

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: 1959/2016
Heard on: 20/10 /2016
Delivered on: 25/11/2016

In the matter between:

THETA MINING PROPRIETARY LIMITED **1ST APPLICANT**

LONRHO MINING SA PROPRIETARY LIMITED **2ND APPLICANT**

And

SCARLET SUN 15 PROPRIETARY LIMITED **1ST RESPONDENT**

BSO KONSULTANTE CC trading as
DELTA GESPECIALSEERDE DIENSTE **2ND RESPONDENT**

THE GOVERNMENT OF THE REPUBLIC
OF SOUTH AFRICA **3RD RESPONDENT**

THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM **4TH RESPONDENT**

THE SYDNEY ON VAAL COMMUNAL

PROPERTY ASSOCIATION

5TH RESPONDENT

NORTHERN CAPE PROVINCIAL GOVERNMENT:

6TH RESPONDENT

DEPARTMENT OF ROADS AND PUBLIC WORKS

THE MINISTER OF MINERAL RESOURCES

7TH RESPONDENT

**THE REGIONAL MANAGER, NORTH CAPE REGION
OF THE DEPARTMENT OF MINERALS AND ENERGY**

8TH RESPONDENT

THE REGISTRAR OF DEEDS, KIMBERLEY

9TH RESPONDENT

JUDGMENT

MAMOSEBO J

[1] On 16 September 2016 the applicants, Theta Mining Proprietary Limited and Lonrho Mining SA Proprietary Limited, approached the Court on an urgent basis seeking interim relief pending the final determination of proceedings still to be launched to determine their entitlement to the use of the road traversing Portion 1 of the Farm Than No 280 in the Administrative District of Barkley West (the Than farm) to access the farm Drooge Veldt No 292 also in the Administrative District of Barkley West. The application was opposed by the first respondent, Scarlet Sun 15 Proprietary Limited (Scarlet Sun) and the fifth respondent, The Sydney on Vaal Communal Property Association, only. The fourth respondent, The Minister of Rural Development and Land Reform, filed a Notice to Abide the decision of the Court.

[2] Having been satisfied that the matter was urgent I granted an interim interdict effectively restoring to the applicants the use of the road B-A-

D. The parties also agreed on timeframes within which to file further affidavits and their written arguments. The matter was to be heard on 20 October 2016.

- [3] Upon the return date the applicants, conceding the existence of a dispute of fact not soluble on the papers, submitted that the Court need not make a final determination at this stage on whether or not they have a clear right to make use of the roads traversing the Than farm in order for them to access Drooge Veldt. Mr Gilbert, for the applicants, contended that they merely required the extension of the interim relief already in place pending the outcome of an action yet to be instituted.

The parties

- [4] The first applicant is Theta Mining Proprietary Limited (Theta Mining). The second applicant is Lonhro Mining SA Proprietary Limited (Lonhro Mining). The first respondent is Scarlet Sun. The second respondent is BSO Konsultante CC T/A Delta Gespesialiseerde Dienste. The third respondent is the Government of the Republic of South Africa. The fourth respondent is the Minister of Rural Development and Land Reform. The fifth respondent is the Sydney on Vaal Communal Property Association. The sixth respondent is Northern Cape Provincial Government: Department of Roads and Public Works. The seventh respondent is the Minister of Mineral Resources. The eighth respondent is the Regional Manager, Northern Cape Region of the Department of Minerals and Energy. The ninth respondent is the Registrar of Deeds, Kimberley.

The background

- [5] Theta Mining is the holder of a mining right granted to it on 12 August 2015 to mine alluvial diamonds on Drooge Veldt. Lonhro Mining has been appointed by Theta Mining as its contractor to mine the alluvial diamonds.
- [6] The applicants maintain that Drooge Veldt has no direct access to a public road and is in that sense landlocked, an assertion disputed by the opposing respondents. The applicants used the roads A-D since June 2009 and from March 2014 used the road B-A-D which Scarlet Sun had, with effect from 01 September 2016, barred them from. They were granted interim access relief on 16 September 2016 with directions to file further affidavits and for argument to be heard on 20 October 2016.
- [7] There are in fact three (3) farms owned by the Government which are contiguous. They are Drooge Veldt where Theta Mining conducts its mining operations and the Than and Mozib farms where Scarlet Sun conducts its mining operations. In terms of the Deed of Transfer T2079/89 the Registrar of Deeds registered the farms under the name Sydney on Vaal Farms (Proprietary) Limited. These farms are perpetual quitrent land held in trust by the Government until all processes have been finalised for them to be transferred to the fifth respondent: (The Sydney on Vaal Communal Property Association the CPA), in terms of the Communal Property Association Act, 1996.
- [8] The applicants pleaded entitlement to use the road traversing the Than farm having done so since 2009, relying on the Deed of Transfer. They raised the following grounds:

- 8.1 The Deed of Transfer applicable to the Than farm expressly provides that all roads on Than farm are to remain free and uninterrupted;
- 8.2 The most direct road crossing Than farm marked “A-D” on the locality plan is a public road, either having been proclaimed as such or by immemorial usage (*vesustas*);
- 8.3 Section 5(3) (a) and (c) as supported by s 25 and read with secs 22(4)(b), 38A(2) and 23(1)(d) of the Mineral and Petroleum Resources Development Act, 2002 (as amended) (MPRDA) entitled them to enter upon the land (Than farm) in respect of which the mining rights have been granted, which would include accessing Drooge Veldt by crossing the neighbouring land (Than farm); and
- 8.4 The applicants claim that they are also entitled to a right of way by necessity (*via necessitates*) in that there is no other way of accessing the landlocked Drooge Veldt except by using the road “A-D”, alternatively “B-A-D” traversing the Than farm.

[9] The applicants submitted that they have concluded a Surface Use Agreement (“DJC6”) with the CPA for the surface use of Drooge Veldt. The agreement was signed on behalf of Lonrho Mining on 09 May 2013 but no witnesses attested to the signature. A signature was appended on behalf of the CPA on the same date but no witnesses attached their signatures to it either. I am pointing this out because in the answering affidavit the following challenge was posed:

“It will be indicated by the affidavit of the CPA that the surface use agreement is not valid, as it has not been approved by the executive committee of the CPA. I refer in this regard to the affidavit on behalf of the CPA attached hereto.”

- [10] As foreshadowed the applicants have conceded that there were several insoluble disputes of fact on the papers. It is trite that the ***Plascon Evans*** principle applies under the circumstances. In an effort to persuade me to extend the interim relief granted on 16 September 2016 but at the same time not to determine the exact nature of their right to traverse the Than farm, which they maintain will be determined in the main proceedings they intend to launch, the applicants emphasised that the road was used out of necessity. In ***Aventura Ltd v Jackson NO and Others*** 2007 (5) SA 497 (SCA) at 500A-B Nugent JA pronounced:
- “What is meant by ‘necessity’ is that the right of way **must be the only reasonably sufficient means of gaining access to the landlocked property and not merely a convenient means of doing so** (Trautman NO v Poole 1951 (3) SA 200 (C) at 207D – 208A).”* (own emphasis).
- [11] Mr Gilbert submitted that the shortest route to the nearest public road, which would cause the least inconvenience to the neighbouring Than farm, is that marked “A-D” on the locality plan premised on the expression “*ter naaste lage en minste schade.*” They refer to the inconvenience caused by taking longer to reach the public road if the Rooipoort road is used.
- [12] However Mr van Heerden, for the opposing respondents, contended that the very fact, even on the applicants’ version that access to Drooge Veldt is attainable through the Rooipoort road negates the applicant’s case that it is landlocked.
- [13] The impression created by the applicants is that when their applications were considered and a decision made, first for prospecting

and later for the mining permit, the road available to them to access Drooge Veldt was either not in issue or was overlooked.

- [14] According to the applicants the efforts by Scarlet Sun to prevent them from accessing Drooge Veldt are aimed at coercing them to succumb to the pressure exerted by Scarlet Sun through their representative, Derek Corns, to acquire their (the applicants') alluvial mining business. They further contended that the issues raised by the said respondents in their answering affidavit were ancillary to the fact that they have *prima facie* established a *via necessitates* right to access Drooge Veldt.
- [15] Let me examine this submission. The letter by the applicants' attorneys, David Levithan Attorneys, dated 02 September 2016 claims entitlement to access and egress the property via unspecified roads through the Mining Area. They invoke as a basis the mining right which they have been granted in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA). There is no reference made to any specific road in the letter. Counsel for the respondents argued that had the applicants attached the Environmental Management Plan (EMP) to the papers it would have been clear from that document the entry point that the applicants are attempting to make pertaining to the access road. The Environmental Authorisation deals with roads generally. It specifies the road for use by the applicants which would in all probabilities have been contained in that document which the applicants have failed to produce. It is therefore unclear whether at the stage of granting the permit the Minister and the officials of the Department of Minerals and Energy (DME) were alive to the alleged inaccessibility of the road or not. The only attachment that purportedly supports the entitlement to traversing the Than farm to reach Drooge Veldt is the Deed of Transfer T2079/89.

Coincidentally this holds true also for the land held in trust for the fifth respondent (the CPA) who is also opposing this application.

- [16] To reiterate: The applicants have up to now not bothered to institute action mindful of the fact that there are several factual disputes not soluble on papers. In my view, they are playing for time by rather opting for an extension of the interim relief. Although the applicants initially argued that the interim relief they obtained in 2012 was against different parties, despite the fact that there were some members of the CPA who had locked the gate denying them access to Drooge Veldt the substance and issues are substantially identical. In my view action or approaching the Regional Manager was in the offing since the first interim relief in 2012, and that is four years ago, but never pursued to its conclusion.
- [17] The applicants ought to have followed the consultation process route as outlined by Froneman J in *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC) at 140 para 67. It seems to me that some consultation may have taken place with other interested or affected parties but not with Scarlet Sun. The issue of access to the road was a critical aspect that needed to be brought to the attention of the Regional Manager accompanied by representations or objections. Interested and/or affected parties were invited pursuant to an advertisement placed in the local Diamond Field Advertiser (DFA) newspaper to register as interested parties but Scarlet Sun did not register. However, this cannot be said to have satisfied s 27(5)(b) of the MPRDA, particularly because either the CPA or Scarlet Sun would in all probability have commented on the use of the road as an affected or interested party.

- [18] In *Joubert and Others v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 198 (SCA) at 202B - E (para 12) Mlambo JA pronounced:

*“Perhaps it is prudent briefly to consider the scheme of the Act relevant to the issue before us. It is apparent from s 27 (5)(b) that once an application for a mining permit is accepted by the regional manager, the latter must notify the applicant for the permit to submit an environmental management plan and to consult with the owner of the land or occupier or any other affected parties, and submit the results of this consultation to him within 30 days. This envisages consultation after the lodging of an application for and before the grant of a mining permit. Furthermore, in terms of s 5(4)(c), once the permit is granted no mining activities may be commenced by the permit holder unless it has notified and consulted with the owner or occupier of the land in question. In *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) at 114D - E the view was expressed that the legislature provided for due consultations between a landowner and the holder of or applicant for a permit in order to alleviate possible serious inroads being made on the property rights of the landowner. Consultation is the means whereby a landowner is apprised of the impact that prospecting (or, I would add, mining) activities may have on his land. I am in respectful agreement in this regard with this view, even though that case was concerned with access in relation to a prospecting right.”*

- [19] The Land Claims Commission had by letter addressed to the Vaalbos: Sydney on Vaal Restitution Community Trust dated 29 May 2009 pertaining to the right of access to Vaalbos granted permission on the following conditions:

19.1 That they present that letter to the security personnel at the gate for access and to Scarlet Sun who were temporary caretakers of the

farm with the CPA. That had to happen by the latest on Saturday 30 May 2009 at 15:00;

19.2 That they provide the Commission and the security at the gate with the contact details of the person who will be dropping off security guards and furnish them with the registration details of their vehicle(s) by Monday 01 June 2009 before 10:00; and

19.3 That the changeover of security guards be carried out before 18:00 to avoid conflicts and extra hours being claimed by security guards. That failure to comply with the above would render the permission invalid.

It is therefore incorrect to state that access to traverse the road was uninterrupted since 2009 when, on the contrary, permission was sought by the Trust and was granted as aforementioned. Scarlet Sun was formally recognised as the caretaker of the farm, albeit for an interim period.

[20] Scarlet Sun was granted a mining permit valid from 16 July 2010 for 12 years, ending on 15 July 2022. A mining permit holder is not exempt from complying with the relevant provisions of the Mine Health and Safety Act, 29 of 1996, and all other applicable laws of the country. This obligation cannot be fanciful. Which is what it would amount to if the applicants' contention is sustained. Sec 5(2)(b) requires an employer to maintain a healthy and safe mine environment. It stipulates that:

*“(2) As far as reasonably practicable, every employer must –
(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.”*

It cannot be gainsaid that this obligation does apply to Scarlet Sun regard being had to the submissions that there are six contractors mining on the

farms Than and Mozib using dumper trucks, front end loaders and excavators which cross over road B-A-D. There are therefore health and safety risks that must be managed.

- [21] In ***Bengwenyama Minerals (Pty)Ltd & others v Genorah Resources (Pty) Ltd & others*** 2011 (4) SA 113 (CC) Froneman J remarked further:
“If the landowner or lawful occupier impedes holders of prospecting rights [I would also add mining rights] in the exercise of their rights, the holders must report this to the regional manager concerned.”
- [22] Section 54(1) of the Mineral and Petroleum Resources Development Act 24 of 2008 stipulates:
“(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question –
(a) refuses to allow such holder to enter the land;
(b) places unreasonable demands in return for access to the land; or
(c) cannot be found in order to apply for access.”
- [23] The applicants have not persuaded me why they have not approached the Regional Manager as required. They are dilatory in their endeavour to bring finality to this this matter. They were previously locked out by the CPA members in Case No 393/2012 whereupon they sought and obtained interim and final relief. The current significant difference between that application and the present one lies with the citation of Scarlet Sun as the party responsible for locking the access gate and not the members of the CPA. It is inexplicable why the applicants would

always resort to seeking interim measures when a problem of this nature surfaces. They do not require a court order to institute an action neither are they prevented from seeking certainty and clarity from the Regional Manager as s 54 of the MPRDA contemplates.

[24] I am not convinced that the applicants have established a *prima facie* right regard being had to the evidence that was placed before me. The balance of convenience favours the dismissal of the application. In any event they have an alternative remedy of either approaching the Regional Manager or institute action for the proper ventilation of all the issues.

[25] The Constitutional Court emphasised the importance of internal remedies by way of the pronouncement by Mokgoro J in ***Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*** 2010 (4) SA 327 (CC) (2009 (12) BCLR 1192;

“[35] Internal remedies are designed to provide immediate and cost effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost effective internal remedies cannot be gainsaid.

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often

emphasised that what constitutes a “fair” procedure will depend on the administrative action and circumstances of the particular case. Thus, the need to allow the executive agencies to utilise their own fair procedures is crucial in administrative action.”

- [26] It is further unclear whether the Land Use Planning Ordinance 15 of 1985 (LUPO) has been complied with. Japhta J discussing the interplay between LUPO and MPRDA in ***Maccsand (Pty) Ltd v City of Cape Town and Others*** 2012 (4) SA 181 (CC) at 191B-C (para 18) stated:

“[18] Therefore in terms of LUPO, mining may only be undertaken on land if the zoning scheme permits it (or a departure is granted). If not, rezoning of the land must be obtained before the commencement of mining operations. The zoning that permits that land to be used for mining does not, however, license mining nor does it determine mining rights. The role played by LUPO is limited to the control and regulation of the use of land.”

This to me suggests that spatial planning and if needs be rezoning ought to have been undertaken to cater for the accessibility to the farm concerned. The responsibility is coordinated among the relevant departments.

- [27] The phrase “*ter naaste lage en minste schade*” is not inflexible. In view of the factual issues emanating from this case it is in my view advisable for this matter to be fully ventilated by way of action proceedings. The Environmental Plan of the applicants, which did not form part of the papers, ought to have addressed the issue of the road. If it does not, the Regional Manager ought to correct this shortcoming.

[28] Regard being had to the oral and written submissions and all the supporting documentation, I therefore find that the applicants have not succeeded in meeting all the requirements for a temporary interdict. Not only did they fail to show that they did not have alternative remedies, apart from seeking an interdict, but also the *prima facie* right to traverse the Than farm is unclear. Their application stands to fail for the stated reasons. The Environmental Authorisation ought to have specified the road to be utilised by the applicants. If there was an omission or oversight, the Regional Manager and all other internal remedies should have been exhausted. The upshot of what has gone before is that Drooge Veldt is not landlocked.

Costs

[29] Scarlet Sun and The Sydney on Vaal Communal Property Association have successfully opposed this application. There is no reason why costs should not follow the result.

Order

[30] The following order is made:

1. **The interim order granted on 16 September 2016 is discharged.**
2. **The first applicant, Theta Mining Proprietary Limited, and the second applicant, Lonrho Mining SA Proprietary Limited, are ordered to pay the costs jointly and severally, the one paying the other to be absolved.**

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MAMOSEBO J

NORTHERN CAPE DIVISION

For the applicants: Adv BM Gilbert
Instructed by: David Levithan Attorneys
Duncan & Rothman

For the respondents: Adv CN van Heerden
Instructed by: Van De Waal Inc