



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

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

CASE NO.: 2057 / 2016
Date heard: 08-12-2016
Date delivered: 13-01-2017

In the matter between:

**Ekapa Minerals (Pty) Ltd
Kimberley Ekapa Mining Joint Venture
Super Stone Mining (Pty) Ltd
Crown Resources (Pty) Ltd**

**1st Applicant
2nd Applicant
3rd Applicant
4th Applicant**

And

**Lucky Seekoei
Godfrey Motloteng
Pieter Mokitini
Victor Taku
John Motshwanaysi
Daisy Damons
The Unidentified Illegal Miners
MEC: Department of Environmental Affairs
MEC: Department of Cooperative Governances,
Human Settlements and Traditional Affairs
MEC: Department of Transport, Safety and Liaison
Minister of Minerals Resources
Minister of Safety and Security
Minister of Home Affairs
De Beers Consolidates Mines (Pty) Ltd**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent

9th Respondent
10th Respondent
11th Respondent
12th Respondent
13th Respondent
14th Respondent**

CORAM: WILLIAMS J:

J U D G M E N T

WILLIAMS J:

1. In this application the applicants essentially seek interdictory relief to prevent the first to seventh respondents from; i) entering into or being on certain immovable properties; and ii) unlawfully and illegally conducting mining activities on the immovable properties.
2. The first applicant, Ekapa Minerals (Pty) Ltd, entered into a Sale of Business agreement with the fourteenth respondent, De Beers Consolidated Mines (Pty) Ltd (De Beers), on 30 November 2015, in terms of which the first applicant purchased *inter alia* the reprocessing of tailings and related business conducted by De Beers, the relevant Tailing Mineral Resources (TMRs) and the immovable properties on which the TMRs are situated. The ownership of the TMRs has been transferred to the first applicant by means of *traditio longa manu* effected in terms of a notarial deed of delivery on 18 January 2016.
3. The second applicant is Kimberley Ekapa Mining Joint Venture, in which the first applicant, the third applicant, Super Stone Mining (Pty) Ltd and the fourth applicant, Crown Resources (Pty) Ltd are participants and partners in the re-processing of the TMRs with effect from 1 July 2016.
4. The first to seventh respondents are a group of illegal artisanal and small-scale miners who conduct their mining activities on the relevant immovable properties, of which not all have been transferred to the first applicant.

5. The eighth to thirteenth respondents comprise of the relevant MECs and Ministers who may have an interest in the application. De Beers, as already mentioned, is the fourteenth respondent. Only the first to seventh respondents (to whom I will henceforth refer to as the *"the respondents"*) oppose the application.
6. It is not in dispute that the TMRs have come about as a result of over 130 years of open cast mining. The debris or waste left over as a result of excavating for diamonds were left in dumps or spread on the surface of the property being mined, in an area used as a tailings disposal site, which is referred to as floors. The TMRs consist of both the tailing dumps and the floors. The TMRs contain valuable diamondiferous material which was previously not fully exploited. With improved mining technology and a demand for smaller diamonds, the reprocessing of the TMRs has become a lucrative business.
7. The applicants complain that for the last six years the respondents, now some 1000 in number, conduct their illegal mining activities by digging trenches and tunnels, some to a depth of 8 metres, on the TMRs. They manually sieve the excavated material for diamonds, mostly on site, but also carry it away to where they live. The applicants estimate their financial loss due to the activities of the respondents at about R6 million per month. In addition the respondents are accused of causing veld fires, disturbing the ecology, littering, theft and various other criminal activities on the properties. The

applicants, who started reprocessing the TMRs on the properties in July 2016, contend that their employees fear for their safety, that they have approached the SAPS and other Government Departments about the problem of the illegal miners, but that they are not in a position to combat the activities associated with the illegal miners.

8. The artisanal miners, as the respondents refer to themselves, deny that they process the tailing dumps but claim to mine the floors, which are described in their answering affidavit as a thin layer of kimberlite which remained after De Beers had removed the dumps for reprocessing. They describe their method of mining (reminiscent of the the old claims system) as follows:

“27.1 ASMs (Artisanal and small scale miners) scan the area for patches of kimberlite.

27.2 When an appropriate patch is found this patch is claimed by an individual or group of individuals. The ASMs recognise this person’s exclusive right to the claim.

27.3 Two to three people usually work the claim. The first step is to scrape off the thin layer of kimberlite, usually around six inches deep and no deeper than 24 inches, with a pick and shovel.

27.4 The kimberlite is then sorted on a sieve to screen out large rocks. It is then run through a finer sieve.

27.5 What is left on top of the sieve after this sorting is laid out on a tarp and picked through.”

9. The respondents deny any criminal activity; they consider themselves to be an organised group of people who due to the current economic climate are unable to obtain employment and are therefore forced to eke out a living for themselves and their dependants by conducting the small-scale mining of the floors as they do. They do not deny the unlawfulness of their mining activities and the sale of the diamonds which they manage to recover (they deny the extent of their mining as alleged by the applicants) but claim to have desperately sought to regularise their operations by seeking the assistance of the Minister of Mineral Resources and the Regional Manager of the Department of Mineral Resources (the DMR), which to date has been to no avail.
10. The respondents, in opposing this application initially set up numerous defences which by the time the application was heard had been refined to the following:
 - 10.1 The order sought is too vague to be enforced;
 - 10.2 The applicants have failed to show a clear right for final interdictory relief;
 - 10.3 The applicants have not approached the court with clean hands; and
 - 10.4 The applicants have an alternative remedy.

The vagueness of the order sought

11. The objectionable matter here is twofold – it relates to the description of the properties in the Notice of Motion and the fact that the seventh respondent is cited as *“The unidentified illegal miners”*. Mr Spoor who appeared for the respondents, contended that in circumstances where the area from which the respondents are sought to be excluded comprise some 10 000 hectares in total, most of the land being unfenced and/or adjacent to informal settlements and townships, it will be impossible for the Sheriff to determine who the illegal miners are, unless of course caught in the act, or for the Sheriff and the respondents to determine what a specific area would encompass, being described as: (an example of one of the areas)

“The Remaining Extent of Erf 5024 Kimberley, Northern Cape Province, including the Gemdene Trailing Mineral Resource and a portion of the Colville Corridor Tailing Resource situated on this property, but not including (a) the Colville Tailing Mineral Resource, (b) the portion of the remaining extent of Erf 5024 Kimberley adjacent to Erven 4812 and 4815 Kimberley.”

12. Such a description would without doubt be confusing to a layperson but probably informative as far as the Sheriff is concerned. However, Mr Chaskalson SC who appeared with Ms Higgs for the applicants, obliged by presenting a draft order describing the properties in simpler terms and which

correspond with the description of the mining areas over which De Beers has a mining right (as described in the Deeds Register) and which form part of the sale agreement between De Beers and the first applicant. The simplification of the description of the properties in addition to the fact that the first respondent, Mr Lucky Seekoei, who is the deponent to the answering affidavit, and spokesperson for the respondents, has after filing the answering affidavit presented the applicants attorneys with a list of some 800 names of artisanal miners (other than the first six respondents) who also conduct their mining operations on the properties, should now have the effect that no unrelated party be prejudiced by the order sought.

The Applicants' failure to show a clear right

13. Here also the complaint is two-fold. Firstly that the first applicant is the owner of only one of the properties the respondents are sought to be excluded from, the rest of the properties sought to be included in the order have not yet been transferred to the first applicant and the applicants have failed to establish a *ius possidendi* over it. Secondly, that the TMRs situated on the properties represent "*minerals*" as defined in the Mineral and Petroleum Resources Development Act, no 28 of 2002 (the MPRDA), are therefore the property of the people of South Africa and that consequently the agreement to sell the TMRs to the first applicant is invalid.

14. With respect to the first issue under this heading, transfer of the remaining Extent of Erf 6489, Kimberley has already taken place on 6 June 2016. The first applicant is the registered owner of this property which is sufficient to establish a clear right for final interdictory relief. With regard to the remainder of the properties, transfer is pending.

15. As far as the right to possess these properties where transfer is pending is concerned, the Agreement of Sale (clause 12.2.16) provides as follows:

“12.2.16 .. with effect from the effective date (18 January 2016), DBCM and the purchaser agree that:

 - 12.2.16.1 the purchaser shall be liable for all rates, taxes, levies and similar imposts levied in respect of the Immovable Properties;*

 - 12.2.16.2 the Purchaser shall be entitled free of charge, to the use and enjoyment of the Immovable Properties as if it were the owner thereof even if transfer takes place after that date; and*

 - 12.2.16.3 all risk and benefit in and to the Immovable Properties shall pass to the Purchaser.”*

16. There can therefore be no doubt that the applicants have a contractual right of possession and the issue of lack of *ius*

possidendi thus falls away. The applicants contend furthermore that they also have occupation of all the properties, which assertion counsel for the applicants contend is not denied by the respondents. This contention is however not entirely correct. If the answering affidavit is read as a whole it is clear that the respondents deny that the applicants are reprocessing the TMRs on all the properties and that they deny that the applicants therefor have possession or occupation over all the properties. It is not clear from the papers however whether the denial of the allegation of possession and occupation in the founding affidavit still applies to the remaining properties after the applicants have in their replying affidavit conceded their mistake in including certain properties (on which the Colville TMRs are situated) in the Notice of Motion. In respect of these properties De Beers had entered into an agreement with former employees that would allow such employees to mine the properties. However the mere fact of the denial of possession and occupation being so vague, I am satisfied that the applicants have proved on a balance of probabilities a clear right of possession and actual occupation of the relevant properties.

17. The further argument by the respondents is that since the TMRs *in casu* were created by De Beers, the holder of an old order right, the diamondiferous material contained in the TMRs are minerals as defined in the MPRDA. This argument of the respondents is premised on the 2013 amendments to the definition of residue stockpiles and residue deposits which now

also include those mine dumps created by holders of old order rights. As such these minerals have, in terms of section 3 of the MPRDA, become the property of the nation, with the State as custodian thereof, and cannot be sold. In addition the applicants are mining the TMRs without a mining right, which under the MPRDA is an offence.

18. The applicants however contend that the MPRDA does not apply to TMRs, does not regulate the processing of TMRs and therefore does not detract from the first applicant's ownership of the TMRs.
19. It is necessary to reproduce the relevant provisions of the MPRDA.

19.1 The definition of "*mineral*" in section 1 of the MPRDA is the following:

"any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay and any mineral occurring in residue stockpiles or in residue deposits, but excludes –

- a) water, other than water taken from land or sea for the extraction of any mineral from such water;*
- b) petroleum; or*
- c) peat."*

(own underlining)

19.2 *“Residue stockpile” means “any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right.”*

19.3 *“Residue deposit” is defined as follows: “means any residue stockpile remaining at termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or an old order right.”*

19.4 Section 5A of the MPRDA prohibits unauthorised mining and states as follows:

“No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without—

- (a) an environmental authorisation;*
- (b) a reconnaissance permission, prospecting right, permission to remove, **mining right**, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and*
- (c) giving the landowner or lawful occupier of the land in question at least 21 days written notice.*

- 19.5 An *“old order right”* is defined in item 1 of Schedule II to the MPRDA as *“an old order mining right, old order prospecting right or unused old order right.”*
- 19.6 An *“old order mining right”* is defined amongst others as *“The common law mineral right, together with a mining authorisation obtained in connection therewith in terms of section 9(1) of the Minerals Act”*.
- 19.7 An *“unused old order right”* is defined as *“any right, entitlement, permit or licence listed in table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect.”*
- 19.8 Table 3 to Schedule II includes under unused old order rights a mineral right under the common law for which no prospecting permit or mining authorisation was issued in terms of the Minerals Act as well as a mineral right under the common law for which a prospecting permit or mining authorisation was issued under the Minerals Act.
20. The respondents’ argument, as I understand it, is that the TMRs were created under De Beers’ old order right which consisted of an unused old order right (a mineral right under the common law with or without statutory mining authorisation) since the TMRs were created long before the enactment of the

MPRDA on 1 May 2004. As such the TMRs are minerals under the MPRDA and a mining right is required to mine it.

21. I am of the opinion however that one can immediately discard the notion of De Beers having held an unused old order right because the TMRs, although having been created over the course of 130 years, have not been lying dormant for all that time. In fact the third applicant had been processing the TMRs and conducting mining operations on the properties as a contractor of De Beers from 1991 until 2008, and it would therefore not have been “a right, entitlement, permit or licence in respect of which no prospecting or mining was being conducted immediately prior to the MPRDA”.
22. De Beers was however the holder of an old order right in the form of an old order mining right (common law mineral right together with a mining authorisation) which was converted to a mining right under the MPRDA on 7 May 2010. The old order mining right is a statutory creation which came into existence with the enactment of the MPRDA. The position is set out as follows in:

i) **HOLCIM SA (PTY) LTD v PRUDENT INVESTORS (PTY) LTD AND OTHERS** [2011] 1 All SA 364 (SCA) at par 37:

“As I have been at pains to emphasise, a common law mineral right is not preserved under the new statutory dispensation. It is not of itself an “old order right” which can

be converted under Item 7 of Schedule II. It survives only as a right underlying a mining authorisation.”;

- ii) **MINISTER OF MINERAL RESOURCES & OTHERS v SISHEN IRON ORE COMPANY (PTY) LTD & ANOTHER**
2014 (2) SA 60 SCA at paras 57 and 60:

57. *“It is important to note that in terms of Table 2, the old order mining right is defined as comprising two components, namely, the mineral right and the mining authorisation. In this regard the old order mining right consists of a package of the mineral right and the mining authorisation. Thus Table 2 alters the composition of the underlying common law right by putting it together with the mining authorisation that was issued to facilitate exploitation of the mineral right. The consequence is a new right created by statute.*

...

60. *To sum up: the old order mining right as defined in Table 2 comprises two elements, namely, the common-law mineral right and the mining authorisation. It is a new right created by statute and which would be converted into a mining right. A failure to convert that old order mining right resulted in the right ceasing to exist.”; and*

iii) **XSTRATA SA (PTY) LTD & OTHERS v SFF ASSOCIATION** 2012 (5) SA 60 (SCA) para 10:

“As pointed out in the Holcim decision of this court these provisions do not serve to preserve common law rights. Instead, for the period of five years specified in item 1, or such lesser period as may elapse until the conversion of the old order right into a mining right under the Act, they create a new right, statutory in origin, embodying the rights previously enjoyed under the relevant old order right, together with an entitlement to convert that right into a mining right under the Act.”

(Own underlining)

23. It follows then that the old order mining right of De Beers came into existence after the enactment of the MPRDA and endured until its conversion to a mining right under the MPRDA on 7 May 2010. It stands to reason therefore that the TMRs, having been created long before 2004, were not created by the holder of an old order right as per the definition of “residue stockpile”. The TMRs, not being residue stockpiles, can automatically also not be residue deposits by reason of the fact (amongst others) that residue deposits relate to and encompass residue stockpiles.
24. The TMRs in casu therefore do not fall under the definition of “mineral” in the MPRDA. Its reprocessing would therefore not require a mining right and since the MPRDA does not apply to

the TMRs there can be no prohibition against it being sold. The view I take of the TMRs not falling under the provisions of the MPRDA is bolstered by the fact that the DMR has tabled a Bill (The Mineral and Petroleum Resources Amendment Bill), which seeks to further amend the definition in the MPRDA of “*residue stockpile*” to include “*historic mines and dumps created before the implementation of the Act.*” Such an amendment and the concomitant transitional arrangements also included in the Bill would be unnecessary if the existing definition of residue stockpile (and by extension “*mineral*”) already includes historic dumps such as the TMRs in issue. That being the case I do not have to deal any further with the respondents’ allegations of the applicants not approaching this Court with clean hands since they themselves do not have a mining right over the relevant properties.

The existence of an alternative remedy

25. The respondents maintain that criminal prosecution would constitute an adequate alternative remedy which they contend the applicants have failed to pursue in any meaningful way. In **SETLOGELO v SETLOGELO** 1914 AD 221 this requisite for the granting of a final interdict which has been consistently affirmed ever since, is stated as “*the absence of similar protection by any other ordinary remedy*”. There can be no doubt that in certain cases a criminal prosecution may well be an adequate alternative remedy. In casu however, where more than 800 illegal miners have been identified, and even if one

disregards for the moment the applicants' allegations of their and De Beers' failure to achieve success through the criminal justice system, one can hardly ignore the difficulties inherent in charging and prosecuting such a large number of people together with the inevitable lengthy delays in bringing such prosecutions to finality, while in the meantime the applicants suffer huge financial losses on a daily basis. In these circumstances criminal prosecution would in my view not be a remedy offering similar protection as an interdict.

26. Mr Spoor for the respondents has argued that even in the event that I find that the applicants have succeeded in satisfying all the requisites for final interdictory relief, I still have a discretion, in the interests of justice, taking into account the prejudice to the respondents who stand to lose their only means of an income for themselves and their families, to refuse the application or at the very least to suspend the operation of the interdict. The suggestion that the operation of the interdict be suspended was premised on the contention that the applicants required a mining right to reprocess the TMRs and the suspension was sought pending the applicants obtaining such a mining right. Having found however that the applicants do not require a mining right to reprocess the TMRs, such relief cannot be granted.
27. The position regarding a general discretion to refuse a final interdict, where all the requisites have been met, is a somewhat controversial issue. The overriding view being that such a

discretion is limited and depends on whether an adequate alternative remedy is available. I do not however deem it necessary to get embroiled in a discussion on this topic which is extensively addressed in **LASKEY & ANOTHER v SHOWZONE CC & OTHERS** 2007 (2) SA 48 (CPD). The problem that the respondents have, no matter how sympathetic I may be to their economic plight and frustrations at the relevant authorities' failure to facilitate the regularisation of their operations, is that they are conducting illegal activities which cannot be seen to be condoned by a discretionary refusal of the relief sought. The application must therefore succeed.

28. The only issue left is that of costs. The applicants having been substantially successful, the normal rule is that costs follow the result. The respondents, however, contend that they were justified and entitled to oppose the application, which opposition was successful to the extent that it limited the scope of the relief initially sought and prevented the unlawful eviction of certain respondents from their homes specifically those situated on the property Kenilworth Estate No. 71. The factual position is however that the applicants are successful in relation to the properties which form the subject matter of the sale agreement with De Beers and on which TMRs are situated, with the exception of the properties on which the Colville TMRs are situated (which the applicants conceded were mistakenly included) and on which the respondents in any event do not appear to be conducting mining activities. The applicants had furthermore engaged the services of a land surveyor, Mr Janis

Grivainis, whose affidavit is annexed to the replying papers, to identify the relevant immovable properties and the TMRs on such properties and to identify whether any form of residences were located on the properties. Shacks were identified on two different portions of Portion 12 of the farm Kenilworth Estate No. 71, the property of the Sol Plaatje Municipality and which do not form part of the properties to which this application relate. The respondents' argument that their opposition had prevented unlawful eviction is thus unfounded. In these circumstances I see no reason why the applicants should be denied the costs of this application, including the costs of two counsel.

THE FOLLOWING ORDERS ARE MADE:

1. The first to sixth respondents and the persons listed on Annexure X hereto are interdicted and restrained from entering into or being on the following immovable properties and any Tailing Mineral Resources situated upon such immovable properties:
 - 1.1 the remaining extent of Erf 5024 Kimberley, excluding the portion of the remaining extent of Erf 5024 Kimberley adjacent to Erven 4812 and 4815 Kimberley;
 - 1.2 the remaining extent of Erf 5045 Kimberley, Northern Cape Province;

- 1.3 the remaining extent of Erf 6489 Kimberley, Northern Cape Province;
 - 1.4 the remaining extent of the farm Kenilworth Estate 71, District Kimberley, Northern Cape Province;
 - 1.5 the remaining extent of the farm Bultfontein 80, District Kimberley, Northern Cape Province;
 - 1.6 the remaining extent of the farm Alexandersfontein 123, District Kimberley, Northern Cape Province;
 - 1.7 the remaining extent of the farm Dorstfontein 77, District Kimberley, Northern Cape Province;
 - 1.8 the remaining extent of the farm Rooifontein 1722, District Boshof, Free State Province; and
 - 1.9 the farm Benauwdheidfontein 124, District Kimberley, Northern Cape Province.
2. The first to sixth respondents and the persons listed on Annexure X hereto are interdicted and restrained from disturbing and/or processing and/or removing any of the materials which form part of the Tailing Mineral Resources which are situated upon the immovable properties referred to in paragraphs 1.1 to 1.9 above.
 3. The first to sixth respondents and the persons listed on Annexure X hereto are interdicted and restrained from mining

or prospecting for diamonds or conducting any related activity on any of the Tailing Mineral Resources which are situated on the immovable properties referred to in paragraphs 1.1 to 1.9 above.

4. The sheriff of this Court is authorised and directed to remove any of the first to sixth respondents and the persons listed on Annexure X hereto who are present upon the immovable properties referred to in paragraphs 1.1 to 1.9 above from such immovable properties.
5. The first to sixth respondents and the persons listed on Annexure X hereto are ordered to pay the costs of this application jointly and severally, including the costs of two counsel.

CC WILLIAMS

JUDGE

For applicants:

Adv. M. Chaskalson SC
Adv. A. Higgs
(oio Duncan & Rothman Inc.)

For 1st to 7th respondents:

Mr. R. Spoor
(oio Richard Spoor Inc. Attorneys)
(c/o Yolandi Koen Attorneys)