronic mail addresses where available;
- (ii) Within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents; and
- (iii)

- [9] Mr Van Tonder opposed the urgent application on 07 December 2017 and noted the order by Williams J including the return date of 23 March 2018. Counsel was therefore well aware of the process and so were his clients.

The respondents' answering affidavit was due by end of January 2018 but none was filed. Mr Van Heerden argued that the applicant filed its heads of argument on the basis that no answering affidavit would be forthcoming and submitted that the out of time affidavit should be disallowed with costs to avoid prejudice to the applicant.

- [10] Pertaining to applying for condonation for the late filing of the answering affidavit the Supreme Court of Appeal pronounced as follows in *Minister for Safety and Security (now Minister of Police) v Scott and Another*¹:

“The principles relating to condonation are well established. The factors that this Court will have regard to when considering such an application include the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success on the merits. Condonation is an indulgence, not to be had merely for the asking. A litigant who does not comply with the rules is required to show ‘good cause’ why the rules should be relaxed.”

- [11] It is on the basis of the above reasons and principles that the respondents' answering affidavit cannot be allowed.

The question of costs on the merits

- [12] Smalberger JA's pronouncements on costs are instructive. In *Intercontinental Exports (Pty) Ltd v Fowles*² the Judge stated:

“[25] The basic rule is that, statutory limitations apart, all costs awards are in the discretion of the court (*Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69, a decision which has consistently been followed). The court's discretion is a wide,

¹ [2014] 3 All SA 306 (SCA) at 313c-d (para 16)

² 1999 (2) SA 1045 at 1055F - I

unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done, as a mark of its displeasure at such party's conduct in relation to the litigation. Is it to be precluded by agreement from doing so? A court should not be obliged to give its imprimatur to an order of costs which, in the circumstances, it considers entirely inappropriate or undeserved. In my view, as a matter of policy and principle, a court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regard to costs."

- [13] Mr Van Tonder contended that since the applicant has unnecessarily caused costs it should bear them. Counsel submitted that the applicant was aware as of 29 November 2017 that mining operations had stopped. The respondents went as far as to give an undertaking that they will not proceed with mining a day before the urgent application was heard. Therefore, it was unnecessary for the applicant to approach the court.
- [14] Mr Van Heerden countered that the applicant has a mining right over the land owned by the respondents. It was denied access to the land. Applicant's attorneys wrote to the respondents on 01 December 2017 notifying them that they are in contravention of its mining rights and the Mineral and Petroleum Resources Development Act³ (MPRDA) by conducting mining operations on that property. The applicant demanded that the respondents should cease such operations immediately; provide an inventory of all the diamonds mined on that property and hand them over to the applicant failing which will leave the applicant with no option but to approach the court on an urgent basis.

³ 28 of 2002

- [15] Despite the fact that the letter was served by the sheriff of the court on the respondents, no response was forthcoming until the applicant served and filed court papers on 05 December 2017. By the time the said undertaking not to mine was made on 06 December 2017 the papers were already filed.
- [16] The question is whether the applicant acted unreasonably in approaching the Court for its relief. In my view, I do not think so. Mr Van Heerden has correctly submitted even if the respondents had allegedly ceased the unlawful mining operations and directed all those who were in possession of the property to cease operating unlawfully on the property, the inventory of what was mined in the property and the handing over of the illegally mined diamonds had not been complied with. This, in my view, entitled the applicants to seek its relief from the Court.
- [17] The purpose of an award of costs is to indemnify a party. A party seeking attorney and client costs seeks an even greater indemnity for costs incurred through having to pursue its claim in court. The applicant was forced to approach Court for relief since the respondents had not responded to its attorney's letter of 01 December 2017. There is also no reason why the respondents could not tender costs having conceded the merits. I share the sentiment expressed by Van Niekerk J in *Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another*⁴. The merits have been disposed of and only the question of costs remained. There was no basis for the Court to have to hear argument on costs to determine liability. It is a wasteful, costly and futile exercise. See

⁴ 1996 (3) SA 692 (CPD) at 700G – J

also *Jenkins v SA Boilermakers, Iron & Steel Workers & Ship Builders Society*.⁵

[18] I am of the view that it is just to order the respondents to pay the costs of the application, including the costs occasioned by the excluded answering affidavit. The conduct of the respondents in litigating this matter also justifiably attracts a punitive cost order. I am also mindful of the unwarranted delay in filing the answering affidavit and the fact that the respondents did not oppose the relief sought save for opposing the award of costs. The applicant was forced to be out of pocket in pursuance of its rights. In the circumstances there is justification in awarding costs on the scale as between attorney and own client.

[19] In the result, the following order is made:

1. The rule nisi issued out of this Court on 07 December 2017 is confirmed.
2. The first and second respondents are jointly and severally ordered to pay costs of this application, including costs for the answering affidavit, on the scale as between attorney and own client, the one paying the other to be absolved.



MAMOSEBO J

NORTHERN CAPE DIVISION

⁵ 1946 (2) WLD 15 at 17 - 18

For the applicant:	Adv M Van Heerden SC
Instructed by:	Engelsman Magabane Inc
For the 1 st and 2 nd respondents:	Adv AG Van Tonder
Instructed by:	Van der Wall Incorporated
For the 3 rd , 4 th and 5 th respondents:	The State Attorney