

Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	<u>YES</u> / NO
Circulate to Regional Magistrates:	<u>YES</u> / NO



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

Case No: 415/2018

In the matter between:

SYDNEY-ON-VAAL PROPERTY ASSOCIATION

1st Applicant

SCARLET SUN 15 (PTY) LTD

2nd Applicant

and

THETA MINING (PTY) LTD

1st Respondent

LONHRO MINING SA (PTY) LTD

2nd Respondent

DIKGATLONG MUNICIPALITY

3rd Respondent

MINISTER OF PUBLIC WORKS

4th Respondent

MEC FOR THE DEPARTMENT OF AGRICULTURE,

LAND REFORM AND RURAL DEVELOPMENT

NORTHERN CAPE

5th Respondent

MINISTER OF MINERAL RESOURCES

6th Respondent

THE REGIONAL MANAGER, NORTHERN CAPE REGION,

DEPARTMENT OF MINERAL RESOURCES

7th Respondent

Coram: Lever AJ

JUDGMENT

1. The applicants' brought an urgent application essentially to restrain the first and second respondents from exercising a mining right held by the first respondent on the farm Drooge Veldt. There is really only one substantive prayer in the relevant Notice of Motion dated 20 February 2018. This is prayer 2 of the said Notice of Motion, which reads as follows:

"That pending the final zoning of the farm Drooge Veldt No. 292 in the administrative district of Barkly-West to allow mining operations to be performed on the said farm, the first and second respondents are interdicted and restrained from conducting any mining activities on the farm Drooge Veldt;"

2. Initially, prayer 2 of the said Notice of Motion read somewhat differently and first and second respondents, correctly took the point that the relief sought by applicants was nonsensical. At the hearing hereof, applicants moved for an amendment which is reflected in prayer 2 as quoted above. First and second respondents did not oppose such amendment, which was duly granted with no order as to costs.
3. The present application was the third application by either one or both of the applicants for the same relief based on the same grounds in a period extending over more than two years. However, the first and second respondents did not oppose the application on the basis of a lack of urgency. Accordingly, I will not deal with the present application on that basis and will decide the matter on the merits of the application.
4. There is a long and involved history of litigation between the applicants and the first and second respondents. For present purposes, it is not necessary for me to deal with this

history. The first applicant is the Sydney-on-Vaal Communal Property Association (“the CPA”). The second applicant is a corporate entity with the name Scarlet Sun 15 (Pty) Ltd (“Scarlet Sun”). The first respondent is Theta Mining (Pty) Ltd (“Theta”) and the second respondent is Lonrho Mining SA (Pty) Ltd (“Lonrho”). These are the active participants in the present litigation. Where it is necessary to identify one of the parties by name I shall use the shortened form of such name set out above.

5. At the hearing of the present application a representative of the State Attorney’s office appeared on behalf of the fourth respondent and handed up what was described as an explanatory affidavit. The fourth respondent re-iterated that it would abide the decision of the court and that it was not opposing the relief sought. The said affidavit did not take the matter further and it is not necessary to deal with such affidavit in any detail.
6. As can be seen from the material part of the Notice of Motion set out above, applicants seek an interdict pending the rezoning of the farm Drooge Veldt for mining purposes. The first question to be decided is whether the applicant seeks a final interdict or an interim interdict. The relevance of this question is that it determines what the applicants have to prove and how they have to prove it. Mr Van Heerden, for the applicants, submitted that the applicants merely sought an interim interdict. Mr Lazarus SC who appeared for the first and second respondent’s (“the opposing respondents”) submitted that applicants were in fact seeking a final interdict.
7. Mr Van Heerden, on behalf of the applicants argued that the actual use of the property and the legislation applicable did not expressly provide for the mining of the property and that before mining could lawfully take place on the said farm it had to be rezoned.

Mr Lazarus on behalf of the opposing respondents argued that by virtue of the fact that there was historically no specific zoning of the farm Drooge Veldt. That there was also no applicable land use scheme in place and that on a proper reading of s26(3) of the Spatial Planning and Land Use Management Act¹ (SPLUMA) no rezoning was required in order to lawfully mine on the farm Drooge Veldt.

8. Mr Van Heerden, in his reply, raised for the first time, regulation 18² promulgated under SPLUMA, in support of his argument that s26(3) of SPLUMA required a formal rezoning application before mining operations could commence on the farm Drooge Veldt. The said regulation was published under the provisions of s54 of SPLUMA. In order to give Mr Lazarus a fair chance to deal with this argument raised at the last minute, I allowed him to submit written representations to me on this question. I also allowed Mr Van Heerden an opportunity to respond to these written submissions. Both Mr Lazarus and Mr Van Heerden submitted their written submissions within the respective time-period granted to each of them for this purpose. These submissions will be dealt with at the appropriate place in this judgment.
9. Having regard to the fact that applicants seek an interdict against the opposing respondents, it would be convenient to first consider the question as to whether the relief sought by applicant is in fact a final or an interim interdict.
10. Mr Lazarus for the opposing respondents argued that the interdict sought by the applicants in the present circumstances was final, since the relief is not sought pending a

¹ Act 16 of 2013.

² These regulations were published as GNR239 of 23 March 2015 and published in Government Gazette 38594. Such regulations came into operation on the 13 November 2015 in terms of GN1126 published in Government Gazette 39415.

final determination of a court of law. In making this submission Mr Lazarus relied upon the authority of *AIROADEXPRESS (PTY) LTD v CHAIRMAN, LOCAL ROAD TRANSPORTATION BOARD, DURBAN*³.

11. Mr Van Heerden, apart from taking a literal approach did not have an answer to Mr Lazarus' argument.

12. Van Heerden JA in the *AIROADEXPRESS* case set out the position as follows:

“According to Van der Linde *Institutes* 2.1.4.7, an applicant for an interdict who is unable to prove a clear right may obtain interim relief in order to enable him to establish his right ‘in een vollediger Regtsgeding’. The author therefore envisages a later and final determination of the existence of the right in question. Hence, as is stated in Joubert *The Law of South Africa* vol 11 at 297, an interim interdict does not involve a final determination of the rights of the parties and does not affect such a determination. In short, an interim interdict serves to adjust the applicant's interests until the merits of the matter are finally resolved. That final decision has to be arrived at by a court of law or, conceivably another body or person such as an arbitrator. Consequently, a temporary injunction does not necessarily constitute interim relief in the above sense: if an applicant seeks an interdict which is to be operative for a fixed or determinable period, it may still be final in its nature and effect.”⁴ (references omitted)

13. Even though the interdict applicants seek is for a determinable period, what the applicants seek in the present proceedings is an injunction, where the merits of the further process envisaged by the applicants will not be finally determined by a court or an arbitrator, but by an administrative body in a process that will include in one form or another, a public participation process and an enquiry, where in the final analysis such administrative body will exercise a discretion to either rezone Drooge Veldt farm or not.

³ 1986 (2) SA 663 (A) at 681 D-F.

⁴ *AIROADEXPRESS* case, above at 681 D-F.

The process of rezoning would not ascertain and determine legal rights in a judicial process.

14. In other words, what this court is being asked to do is determine that mining may not lawfully take place on Drooge Veldt unless a further administrative process determines that the relevant land may be used for mining. To my mind, this would be a final determination of legal rights by this court. Thus, in both substance and effect, what applicants seek in the present process is a final interdict.
15. Even if I am wrong in this conclusion, for the reasons set out below I have also reached the conclusion that applicants have not even set out a *prima facie* right though open to some doubt, being the first leg of the inquiry into the requirements for an interim interdict.
16. The significance of the conclusion that applicant in both substance and effect seeks a final interdict is that in these proceedings, applicants will have to fulfil the requirements of a final interdict before this court will grant the envisioned interdict.
17. The requirements for a final interdict are well established and applicants must establish a clear right, an act of interference and that there is no other satisfactory remedy.⁵ The question of whether or not applicants have met this standard will be considered in due course.

⁵ PREST., THE LAW AND PRACTICE OF INTERDICTS., Juta & Co., 1996., Chapter 4 pp 42-47.

18. Both Mr Van Heerden and Mr Lazarus researched and set out the history of the relevant legislation that dealt with the zoning and use of land.
19. The community that now forms the CPA, in a land claims process had been awarded the farms Mozib 279, Than 280 and Drooge Veldt 292 all situated in the District of Barkly West. The first applicant describes itself as the beneficial owner and the occupier of such farms. The said farms are still registered in the name of the Republic of South Africa. Prior to the successful land claim of the group that now forms the CPA, the said farms formed part of the Vaalbos nature reserve.
20. The explanatory affidavit handed up on behalf of the fourth respondent sets out that the process of transferring the said farms to the CPA had been delayed due to turbulence in the community. That at the time that the said affidavit was deposed, that the fourth respondent had now started the process of transferring such farms to the CPA. At the time that this matter was heard the transfer had not yet taken place.
21. In order to determine if applicants have established a 'clear right', it is important to establish if the law presently applicable requires that the farm Drooge Veldt needs to be zoned specifically for mining. The right that applicants seek to enforce is that they entitled to insist that the opposing respondents mine lawfully on the farm Drooge Veldt, which applicants occupy. The applicants would like me to approach this issue from the perspective of 'is mining a legitimate use of the relevant farm,' vis-a-vie the applicable zoning legislation. The opposing respondents, by contrast would like me to approach this issue from the perspective of 'is there anything that would prevent it from mining on the said farm,' in the circumstances. In my view nothing really turns on the starting point or

the perspective from which I commence my enquiry. The answer is a matter of interpreting the relevant legislative provisions.

22. The applicants proceed from the position that they had actually been conducting the business of game farming on the farm Drooge Veldt immediately prior to 1 July 2015, the date when SPLUMA came into effect. The applicants then proceed to contend that ss 14 and 8 of the Land Use Planning Ordinance⁶ (“LUPO”) are relevant in this regard. Then Mr Van Heerden submitted that by virtue of the provisions of LUPO, the farm Drooge Veldt was deemed to be zoned in accordance with its actual utilisation.

23. Then applicants contend that for the purposes of s26(3) of SPLUMA that the farm Drooge Veldt had actually been zoned for agricultural purposes. In support of this contention applicants rely on two zoning certificates. The first one annexed to their founding affidavit being annexure “FA7” and emanating from the Dikgatlong Municipality is dated 19 October 2016. The District of Barkly West, where the farm Drooge Veldt is located, falls under the administration of the Dikgatlong Municipality. The second zoning certificate, curiously emanates from the Sol Plaatjie Municipality. It is dated the 20 February 2013 and is annexed to the replying affidavit as annexure “RA7”.

24. The many curious features and circumstances surrounding both of these documents will be considered in due course, together with the question as to whether they constitute ‘administrative action’ or not.

25. The applicants also appointed a town planner, a certain Mr N Haarhoff (“Haarhoff”), whose affidavit is annexed to the founding papers as annexure “FA9”, to investigate the

⁶ Ordinance 15 of 1985 for the Cape of Good Hope Province.

position regarding zoning in the Dikgatlong Municipality. Haarhoff attaches a letter from the then acting Municipal Manager to the effect that the Dikgatlong Municipality is still using LUPO, that they do not have a Land Register or a Zoning Map. The letter further states that they had compiled a new 'land use scheme' but that this was never promulgated.

26. Haarhoff then confirmed that on his visit to the Dikgatlong Municipality he found that: there was no land register in terms of LUPO; there was no plan as prescribed in LUPO; and there is no zoning map as required in LUPO. Haarhof then expressed the opinion that in terms of the general provisions of LUPO, if there is no zoning scheme then the land remains zoned as agriculture. Haarhoff then also expressed the opinion that if a company did not have a mining right before 1 July 2015 when SPLUMA came into effect then mining was not a lawful use of the property concerned.

27. Mr Van Heerden then submitted that based on the Maccsand⁷ principle, the zoning certificates referred to above and established facts, that Drooge Veldt had been zoned for agricultural purposes. Further, that if the opposing respondents disputed the said zoning certificates, based on the Oudekraal⁸ principle, such certificates would have to be set aside first.

28. Mr Van Heerden submitted that in order for the court to interpret s26(3) of SPLUMA and to interpret the zoning legislation generally, cognisance should be taken of what actually

⁷ Maccsand (Pty) Ltd v The City of Cape Town and Others 2011 ZASCA 141 and the Constitutional Court Judgment 2012 ZACC 7.

⁸ Oudekraal Estates (Pty) Ltd v City of Cape Town & Others 2004 (6) SA 222 (SCA) at para [26].

happened on the farm Drooge Veldt factually before 1 July 2015. That Theta did not lawfully use Drooge Veldt for the purpose of mining immediately before 1 July 2015.

29. Mr Van Heerden vaguely suggested that the Regulations published by the Administrator under the provisions of s8 of LUPO⁹ for land that fell outside of existing town-planning schemes would be zoned according to their utilisation. However, his main support for this contention was almost exclusively based on s14 of LUPO. In fact, the said scheme regulations published by the Administrator under the provisions of s8 of LUPO refer back specifically to s14(1) of LUPO. Again, Mr Van Heerden emphasised that Drooge Veldt was used for agricultural purposes.

30. Mr Van Heerden argued that in terms of the provisions of s14(1) of LUPO the farm Drooge Veldt was zoned as agricultural land in accordance with its utilisation. Further, that the commencement of SPLUMA did not have any effect on that zoning.

31. Mr Van Heerden then submitted that even if I find against the arguments set out above, I should find that Drooge Veldt should be deemed to be for agricultural purposes, because:

31.1. SPLUMA commenced operation on the 1 July 2015;

31.2. If no zoning has taken place s26(3) of SPLUMA should be applied;

31.3. In terms of applicants' interpretation of s26(3) of SPLUMA the actual land usage of Drooge Veldt immediately prior to 1 July 2015 was agricultural. That the opposing respondents could not lawfully commence mining before the 1 July 2015 as the amendments to the MPRDA set out that the effective date of their mining

⁹ As published in P.N. 353 of 1986.

right was the date that the mining right was executed. That the mining right itself set out that the effective date would be the date of execution of the mining right. It is common cause that the mining right was executed on the 12 August 2015. That Drooge Veldt can only be used for agricultural purposes unless it is rezoned.

32. Mr Van Heerden also contended that regulation 18 promulgated in terms of SPLUMA, referred to above, supported the interpretation applicants' put forward in respect of s26(3) of SPLUMA that rezoning was required. Again, Mr Van Heerden relied on the Maccsand judgment referred to above.¹⁰

33. In the further written submissions made on applicants' behalf on regulation 18, promulgated under SPLUMA, Mr Van Heerden submitted that it supported applicants' interpretation of s26(3) of SPLUMA. Paragraph 4 of the written submissions reads as follows:

"Applicant submits that the interpretation of the words 'land may be used only for purposes permitted' in Section 25(2) (sic) and the words 'only' and 'immediately prior' in Section 26(3) is underpinned by Section 58(1)(b) and (c) read with Regulation 18"

34. Presumably the reference in the passage quoted above to s25(2) is meant to refer to section 26(2) otherwise, these submissions would make no sense at all. Reference to s58 of SPLUMA refers to the 'penalties' provision in the said Act.

¹⁰ Maccsand case., above.

35. Further, Mr Van Heerden argued that the interpretation of s26(3) of SPLUMA must be restrictive, that it is intended to make a final determination on the meaning of 'lawful use' and 'could lawfully have been used' immediately before the commencement of SPLUMA. He then submits that the relevant date is 1 July 2015. Mr Van Heerden then contends, "If the interpretation of Respondents is accepted then the words immediately before are irrelevant and have no meaning." Accordingly, Mr Van Heerden submits that Regulation 18 is relevant and assists with the interpretation of s26 of SPLUMA.
36. Mr Van Heerden then went on to contend in a lengthy argument that the opposing respondents had not complied with s5A of the MINERAL, PETROLEUM AND RESOURCES DEVELOPMENT ACT¹¹ ("MPRDA"). The appropriateness of this contention in the circumstances will be considered later in this judgment.
37. Mr Lazarus on behalf of the opposing respondents, contended that the Maccsand¹² case is distinguishable from the facts of the present case. He pointed out that in the Maccsand case there was in fact a zoning for the relevant piece of land that precluded mining. This was not the case on the facts presently before the court. He submitted that the farm Drooge Veldt had never be zoned.
38. Mr Lazarus referred me to the work of Dale¹³ where the learned author set out a process of enquiry to determine whether a particular piece of land needed to be rezoned in order for mining to take place on such land.

¹¹ Act 28 of 2002.

¹² Above.

¹³ Dale, South African Mineral and Petroleum Law, Lexis Nexis Issue 23, MPRDA 202.

39. The process proposed by Dale is to make the following enquiries:

- 39.1. Has a town planning scheme been promulgated over the relevant land?
- 39.2. If yes, has the land in fact been zoned?
- 39.3. If yes, does the zoning permit mining?
- 39.4. If not, does the scheme contain an exemption for mining?
- 39.5. If not, is there an existing use provision which permits mining to continue?
- 39.6. If not, the land would have to be rezoned to permit mining.¹⁴

40. Mr Lazarus submitted that if the answer to the first question posited by Dale was “no”, that would be the end of the enquiry. This would be true for the second question as well. He then submitted that the farm Drooge Veldt had never been zoned. In support of this contention he pointed to the evidence of Haarhoff, the town planner, who submitted an affidavit on applicants’ behalf.

41. Mr Lazarus then contended that Drooge Veldt could also not have a deemed zoning under s14(1) of LUPO. He made this contention on the authority of the judgment of Thring J in the case of *HANGKLIP ENVIRONMENTAL ACTION GROUP v MEC FOR AGRICULTURE, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE, AND OTHERS*¹⁵ where it was held that s14(1) envisages a two-stage approach where the local council concerned must factually determine the actual use of the relevant land and then it issues the most restrictive zoning under the provisions of s14(3) of LUPO. Mr Lazarus then pointed out that there was no evidence to suggest that

¹⁴ Dale, above.

¹⁵ 2007 (6) SA 65 (CPD) at 72 D-H.

the Dikgatlong municipality had ever determined what the actual use of the farm Drooge Veldt was at the time that LUPO came into effect on 1 July 1986.

42. Mr Lazarus then informed the court that the Northern Cape Planning and Development Act¹⁶ came into effect on the 1 June 2000. This act repealed LUPO in the Northern Cape. Although in terms of s39 of the said act, the existing zoning or planning schemes made or deemed to have been made in terms of LUPO shall remain in force until a new scheme is approved in terms of s41 of the Northern Cape Act. He then pointed out that although schedule E of the Northern Cape act lists a scheme for Barkly West under the provisions of s8 of LUPO, there is no evidence that this applied to Drooge Veldt.
43. Mr Lazarus then deals with SPLUMA and points out that s26(3) read with s24(1) of SPLUMA is clearly a transitional arrangement. It will hold sway for a period of 5 years from the commencement of SPLUMA, being 1 July 2015. He then points to the affidavit of Haarhoff, which confirms that the Dikgatlong municipality does not have a land use scheme under SPLUMA.
44. Mr Lazarus argues that s26(3) of SPLUMA allows for land use to continue where the land was being used for that purpose immediately prior to the commencement of SPLUMA on the 1 July 2015. However, he contends that s26(3) goes further than that and allows for the land to be used for certain purposes where the land concerned was not actually being used for that purpose but could lawfully have been used for that purpose at that time. In other words, provided the land was capable of being used for a purpose listed in schedule 2 to SPLUMA, such land use could continue.

¹⁶ Act 7 of 1998.

45. Mr Lazarus submitted that there being no actual zoning for Drooge Veldt and no prohibition of mining activity on Drooge Veldt in the relevant title deed or in any legislation, and mining being specifically included in schedule 2 of SPLUMA that rezoning was not required for mining to take place on Drooge Veldt.
46. In respect of the zoning certificates being annexure “FA7” to the founding affidavit and annexure “RA7” to the replying affidavit. Mr Lazarus pointed out that there were multiple difficulties with each of them. He also contended that on the authority of *JACOBS AND ANOTHER v TRANSAND AND ANOTHER*¹⁷ and *MAGALIES-BROMBERG PROPERTY OWNERS ASSOCIATION v CITY OF TSHWANE*¹⁸ that a *prima facie* right cannot be established by such certificate. That in and of themselves such certificates do not constitute administrative action in that issuing such certificates does not involve the taking of a decision. The underlying decision by the relevant authority constitutes the administrative action. That there is no evidence of such underlying decision, whether deemed or granted in respect of either certificate tendered by the applicants.
47. In respect of the argument made by the applicants in relation to s5A of the MPRDA Mr Lazarus points out that applicants in their founding affidavit have merely alleged non-compliance with the said section of the MPRDA. They have not informed respondents in what manner they have failed to comply with the provisions of s5A of the MPRDA and that in such circumstances the opposing respondents could not be expected to do more than annex their notice to the landowner and/or occupier and their environmental authorisation to their answering affidavit.

¹⁷ [2014] ZAWCHC 172 (14 November 2014) at para [18].

¹⁸ [2016] ZAGPPHC 534 (9 March 2016) at para [25].

48. In respect of the reference to Regulation 18 under the regulations issued under SPLUMA the opposing respondents contend that such regulation is not relevant because they do not wish to change the purpose of the land use from one lawful purpose to another, nor do they wish to formalise an existing land use. This submission rests on the contention that Drooge Veldt has never been zoned and that it also does not have a 'deemed' zoning.

49. In dealing with the arguments raised by the applicants and the opposing respondents, it would be convenient to start with the submissions made on the applicability of Regulation 18. Whilst both applicants and the opposing respondents have made written submissions on this aspect, in my view they have both overlooked a fundamental difficulty. Regulations are made under delegated authority, and it creates certain difficulties if such regulations are used to aid in the interpretation of the empowering statute itself.

50. The function of this court is to interpret the empowering act. This must be done with reference to the content and context of the relevant Act. Accordingly, Regulation 18 is no more than an opinion by the appropriate government department on what Parliament intended in enacting SPLUMA. The regulations do not give context to SPLUMA because the regulations were promulgated some two years after Parliament passed SPLUMA.

51. This approach was adopted by the author Kellaway¹⁹ relying on English authorities. In my view, this is the appropriate approach to take and I find as Regulation 18 was not contemporaneous with SPLUMA, it cannot lend context to the act. It is no more than an opinion of what the relevant department thinks that SPLUMA means. It is not binding on this court and for the reasons set out above I find that it does not lend context to SPLUMA. Accordingly, I will not be using the said regulation 18 as an aide in interpreting s26(3) of SPLUMA.

52. If I am wrong in this approach I find for the reasons set out below that the farm Drooge Veldt has not been zoned and does not have a deemed zoning. Therefore, the opposing respondents attitude is quite correct, Regulation 18 is not relevant because the opposing respondents do not wish to and are not required to change the use of the farm Drooge Veldt under the provisions of SPLUMA nor do they wish to and are furthermore not required to formalise the existing use under SPLUMA.

53. Turning next to the reliance of applicants on the provisions of s5A of the MPRDA as a basis for their relief. The opposing respondents complain that applicants have not pertinently set out in what respects they have not complied with the said s5A. The opposing respondents are quite correct in this complaint. In the whole of the applicants' founding affidavit, there is exactly one sentence that deals with the said s5A. This reads as follows: "Theta has not complied with s5A of the MPRDA and is not entitled to commence mining operations on this basis alone."

¹⁹ Kellaway EA., PRINCIPLES OF LEGAL INTERPRETATION, Statutes, Contracts & Wills., Lexis Nexis., 1995 at pp 208-209.

54. By way of contrast, four and a half pages of the applicants Heads of Argument are devoted to this issue. Having regard to the nature of applications where affidavits form both the pleadings and the evidence tendered in support of such case, the founding affidavit must appraise the respondent of the case it has to meet. In this context, the applicants had an obligation to set out pertinently in what respects Theta had not complied with s5A of the MPRDA so that the opposing respondents were properly appraised of the case it had to meet.

55. In these circumstances I find that by attaching the notice sent to the owner/occupier and the Environmental Authorisation the opposing respondents have properly met the case they were called upon to deal with in applicants' founding affidavit. Accordingly, I will not uphold s5A of the MPRDA a basis for the relief claimed in the applicants' Notice of Motion.

56. I have another difficulty with this aspect of applicants' case, conceptually having regard to the manner in which the applicants have framed their Notice of Motion this, as a ground for the relief claimed, simply does not fit in. At the hearing of this application save for the amendment to paragraph 2 already dealt with above, applicants did not seek to amend their Notice of Motion further.

57. It is not the place of this court to make a case for the applicants and re-cast the applicants' Notice of Motion in a way that might accommodate the inclusion of s5A of the MPRDA as a ground for the relief claimed or as a ground for different relief. To attempt to do so would be unfairly prejudicial to the opposing respondents. For this

reason as well, I cannot hold that s5A of the MPRDA provides a basis for the relief claimed in the applicants' Notice of Motion.

58. Turning now to the certificates being annexure "FA7" to the founding affidavit and annexure "RA7" to the replying affidavit and the question whether in and of themselves they have any probative value as well as the question as to whether they constitute 'administrative action' in the sense contemplated in the Promotion of Administrative Justice Act²⁰ ("PAJA").

59. Dealing first with the certificate issued by the Sol Plaatjie Municipality annexed to the replying affidavit as annexure "RA7". This certificate is dated 18 February 2013.

Although this certificate purports to be issued by the Acting Chief Town Planner, one Motseoa Fumane Phatedi ("Phatedi"), it was not signed by the said Phatedi. The letters 'pp' precede an illegible signature. On the face of the document, there is nothing to show that the actual signatory had the authority to sign and issue the relevant certificate. This issue was not dealt with in the applicants' replying affidavit.

60. The second difficulty with this document is that it purports to show that the farm Drooge Veldt is zoned agricultural in terms of 'the Sol Plaatjie Land Use Management Scheme 2008. As Mr Lazarus pointed out having regard to the chronology the Sol Plaatjie Land Use Management Scheme 2008 must have been promulgated under the Northern Cape Act²¹. Mr Lazarus pointed out that there was nothing in the said Northern Cape Act that allowed for extra-territorial jurisdiction. I could find nothing in the said Act authorising extra territorial jurisdiction for the Sol Plaatjie Municipality or any other local

²⁰ Act 3 of 2000.

²¹ Fn 16 above.

authority. Mr Van Heerden also did not refer me to any such authority in the Northern Cape Act or in any other legislation that would authorise such authority.

61. The third difficulty with the certificate being annexure “RA7” is that it carries the following notation:”

“#Although farm is in Barkly West this certificate is issued in terms of the 2011 Demarcation in which it resides as included in the Sol Plaatjie Local Municipality map (map provided by the Francis Baard District Municipality) Property had no notation indicated in the previous zoning register. If actual zoning differs from above the onus lies with the owner to provide documentation to the local authority proving the contrary.”

62. The difficulty with the said notation as pointed out by Mr Lazarus is that no legal basis is set out or established for making it. Indeed, Mr Van Heerden had no response to this contention in his submissions in reply.

63. I find that no legal basis has been set out for making such notation and furthermore, no legal basis has been set out or established by applicants for the Sol Plaatjie Municipality to issue such certificate in the first place, the relevant farm being outside their area of jurisdiction.

64. Turning now to the second certificate, being annexure “FA7” to the founding affidavit.

The certificate is issued by the Dikgatlong Municipality and it is dated 19 October 2016.

There are a number of curious features to this document as well. Firstly, the farm

Drooge Veldt is referred to as “Agricultural Zone”, this is a strange choice of language in the context. Usually, reference would be made to “agricultural land”.

65. Secondly, this certificate purports to be signed by the Acting Municipal Manager, one Kgotso Moeketsi. The same Acting Municipal Manager then purported to write a letter to the Department of Mineral Resources approximately one month after issuing the said certificate. This document is annexed to the founding affidavit as annexure “FA8”. The signatures on both of these documents purporting to come from the same person are so fundamentally different that the veracity of one or both of these documents are called into question. Although Mr Lazarus raised these issues in his argument, Mr Van Heerden did not deal with them in reply.

66. Thirdly, this certificate purports to have been issued under LUPO, yet on the evidence of Haarhoff as supported by the letter of the acting Municipal Manager dated 24 January 2018, Dikgatlong municipality does not have a ‘land register’, a plan or a zoning map. All of which are required by LUPO. Accordingly, there can be no lawful factual basis for issuing “FA7” on the 19 October 2016. In such circumstances annexure “FA7” could never have been lawfully issued.

67. Dealing now with the question as to whether “FA7” or “RA7” constitute ‘administrative action’. On the authority of both *JACOBS AND ANOTHER v TRANSAND AND ANOTHER*²² and *MAGALIES-BROMBERG PROPERTY OWNERS ASSOCIATION v CITY OF TSHWANE*²³ the certificates themselves do not constitute ‘administrative action’. The underlying Council decisions and resolutions would constitute the ‘administrative action’.

68. On the applicants’ papers in the present application there is absolutely no proof of any such underlying decisions or resolutions of the Council. On the contrary, the evidence of

²² [2014] ZAWCHC 172 (14 November 2014) at para [18].

²³ [2016] ZAGPPHC 534 (9 March 2016) at para [25].

Haarhoff that there was no register, plan or map as required under LUPO would tend to support the conclusion that no such decisions or resolutions were ever taken by the Dikgatlong municipality.

69. At best the said certificates might be *prima facie* proof of the existence of such administrative action, although the MAGALIES-BROMBERG²⁴ case would not support this view. However, taking into account the difficulties with both such certificates, as well as the fact that on applicants' own evidence in the form of Haarhoff's affidavit, no register, plan or map exists as required by LUPO, in my view such certificates cannot even be considered as *prima facie* proof of such administrative action.

70. The consequence of my conclusion that such certificates are not in and of themselves 'administrative action', and also that in the circumstances referred to above they cannot even be regarded as *prima facie* proof of such 'administrative action', is that there is nothing that needs to be set aside by the opposing respondents. The practical effect of such conclusions in the present circumstances are that I will simply regard "FA7" and "RA7" as having absolutely no probative value in the present circumstances.

71. The next question that needs to be considered is whether the farm Drooge Veldt can be said to have a deemed zoning under the provisions of s14(1) of LUPO. Section 14(1) of LUPO reads as follows:

"14(1) With effect from the date of commencement of this Ordinance all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the council concerned."

²⁴ Above, at para [25].

72. As set out above Mr Van Heerden points to evidence of the actual utilisation of the farm Drooge Veldt and his interpretation of s14(1) of LUPO ends at the comma and omits the phrase “..., as determined by the council concerned.” Mr Lazarus points out that there is no evidence that the council concerned, in this case the Dikgatlong municipality ever determined the actual usage of the farm Drooge Veldt on the 1 July 1986 when LUPO commenced.

73. Mr Lazarus is correct there is a well-known canon of interpretation that a court must, if possible, give meaning to every word in a statute unless necessity determines otherwise. The position was set out by Kotze JA in the case of ATTORNEY-GENERAL, TRANSVAAL v ADDITIONAL MAGISTRATE FOR JOHANNESBURG²⁵ as follows:

“A statute should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. To hold certain words occurring in a section of an Act of Parliament as insensible, and as having been inserted through inadvertence or error, is only possible as a last resort.”²⁶ (references omitted)

74. There is no case made out that to give effect to these words would undermine the intention of the provincial legislature that enacted LUPO. There is also nothing to suggest that this would be the result of giving effect to the ordinary meaning of the phrase “..., as determined by the council concerned.” There is no ambiguity in the phrase itself, nor is any ambiguity created by its insertion into s14(1) of LUPO. In the circumstances, I must give effect to the ordinary meaning of such phrase.

²⁵ 1924 AD 421.

²⁶ Above at 436.

75. Indeed, there is no evidence that the Dikgatlong municipality ever determined what the actual utilisation of Drooge Veldt was before 1 July 1986 when LUPO came into effect.

The consequence of this is that Drooge Veldt does not have a deemed zoning under the provisions of s14(1) of LUPO.

76. The next question to be determined is how s26(3) of SPLUMA is to be interpreted.

Section 26(3) must be read in conjunction with s24(1) of SPLUMA because it shows that s26(3) is an interim arrangement that will only hold sway for a period of 5 years. Section 24(1) of SPLUMA reads as follows:

“24(1) A municipality must, after public consultation, adopt and approve a single land use scheme for its entire area within five years from the commencement of this Act.”

77. Section 26(3) of SPLUMA reads as follows:

“26(3) Where no town planning or land use scheme applies to a piece of land, before a land use scheme is approved in terms of this Act such land may be used only for the purposes listed in Schedule 2 to this Act and for which the land was lawfully used or could lawfully have been used immediately before the commencement of this Act.”

78. Section 26(3) also has to be read in the context of schedule 2 of SPLUMA because this constitutes a finite list of the uses that land which has not been zoned and is not subject to a land use scheme may be used. Depending upon how one reads and interprets s26(3) may also be the list of lawful uses for which the relevant land could have been used immediately before the commencement of SPLUMA.

79. In short, Mr Van Heerden contended that s26(3) required that the land concerned must actually have been used for the relevant purpose immediately before the

commencement of SPLUMA. In effect his interpretation of the relevant sub-section stopped after the word “used” in s26(3), although he tried to interpret the phrase that followed the word “used” in a manner that would be consonant with his interpretation, the result was a strained and unnatural construction of the language used. Mr Van Heerden’s contention was that the land was used for agriculture immediately prior to SPLUMA coming into effect therefore Drooge Veldt could only lawfully be used for agriculture unless it was rezoned.

80. Mr Lazarus contended that s26(3) meant that the land must have been used for the purpose concerned “or” was at least capable of being used for that purpose immediately before the commencement of SPLUMA. The effect of Mr Lazarus’ interpretation is that if there was no legal impediment and the land concerned was capable of being used lawfully for any purpose set out in Schedule 2, then no rezoning or zoning was required in this interim period. Mr Lazarus pointed out that Drooge Veldt had never been zoned, consequently s26(3) applied. He further pointed out that Drooge Veldt had no impediment to it being used for mining. That there was nothing in the title deed of Drooge Veldt that would prohibit or restrict mining. Mining was a land use that was specifically included in Schedule 2. He also pointed out that there was nothing in the relevant legislation that prohibited mining on Drooge Veldt in these circumstances. Finally, he pointed out that the mining right itself was proof that the farm Drooge Veldt was capable of lawfully being used for the purpose of mining.

81. Mr Van Heerden in his response to Mr Lazarus’ submissions on regulation 18 included a further argument. Although strictly speaking Mr Lazarus hasn’t had an opportunity to

respond to it, for the sake of completeness I am going to consider it. This argument was to the effect that if I adopt Mr Lazarus' interpretation of s26(3) it would render everything that precedes the phrase "...or could lawfully have been used immediately before the commencement of this Act.", irrelevant and meaningless.

82. What Mr Van Heerden loses sight of is that s26(3) is clearly an interim arrangement.

That 'wall to wall' municipalities only came into existence in 2002. That s26(3) was intended to deal with a situation where a large flood of properties that were previously not affected by town planning and associated zoning would have to be accommodated in the system. Mr Lazarus' interpretation is both a practical and pragmatic way to deal with this flood of new properties into the system. It restricts the use of such land in two ways. Firstly, it confines the use of the land to a use listed in Schedule 2. Secondly, the use of the land must be lawful in other words there must be no legal impediment to such use either in the title deed or in respect of any other law. Finally, one must not lose sight of the fact that this is an interim arrangement to cater for a transitional period.

83. In my view parliament must have foreseen this problem because s26(3) provides a practical and pragmatic way to deal with this transitional period. Accordingly, I find that it is not necessary to zone or rezone the farm Drooge Veldt before mining can take place on the property.

84. Mr Lazarus' argument follows the process suggested by Dale, as set out above. In the present circumstances I believe it is an appropriate process to follow. The evidence shows that Drooge Veldt was never factually zoned up to the launch of the present application and for the reasons set out above cannot be said to have a 'deemed zoning'.

Accordingly, it would not be necessary to rezone Drooge Veldt for mining to lawfully take place on the said farm.

85. It follows from these conclusions that applicants have not proved a clear right or even a *prima facie* right as a basis for the relief that they claim. In the circumstances, it is not necessary to deal with the other requirements for a final or even a temporary interdict and the application stands to be dismissed.

86. The last remaining issue is the issue of costs. Both Mr Van Heerden and Mr Lazarus adopted the approach that costs should follow the result. Indeed, neither party made out a case to depart from this general rule. In the circumstances, costs will follow the result. Such costs will include the costs of the postponement on the 9 March 2018.

In the circumstances, the following order is made:

- 1) The application is dismissed.
- 2) The applicants are to pay the costs of this application jointly and severally, the one paying the other to be absolved. Such costs shall include the costs of the postponement on the 9 March 2018.

Lawrence Lever AJ

Northern Cape Provincial Division

Representation:

Applicants:

Mr C N van Heerden oio Van de Wall Inc

1st and 2nd Respondents:

Mr P Lazarus SC oio Duncan & Rothman Inc.

Date of Hearing: 28 March 2018

Judgment handed down on: **26 October 2018**