



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 HIGH COURT, DIVISION, KIMBERLEY]

Case No: 1463/11

In the matter between:

SAAMWERK SOUTWERKE (PTY) LTD

PLAINTIFF

AND

MINISTER OF MINERAL RESOURCES

1ST DEFENDANT

SA SOUTWERKE (PTY) LTD

2ND DEFENDANT

CORAM: LEVER AJ

JUDGMENT

Lever AJ

1. In this matter the plaintiff, Saamwerk Soutwerke (Pty) Ltd ("Saamwerk" or "plaintiff"), claims damages in delict against the Minister of Mineral Resources ("the minister" or "first defendant") and SA SOUTWERKE (Pty) Ltd ("SAS" or "second defendant"), jointly and severally, the one paying the other to be absolved.

2. At the commencement of these proceedings the parties moved an application by agreement that the issues of the quantum and the merits be separated. In the circumstances the issues were separated and the appropriate order was made.
3. The parties have already engaged in fairly lengthy litigation leading up to the present damages claim. The background to this earlier litigation will only be referred to insofar as it is necessary to give context to the present action.
4. On the 13th July 2005 the plaintiff applied to the Kimberley office of the erstwhile Department of Minerals and Energy (“DME” or “the department”) for a permit to mine salt on a property described as Portion 146 of Portion 58 (Vrysoutpan) of the farm Kalahari-West No: 251, Gordonia District, Northern Cape Province (“Vrysoutpan”) under the provisions of section 22 of the Minerals and Petroleum Development Act¹ (“MPRDA”).
5. The second defendant got to hear of the plaintiff’s application in July or August of 2006 and wrote to the department claiming to have a valid “old order right” to mine salt on Vrysoutpan and attached a copy of the document that embodied the right it claimed to this letter.
6. On the 27th September 2006 the department informed the plaintiff in writing that its application for the right to mine salt on a portion of Vrysoutpan had been approved in principle, subject to certain conditions. In essence all that remained to be done in respect of the said application for a mining right was for the plaintiff to fulfil the conditions referred to in this letter (“the letter of grant”) and the formal execution of the mining right.
7. The two conditions relevant to the “in principle” approval of the plaintiff’s mining right in the letter of grant, were: Firstly, the lodging of a proper rehabilitation guarantee; and Secondly, a revised

¹ Act 28 of 2002.

Social and Labour Plan (“SLP”). Plaintiff contends that it fulfilled both of these conditions. The last of which was the revised SLP, which it submitted on the 6th December 2006. Accordingly, plaintiff claims to have been entitled to the formal execution of its mining right by no later than the 2nd January 2007.

8. Second defendant claimed a pre-existing old order mining right for the same property and in respect of the same mineral. The right that second defendant claimed is embodied in a document described as MP169/2004. This document was not in the relevant mineral laws file in the early days of this saga. The document that was present in the relevant mineral laws file at that time, was a copy of MP 169/2003.
9. MP169/03 was issued for a period of one year and had expired by the material time. MP169/2004 did not have provision for a period of validity and this feature will be considered later on in this judgment. By virtue of the fact that MP169/2004 did not provide for a period of validity certain staff members of the department considered MP169/2004 to be at least invalid. What was said at certain meetings by such staff members and what they claim to have meant when they referred to this document in those meetings will also be referred to later on in this judgment.
10. The department did not execute the plaintiff's mining right and set up a process to investigate the situation. This was the position that prevailed on the 22nd March 2007 when the plaintiff instituted an application under case number 292/2007 seeking *inter alia* an order compelling the department to execute its mining right.
11. Initially the department defended this application, which was referred to oral evidence to resolve the various disputes. At some point before the oral evidence was heard in that application, the department withdrew its opposition to the application. The presiding judge in that application felt that he could not resolve the disputes in that matter without the input and evidence of the

department. The department then filed an application seeking leave to re-join the matter. On this basis, the department participated in the application and adduced evidence to assist the court.

12. Ultimately, on the 10th December 2009, the High Court in matter number 292/07 found in favour of the present plaintiff and ordered *inter alia* that the department execute the present plaintiff's mining right.
13. Thereafter the present second defendant sought leave to appeal, which was refused. Ultimately, by way of petition second defendant appealed to the Supreme Court of Appeal (SCA). The matter proceeded in the SCA under SCA case number 491/10.
14. On the 1st June 2011 the SCA also found in favour of the present plaintiff and dismissed the appeal.
15. The first defendant executed and issued the plaintiff's mining right on the 5th June 2011.
16. The High Court in case number 292/07 and the SCA in appeal number 491/10 both found that permit number MP169/2004, on which the present second defendant relied to establish its pre-existing old order right, was a forged document.
17. In the present proceedings it was eventually agreed by all of the parties involved that neither the High Court in matter number 292/07 nor the SCA in appeal number 491/10 needed to find that MP169/04 was a forged document in order to reach their respective conclusions and that accordingly this issue is not *res iudicata*.
18. Plaintiff claims as damages its loss of profit for the period from 1 January 2007, the date when it believes it was entitled to its mining right up to the 24th June 2011, the date when the second defendant vacated Vrysoutpan. Although plaintiff claims damages from the 1st January 2007 in its Particulars of Claim, Mr Duminy SC who appeared on behalf of the plaintiff conceded that plaintiff

would probably only have had its right issued to it on the 2nd January 2007, as the 1st January was a public holiday.

19. The basis of plaintiff's claim for damages against the first defendant is that first defendant and/or the department had a legal duty to approve and/or sign and issue plaintiff's mining right by, at least, the end of December 2006. Also that first defendant had a legal duty to prevent the second defendant's illegal mining activities on Vrysoutpan.
20. Then plaintiff pleaded that: Firstly, the first defendant unlawfully, with malicious intent and dishonestly, alternatively negligently refused and/or neglected to approve and/or sign and issue the plaintiff's mining right by December 2006; and Secondly, dishonestly and with malicious intent refused and/or neglected to prevent the second defendant's illegal mining activities on Vrysoutpan.
21. Plaintiff then pleaded that the direct result of above acts or omissions on the part of the first defendant led to the plaintiff only being able to commence its mining activities on Vrysoutpan on the 25th June 2011.
22. As against the second defendant, the plaintiff pleaded that the second defendant unlawfully, with malicious intent and fraudulently represented to the department and the plaintiff from September 2006 to 10 December 2009 that it held a lawfully issued and valid mining permit that authorised it to mine salt on Vrysoutpan from 28th April 2004 for an indeterminate period, well knowing that such permit was a false permit, or an invalid permit or that such permit had not been lawfully, validly or regularly issued by the department. Alternatively, that second defendant was negligent in that it ought reasonably to have been aware or become aware that such permit was not lawful, regular or valid. Further alternatively, the second defendant was negligent in accepting the validity of such permit at face value where on the face of it, such permit appeared questionable or where the questionable status of such permit was brought to the attention of the second defendant as early as 2006.

23. Plaintiff pleaded that the second defendant refused to vacate Vrysoutpan until the 24th June 2011.
24. Plaintiff further pleaded that the second defendant's conduct, dealings and/or refusal and/or neglect directly contributed to the department's refusal to sign and issue the plaintiff's approved mining right to extract salt from Vrysoutpan. Furthermore, the said conduct, dealings and/or refusal and/or neglect directly contributed to the fact that plaintiff could only exercise its right to mine on Vrysoutpan from the 25th June 2011.
25. Mr Duminy conceded that plaintiff would not be relying on negligence as a basis for its claim as against both first and second defendants. He submitted that in any event the evidence would establish fraud on the part of both first and second defendants.
26. It is necessary to briefly mention one further aspect of the prior litigation before turning to deal with the merits of the present action. In the court *a quo* in case number 292/07 the court made an order on the 10th December 2009 and provided its reasons approximately three weeks thereafter. In the said reasons for judgment, the learned judge in that application recorded that it was common cause between the parties that MP169/04 was a forged document.
27. Mr Grobler SC, who appeared on behalf of the second defendant, took me through the relevant passages of the record in matter number 292/07 which forms part of the SCA record in appeal number 491/10. Specifically, Mr Grobler referred me to certain concessions made by the present second defendant in a counter-application that formed part of case 292/07.
28. Mr Duminy in his argument in reply did not even refer to this issue and the submissions made by Mr Grobler in argument on behalf of the present second defendant. In these circumstances I think I can safely conclude that there are no other concessions, either in the main application or the

counter application in matter number 292/07 that would justify the court a quo's conclusion that it was common cause that MP169/04 was a forged document.

29. Mr Grobler also referred me to the application for leave to appeal, which listed this issue as one of the grounds of appeal. The court a quo in dealing with this issue when refusing leave to appeal stated that even if it had erred in this regard, it would not have made any difference to the outcome of matter 292/07. Mr Grobler informed the court that this ground of appeal was not proceeded with in the SCA.
30. After considering the passages that Mr Grobler referred me to, and with the greatest respect to the court a quo in matter 292/07, I do not believe that it justified the conclusion that the present second defendant conceded that permit MP169/04 was a forged document.
31. The first and second defendants both filed special pleas of prescription. The plaintiff's claim is for a continuing wrong that persisted from the 1st January 2007 until the 24th June 2011. In effect its claim is for a series of infringements that arose from day to day during the aforementioned period. Summons was issued against the first defendant on the 6th September 2011 and was served on the second defendant on the 11th September 2011. In these circumstances prescription would only be a partial defence and would affect only those claims that arose before the 6th and 11th September 2008 respectively. Accordingly, I will only consider the issue of prescription if the plaintiff establishes that one or both of the defendants is/are liable in delict to make good the damages it claims.
32. First defendant, being an Organ of State has also pleaded that plaintiff has not fully complied with the provisions of the Institution of Action Against Certain Organs of State Act². First defendant pleads that plaintiff has only complied with the provisions of section 3 of the Act mentioned herein for the six month period immediately preceding the notice given by the plaintiff. Similarly, this is

² Act 40 of 2002.

also only a defence to a portion of the plaintiff's claim. In the circumstances, I will also only consider the merits of this defence if the plaintiff establishes that first defendant is delictually liable to make good the damages it has suffered.

33. Plaintiff in its replication sought condonation for its non-compliance with the notice required in terms of the Institution of Actions Against Certain Organs of State Act. Again, since this issue affects part of the claim and does not concern the entire claim, I will only consider the application for condonation if the conclusions reached require that it be dealt with.
34. First and second defendant have both raised issues related to causation. Broadly, first defendant submitted *inter alia* that plaintiff's first rehabilitation guarantee was not regular and a proper guarantee was only provided on 20th April 2009 and that it would not have been able to mine prior to that date and also it had not had its Environmental Management Plan ("EMP") approved, which occurred simultaneously with the issue of the mining right on the 7th June 2011. Second defendant added the issue of a valid water use permit, which it maintains the plaintiff still does not have. Second defendant submits that by virtue of the provisions of the MPRDA the plaintiff cannot mine without a water use permit.
35. Furthermore, second defendant also raised the issue of the Social and Labour Plan ("SLP") and submits that only the revised plan submitted in April 2009 proved to be compliant. Then second defendant submits that the plaintiff's mining right could only have become unconditional after 2009 and that in fact the plaintiff's SLP was only approved by the department on the 7th June 2011.
36. In my view the real dispute to be determined between the parties is whether or not either or both the first and second defendants acted fraudulently as pleaded by the plaintiff. This issue is then the appropriate point of departure. The fact that I am not considering the prescription, legal notice to the first defendant and causation issues does not mean that I have rejected them, but merely that it

may not be necessary for me to deal with them further until I have resolved the issue of the alleged fraud on the part of the first and second defendants.

37. Plaintiff has accepted that it bears the onus of establishing fraud on the part of the defendants. In order to succeed in its claim against both defendants, plaintiff must establish fraud on their part and that first and second defendants colluded in such fraudulent conduct. As already set out herein plaintiff has abandoned the alternative cause of action based on negligence.

38. Mr Trengove SC, who represented the first defendant herein, has submitted that the plaintiff has not pleaded nor established that any employee of the department who colluded in the alleged fraud acted within the course and scope of his/her employment with the first defendant.

39. Nor has plaintiff pleaded or established that if such employee was not acting within the course and scope of his/her employment that there existed special circumstances under which the first defendant should still be held liable for the alleged fraud.

40. Mr Trengove mentioned the issue of vicarious liability, in reality in passing, it was not dealt with in the pleadings and it was not taken any further than simply mentioning it in argument. Having regard to the overall view I take of the case it is not necessary to delve into the issue of vicarious liability.

41. Plaintiff has not been able to adduce any direct evidence of fraud on the part of either of the defendants. Plaintiff's case rests on a number of inferences it wishes the court to draw from circumstantial evidence in order to justify the conclusion that the defendants committed or colluded in fraud as alleged in its Particulars of Claim.

42. In the matter of LOOMCRAFT FABRICS CC v NEDBANK LTD & ANOTHER, Scott AJA dealt with the issue of how fraud is to be established and proved in the following manner:

“But the fraud on the part of beneficiary will have to be clearly established. The *onus*, of course, remains the ordinary civil one which has to be discharged on a balance of probabilities but, as in any other case where fraud is alleged, it will not lightly be inferred.”³ (references omitted)

43. The learned authors of SCHMIDT., LAW OF EVIDENCE, deal with the issue in the following manner:

“According to current views it would not, however, be quite correct to speak of a stricter measure than proof on a balance of probabilities. The standard remains the same, but in such cases it is accepted that the preponderance of probabilities is usually more difficult to establish than the normal case.”⁴

In discussing what this means the learned authors cite two possibilities, the second one seems apposite in the present case. Namely, that the type of conduct is so contrary to the normal that right from the start, the balance is tipped towards the other side for example where immoral conduct is in issue.⁵ In order to illustrate what is meant by this, the learned authors cite a *dictum* of Watermeyer JA:

“There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.”⁶

44. Furthermore, any inference sought to be drawn must be consistent with all of the known or proved facts.

³ LOOMCRAFT FABRICS CC v NEDBANK LTD & ANOTHER 1996 (1) SA 812 (AD) at 817 E-H.

⁴ CWH SCHMIDT & H RADEMAYER., Law of Evidence., Lexis Nexis., Issue 12., 3-6.

⁵ Schmidt., supra., at 3-6.

⁶ Gates v Gates 1939 AD 150 at 155.

45. Broadly, the scenario that the plaintiff sought to establish as the most probable one and which it contends would establish fraud on the part of the defendants, is as follows: The department issued and delivered MP169/03 to the second defendant during or about April of 2004; MP169/03 clearly had a period of validity of one year from the date of issue; second defendant received MP169/03, noted its period of validity but ultimately did nothing to secure a right beyond that expiry date; when second defendant realised that there was a competing right, someone on its behalf must have colluded with someone employed in the department to forge or manufacture MP169/04; that MP169/04 was forged or manufactured with the intention of frustrating the execution of plaintiff's mining right which had been approved in principle in the letter of grant and also trying to create a right for the second defendant to rely on in its application to convert an old order right to a right under the MPRDA.
46. Although the evidence adduced by the plaintiff was wide ranging and plaintiff never succinctly set its case out in the manner set out above. This is what emerged from the evidence led by and the submissions made on behalf of the plaintiff.
47. For my own convenience I have divided the evidence up to deal with three contentions made on behalf of the plaintiff to assist me in analysing the evidence in order to establish whether the plaintiff has established its version is consistent with all of the known facts and whether it has established on a balance of probabilities that its version is the most probable version in the circumstances.
48. These three contentions made on behalf of the plaintiff are set out hereunder.
49. Firstly, Mr Duminy contends that the very fact that MP169/2004 was produced on the department's letterhead, which it is alleged was not freely available, means that somebody in the department must have colluded with somebody from the second defendant to forge or manufacture MP169/04. This is

connected to a further contention being that the second defendant would be the only entity to benefit from the forging of MPI69/04.

50. Secondly, the fact that MPI69/04 did not appear in the department's mineral laws file initially, but a copy of MPI69/04 was discovered relatively recently in the rehabilitation file when the first defendant filed its discovery affidavit for this action is suspicious or sinister.
51. Thirdly, that the second defendant had in fact received MPI69/03. This showed that second defendant was aware that it had a permit that was only valid for a period of one year from the 28th April 2004 and thus had a motive for someone on behalf of second defendant to collude with someone in the department to forge or manufacture MPI69/04.
52. Each of these contentions will be examined individually to determine whether they are consistent with all of the known facts. However, they will be considered together or cumulatively to determine whether they, collectively, go far enough to establish on a balance of probabilities, on the basis set out above, that one or both of the defendants acted fraudulently with malicious intent as pleaded by the plaintiff.
53. Turning to the first contention. MPI69/03 and MPI69/04 both purport to have been issued on the 28th April 2004. This places the second defendant's permit in the transitional phase between the old Act and the new MPRDA.
54. The department's record of decision relating to the second defendant's application for a mineral right, as well as the correspondence and royalty payment records show that a five year mineral right in favour of the second defendant was contemplated. The permit register also disclosed that the mineral right contemplated was for a period of five years. An employee of the department, one Succaina Jarodien ("Jarodien") drew up the draft permit and filled in the permit register in accordance with the contemplated five year period of validity.

55. The second defendant's application came before the then head of the Kimberley office of the department, who at the time was a Mr Mfetwane ("Mfetwane"). On the department's record of decision the reference to five years was changed in that the word "five" was crossed out and replaced with the numerals "12". Mr Duminy submitted that the most probable meaning of that was the permit was to be issued for 12 months. This seems to have been accepted by both defendants and this seems to coincide with MP169/03 which has a one year period of validity.
56. Second defendant relies on permit MP169/04 to establish its old order right. MP169/04 appears to be the same as MP169/03 in format and overall appearance, but there are two important differences in the appearance of the printed documents. There are also certain differences in the department's stamps, but it is difficult to draw conclusions from the differences in these stamps and nothing more will be made of the differences in the stamps on the respective documents.
57. The important differences in the appearance of the respective documents are that MP169/03 has provision for a period of validity and MP169/04 has no provision for a period of validity. MP169/03 has less than a centimeter space between the department's coat of arms and the document's first heading. Whereas MP169/04 has approximately three centimeters between the same coat of arms and the same first heading.
58. There was a meeting on the 6th December 2006 where Mr Mdaweni ("Mdaweni"), Mfetwane's successor as head of the Kimberley office, was heard to use words to the following effect, that: "MP169/04 was issued under fraudulent circumstances." Mdaweni was called as a witness on behalf of the plaintiff, but he specifically tried to qualify that statement in his evidence by saying that what he meant was that on the face of it MP169/04 was not valid as it did not provide for a period of validity and that there was no record of it in the mineral laws file, the file in which mining permits were kept.

59. It was clear from Mdaweni's evidence that at that stage he had no evidence of fraud on which to base the aforementioned statement. In fact viewing Mdaweni's evidence as a whole, it does not disclose a reasonable and acceptable basis on which to make an allegation of fraud. Certainly, there were legitimate concerns such as the fact that MP169/04 did not have provision for a period of validity and that it was not in the mineral laws file, but this is not sufficient in and of itself to show fraud.
60. The evidence establishes that a Mr Guthrie ("Guthrie") was sent by the department's head office in Pretoria to investigate the matter. He also expressed the view that on the face of it MP169/04 was not valid. He was going to write a report to the Director General Ms Zikalala with a recommendation. This report never emerged and we also do not know what Guthrie's recommendation was.
61. Mr Swart ("Swart") followed Mdaweni as the head of the Kimberley office of the department. Swart was used as a "troubleshooter" to regularise problematic offices. He of course held that position in the Kimberley office long after the events in question had taken place. Swart was involved whilst the litigation in case number 292/07 and the subsequent appeal was in progress.
62. It emerged from Swart's evidence that he was told that at the time that either MP169/03 or MP169/04 was issued that Mfetwane had signed a batch of second pages for permits in bulk because the office was under severe strain due to the fact that this was the transition period from the old Act to the MPRDA. Mr Duminy objected to this hearsay evidence. At the time I ruled that this hearsay evidence was provisionally admitted and that the issues relating to its admissibility would be fully canvassed during argument.
63. Ms Roelien Oosthuizen ("Oosthuizen") gave evidence that at the time that either MP169/03 or MP169/04 was issued she worked in the environmental department of the Kimberley office of the

department. Her evidence really relates to the second contention and will be dealt with in more detail hereunder. She did however express a view that what came to be known as the “innocent explanation theory” was possible and that is the reason for her evidence being mentioned at this point in the judgment.

64. Mr Trengove, on behalf of the first defendant, put a hypothetical scenario to the witness who either worked in the department at the time that the permits in question were issued, investigated the matter or were involved in the litigation in case number 292/07.

65. The scenario that was put to these witnesses went along the following lines: The permits concerned were created in the Kimberley office on the computers of the Mineral Laws department; standard templates for these permits were used; the appropriate fields on these templates were filled in; the first page of the permit was a departmental letterhead that had a coat of arms lithographed onto it; the letterhead page was a better quality paper than the second page which was ordinary bond paper; these permits were printed on various printers available in the department; permit numbers were allocated chronologically in the “permit register” for the year in which they were issued; it was not usual practice in that office to physically issue a permit with a permit number from the previous year; the permit register in relation to the permit concerned was filled in during 2003; the record of decision, the draft covering letter and the draft permit were prepared in 2003; the permit concerned was only signed during April 2004; an unknown person in the Kimberley office reprinted the first page of the permit and changed the permit number to reflect that it was issued in 2004; the different computers made different provision in each template to accommodate the coat of arms on the letterhead page; MP 169/04 made greater allowance for the coat of arms and there was more space on it between the coat of arms and the first heading of the body of the permit; as a result of this greater allowance for the coat of arms the provision for the period of validity fell off the bottom of page 1 and would have appeared on page 2; however, if one simply reprinted the first page and

attached it to the signed second page a permit would be created without provision for a period of validity.

66. Each of the relevant witness confirmed the factual contentions relating to the procedures followed in this scenario as far as they were able to and save for Mdaweni, confirmed that the other aspects were indeed possible. Mdaweni maintained that he could not accept or deny this theory. Implicitly, Mdaweni's approach confirms that the said scenario was possible. This scenario came to be known as "the innocent explanation theory".
67. It was only Guthrie that qualified his acceptance of the possibility of this theory to the extent that he maintained that the template was only available on the computers of the Assistant Deputy Directors or Deputy Directors in the Mineral Laws department. Swart's evidence was that these templates were more widely accessible. Swart estimated that 7 to 9 people had access to these templates in the mineral laws department at that time. Furthermore, he stated that these people would not necessarily be high ranking officials in the mineral laws department.
68. The plaintiff called a document expert, Mr Hattingh ("Hattingh") who examined the original MPI69/04. Hattingh's main findings were that the first page of MPI69/04 was printed on an ink jet printer and the second page of that document was printed on a laser printer. The second page had one set of punch holes on it that were not on the first page. The first page had certain staple holes that were not found on the second page and visa – versa. Furthermore, the second page of MPI69/03 appeared to be the same as the second page of MPI69/04. However, it must be noted that Hattingh never had the original of MPI69/03 to compare its original second page to that of MPI69/04.

69. Hattingh conceded that the innocent explanation theory was possible. Save for the issue of the pair of punch holes on the second page of MP169/04 Hattingh's main findings could also be consistent with the innocent explanation theory.
70. It is true that the issue of the pair of punch holes on the second page does raise certain questions, but whether in and of itself, this is sufficient to establish fraud on the part of the defendants is doubtful.
71. Considering the evidence of those persons who worked in the office of the department in Kimberley at the relevant time and the evidence of those who investigated this matter on behalf of the department at that time, it is clear that the Kimberley office of the department was under severe pressure during and around April 2004.
72. The MPRDA came into effect on the 1st May 2004. Holders of "old order" rights held significant advantages over new applicants for mineral rights under the MPRDA. Therefore there was a rush by those involved in the mining sector to secure their old order rights before the cut-off date. The evidence was that on the last day for registration of permits under the old legislation twenty permits were registered and issued. By contrast on a normal day if any permits were issued at all, there would not be more than one or two permits issued on that particular day.
73. From the evidence led on this transition period it would be fair to conclude that there was a measure of chaos that prevailed in that office at that time.
74. Turning to the question of the hearsay evidence tendered by Swart relating to the signing of the second pages in bulk by Mfetuane. I canvassed the issue of hearsay evidence directly with Mr Duminy during his argument on behalf of the plaintiff. His attitude was that he would not take the matter further as he did not believe anything turned on it. Having regard to Mr Duminy's attitude, I intend to admit this evidence, but I do not intend to give it much weight. I will only rely on it to the

extent that it supports the conclusion that there was a measure of chaos in that office at the relevant time.

75. Turning to the related contention made on plaintiff's behalf that it was only the second defendant that stood to gain from a forged MP169/04. In my view this argument does not take account of the fact that the second defendant used professional advisers in their application for a mining right. These professional advisers would have known that once an old order right had been secured a conversion was almost a formality. In these circumstances it would not matter whether the old order right was for a period of one year or five years.
76. The second defendant and its legal advisers might have made a mistake in regard to the validity of the permit that second defendant received or the period they believed the permit to be valid, but whilst they believed they had a valid permit there would be no motive or reason to forge a permit.
77. It is more probable that second defendant's legal advisers would have advised them to lodge an application to convert their old order right. The right to do so emerges clearly from the MPRDA.
78. The argument that the second defendant was the only one to benefit from a forged MP169/04 and therefore it had a motive to do so might have carried more weight if plaintiff could establish that the forgery occurred after the expiry of the period of validity of MP169/03. Understandably, plaintiff is not in a position to do so.
79. The factors that tend to show that MP169/04 might be a forgery are as follows:
 - 79.1. On the face of it, it does not make provision for a period of validity;
 - 79.2. The permit number 169/04 does not exist in the permit register for 2004;
 - 79.3. The pair of punch holes on the second page of the permit when it was examined by Hattingh still raises some questions; and

79.4. The covering letter refers to MP169/03.

80. The factors that tend to support the “innocent explanation theory”, are as follows:

80.1. The physical appearance of MP169/04 shows that a great deal more space was left to make provision for the coat of arms on the department’s letterhead;

80.2. In these circumstances it is probable that the provision for the period of validity, which appears at the bottom of the first page in MP169/03, would have fallen off the bottom of page one on MP169/04 and would have been moved by the word processor to the second page;

80.3. If a member of staff changed the permit number to reflect the year of actual issue and reprinted the first page on a computer whose template left more space for the coat of arms on the letterhead, it is probable that MP169/04’s physical appearance would be as it is today;

80.4. If MP169/04 was in fact forged, it is an almost unbelievably shoddy attempt at forgery. If one is going to the trouble of committing a criminal act and forging an important document such as a mining permit, you would expect the perpetrators to at least go to the trouble of making it look valid on the face of it;

80.5. In fact it is also incredibly stupid for a forger to use a permit number that clearly doesn’t exist in the permit register. It would be more probable for a forger to stick to the 2003 register number. To use a permit number that doesn’t exist simply draws attention to the document and announces its doubtful provenance; and

80.6. It begs the question as to why the second defendant would forge an old order right when it was clearly entitled to an old order right on the basis of the record of decision and once it had an old order right, all that it needed to do was to lodge an application for conversion.

81. The “innocent explanation theory” is compatible with an official letterhead being used for MP169/04. In these circumstances, the use of the official letterhead becomes a neutral factor.
82. The evidence in relation to the covering letter was that it was drafted in 2003 when the entry was made in the permit register. In the chaos prevalent in the Kimberley office of the department during the transition period to the MPRDA it is possible that the covering letter might simply have been sent out without reading and checking it. Clearly, the office was overwhelmed during this transition period.
83. While the pair of punch holes on the second page raises some questions. It does not in and of itself prove that the document was forged. Mr Van Den Heever (“Van Den Heever”), the second defendant’s attorney gave evidence that the document was pristine and without punch holes when he received it. Van Den Heever’s evidence will be considered in greater detail later in this judgment.
84. I now turn to consider the plaintiff’s second contention being that the absence of MP169/04 from the department’s records and it being found in the rehabilitation file during the discovery process for the present action is suspicious.
85. It emerged from the evidence of Oosthuizen and Van Den Heever that there had been telephonic contact between Van Den Heever’s secretary and Oosthuizen as well as between Van Den Heever and Oosthuizen during the period April to June 2004.
86. The point of this communication was to establish what happened to the second defendant’s mining right and Van Den Heever’s office wanted to establish what happened to the permit itself as it had not at that time been received by the second defendant.
87. Although Oosthuizen was in the environmental department there had been contact between her and Van Den Heever’s office regarding the permit which was the function of the mineral laws

department. However, it appears that over the transition phase to the MPRDA everyone pitched in where they could.

88. When dealing with the enquiry of where the permit was Oosthuizen checked the mineral laws file and found on top of it a package of documents being a copy of the covering letter and the permit. Oosthuizen's evidence was that she took this pack of documents made a copy replaced the original copy in the mineral laws file, faxed the new copy to Van Den Heever's office and placed the new copy of such documents in the environment file.
89. In bundle "C" at pages 138,139,139A and 139B the document that was received by the fax machine in Van Den Heever's office appears. This document has the imprint of the receiving fax printed on the bottom of each page. This imprint shows that the fax was received on the 14th June 2004 at 10:43, that this document was the 15th communication received by that fax machine and the pages received were numbered consecutively. Showing that four pages were received.
90. Pages 3 and 4 of this fax show that MP169/04 was faxed to Van Den Heever's office on the 14th June 2004. This document shows Oosthuizen's handwritten note on the front page of the covering letter, "For Attention: Rista 054 – 3388111".
91. Rista was Van Den Heever's secretary at that time and the number written on the document by hand is the fax number of Van Den Heever's office.
92. The next document in bundle "C" at pages 140, 141, 142 and 143 show the same document without the fax imprint at the bottom of the page. This document has a typed inscription at the top right hand corner of each page "REHAB – 17", "REHAB – 18", "REHAB – 19" and "REHAB – 20" respectively. The Court was informed by Mr Trengove that these inscriptions were made by his junior Mr Vorster during the discovery process when preparing for this trial.

93. The evidence was that this was the document that was faxed by Oosthuizen and placed by her in the rehabilitation file after it was faxed. Oosthuizen's evidence when asked about the reference to MP169/03 in the covering letter was that she did not read the document, she simply faxed it.
94. Another feature of both these documents that needs to be mentioned is that somewhere between a third of the width and halfway into the width of each of these pages there is a light area that runs from the top to the bottom of each page. Even though it appears that these two documents were photocopied at different magnifications this light stripe seems to match in each respective page of the respective documents. The evidence was that this light stripe was caused by the department's photocopying machine.
95. Mr Grobler pointed out another copy of the covering letter of this document appeared in the SCA record. This copy of the covering letter shows Oosthuizen's covering note but it does not show the fax imprint at the bottom of the page. The evidence of Van Den Heever was that this copy of the document was faxed to his Kimberley correspondent, Mr Potgieter ("Potgieter") when he was trying to trace the original permit. Mr Grobler submitted that at the time of the application 292/07 and the subsequent appeal, the relevance of these three copies of the same document was not realised.
96. No evidence was tendered to try and explain why the fax imprint did not appear at the bottom of the page of the covering letter faxed to Potgieter's office. There are a number of possible explanations. One cannot just assume that the explanation for the fact that the fax imprint does not appear on the bottom of this copy must be a sinister one.
97. In argument Mr Duminy submitted that this fax would have been highly relevant in matter number 292/07 and the fact that it only comes to light now is very suspicious. I would be more impressed by Mr Duminy's argument if he told me that the contents of the rehabilitation file were discovered

in matter number 292/07 and this fax did not appear from such discovery. I have to assume that the reason Mr Duminy did not say so was because he was not in a position to say so.

98. Mr Duminy also submitted that the fax should have been in the mineral laws file and the fact that it comes out of the rehabilitation file is also suspicious. Mr Grobler countered with the argument that the fact that MP169/04 was missing from the mineral laws file when Oosthuizen's evidence was that she returned it too that file is equally suspicious. In my view Mr Grobler's point is well made.

99. Turning to the third contention, being that second defendant had in fact received MP169/03 and was well aware that it was only valid for a period of one year from the 28th April 2004. That consequently there was a motive for someone from the second defendant to collude with someone from the department to forge or manufacture MP169/04.

100. On this aspect, plaintiff called a Mr Daniel Johannes Van Zyl ("Van Zyl"). Van Zyl was sometimes referred to as "Danie" or "Danie Van Zyl" by some of the other witnesses. Van Zyl's evidence was to the effect that he was a former employee of the second defendant. That he prepared the second defendant's application for an old order right on Vrysoutpan. He left the employ of the second defendant at the end of May 2004. He never saw the permit concerned himself. He was told by someone, he can't remember who it was that the permit had been issued but that it was only valid for one year. There was a handover meeting in his office before he left attended by one Arrie Bester and Andre Blaauw. He remembers that something needed to be done in respect of the second defendant's mining right on Vrysoutpan, but that Bester and Blaauw had a nonchalant unconcerned attitude.

101. At some later stage Van Zyl read about the second defendant's alleged mining with a forged permit on Vrysoutpan in the Rapport newspaper. It was later established that this was probably the article that was published in Rapport on the 21st February 2010. A day or two after reading this article he phoned a certain Piet Prins ("Prins") whom he considered to be a friend of his and asked

him what was happening that the second defendant had made the papers. According to Van Zyl, Prins told him that he (Prins) told Elizma Fourie (“Fourie”) to get the permit out and when they saw the permit they realised that it was not a valid permit and then it emerged that Fourie never applied for the conversion. Prins who testified later on behalf of the second defendant denied telling Van Zyl these things.

102. Van Zyl in his testimony was particularly vague in regard to how he heard that the permit application had been successful but that it was only valid for one year. He acknowledged that he had never seen the permit. He left the employ of the second defendant at the end of May 2004.

103. Van Zyl maintains that he could have heard of the successful application either from Van Den Heever, second defendant’s attorney or that Van Den Heever had told Blaauw who told him. Van Den Heever denied discussing the permit with Van Zyl. Van Den Heever was criticised by Mr Duminy for embroidering his version when pushed under cross-examination in relation to the opportunity he may have had for discussing the permit with Van Zyl he disclosed that he dealt with Van Zyl when dealing with second defendant’s labour disputes. Van Den Heever did not give me the impression that he was embroidering his evidence. Van Den Heever was under cross-examination for a period that stretched over two days. I got the impression he was trying to be fastidious and provided detail as to his contact with Van Zyl.

104. The evidence relating to the circumstances under which Fourie left the employ of the second defendant does not show that she left under difficult circumstances. In fact there is still an ongoing relationship between the Blaauw group of enterprises and Fourie that undermines the contention that she left under difficult circumstances because she neglected to submit the conversion application.

105. My overall impression of Van Zyl’s evidence was that he was just too vague on how he came to learn of the permit being granted and that it was only valid for a year. In the circumstances I cannot

give this testimony any real evidential weight. The evidence of the conversation with Prins around Fourie's failure to submit the conversion application is denied by Prins and is not supported by the evidence relating to her departure from the employment of the Blaauw group and is also improbable in the light of Fourie's ongoing relationship with the Blaauw group.

106. Then plaintiff also adduced the evidence of Mr Zondagh ("Zondagh") and Adjutant Botha ("Botha") to show that second defendant had indeed been in possession of MPI69/03. To answer the plaintiff's evidence on this aspect the second defendant led the evidence of Ms Hester Pienaar ("Pienaar").

107. Zondagh was also a former employee of the second defendant and he described himself as the mine manager on Vrysoutpan. His evidence was that a Mr Jalie du Toit ("Du Toit") from the plaintiff had visited Vrysoutpan and had made certain allegations about the second defendant's permit. As a result of this Zondagh contacted Prins and asked about the permit. His evidence was that he was given a permit which had already expired to keep in his house on the pan. He then goes on to state that the commander of the Noenieput police station collected this permit from his housekeeper one day when he was absent from Vrysoutpan and that this was reported to him after the event by his housekeeper. After the first permit was taken in this fashion, he was later given a copy of MPI69/04 in a frame and he made copies of this for a policeman from the Witdraai police station by the name of De Koker.

108. Zondagh's evidence was of a very poor quality. He confused dates, he mixed up the chronology of events. He changed the chronology of events at different stages of his evidence. Having regard to the purpose for which Zondagh's evidence was given, the date when he allegedly came into possession of MPI69/03 is critically important. It is not something that can be ignored or lightly brushed over. There is also at least one improbability to his version. He claims that he asked for a copy of the permit because Du Toit made allegations about illegal mining. The evidence was that Du

Toit made a number of visits to Vrysoutpan but Zondagh never showed Du Toit the copy of the permit he had in his possession on any of these occasions.

109. Furthermore, in relation to Fourie and Bester's alleged failure to compile and submit second defendant's conversion application and how this story came out, he gave a version that was totally at odds with Van Zyl's evidence. When confronted with the fact that Van Zyl had left the employ of second defendant at the end of May 2004 and this alleged meeting took place long after that, Zondagh developed his evidence and then testified that this subsequent meeting took place after Van Zyl left but that he had visited the second defendant's offices on a social visit when this meeting allegedly took place. However, this is still at odds with Van Zyl's evidence on these issues.
110. In addressing this issue in argument Mr Duminy tried to excuse these lapses on Zondagh's part by arguing that Zondagh was not a sophisticated man and that he had previously been a truck driver and conceded Zondagh was poor with dates. I am not convinced. Zondagh's evidence was a poor display. To my mind it is inherently unreliable and must be treated as such.
111. Botha's evidence came before court as a result of the plaintiff bringing an application to re-open its case as a result of a reference Zondagh had made to the Nonieput station commander taking the first permit, alleged to be permit MP169/03. This application was granted but Zondagh was recalled to the stand for further cross-examination before Botha gave evidence.
112. Botha, an Adjutant in the SAPS, gave evidence that was to the effect that Gawie Hendriksz ("Hendriksz") lodged a criminal complaint by faxing an affidavit to him that there was illegal mining activity going on at Bloupan on the farm Annesley.
113. Botha's evidence-in-chief, surprisingly, commences with the allegation that he went to Vrysoutpan to investigate this complaint of illegal mining on Bloupan. It is only under cross-examination that Botha said no he went to Bloupan first and spoke to one Stoffel Gooi ("Gooi") who

referred him to Zondagh on Vrysoutpan and that Gooi said that Zondagh was in possession of all the permits. Why Botha started off his evidence-in-chief in this way was never satisfactorily explained.

114. Botha's evidence was to the effect that he arrived on Vrysoutpan, knocked on Zondagh's door. That a lady who he thought was the secretary opened the door, he explained what he wanted to her. That she did not invite him in but went inside and returned with a document. Botha took this document and drove off and a short distance away he stopped and examined the document and saw that it had already expired.
115. Under cross-examination he was asked if he saw that the document referred to Vrysoutpan and not Bloupan. His answer was that he thought that the document applied to all the salt pans. This aspect was also not satisfactorily explained. It appears that Botha did no further investigation. He completed the docket took it to his superior in Upington for inspection. His superior told him to refer it to the senior public prosecutor. Which he did and the docket got lost never to be seen again. Botha's investigation diary was archived and was not available at the trial.
116. Botha read in the press that there was an investigation going on in relation to the illegal mining on Vrysoutpan. He heard indirectly that the Witdraai police station was investigating the Vrysoutpan matter. Vrysoutpan being within the area of jurisdiction of the Witdraai police station. When asked whether he informed the Witdraai police that he had in investigating the Bloupan matter, taken into his possession a vital piece of evidence related to their investigation he answered no he did not contact them because he only heard indirectly about their investigation and he expected Zondagh to tell the Witdraai police that he (Botha) had investigated and taken the earlier permit. This answer is in my view singularly unconvincing.
117. Furthermore, if one looks at Botha's evidence in its entirety he simply believes that the permit, although it refers to Vrysoutpan also covered Bloupan and he seems to believe this gave him a

convincing case in relation to illegal mining on Bloupan that he thought could go to the prosecuting authority without any further investigation. I would at the very least have expected Botha to go to the head office of SAS in Upington and also phone up the department to confirm the position in relation to Bloupan. None of this was done. Botha's investigation was so perfunctory that his evidence just seems improbable.

118. Also Botha could only identify the permit itself, being MP169/03 in the format that it was faxed to him. The document was shown to him in the format in which he probably would have received it when he allegedly took it from Zondagh's house on Vrysoutpan and he could not identify it. At this stage of his evidence Botha was being questioned by Mr Duminy who gave him every opportunity to realise his mistake and correct his evidence, but he failed to do so.

119. Botha in his oral evidence also contradicted what was stated in the affidavit he filed in the plaintiff's application to re-open its case.

120. Mr Grobler also criticised the manner in which Botha identified the permit concerned. The permit was faxed to Botha to identify. Mr Grobler described this procedure as akin to a complainant being led into an identity parade with only one person, the suspect on parade. In my view Mr Grobler's point is well made.

121. Ms Pienaar was called by the second defendant and she gave evidence that she worked for Zondagh as a domestic worker on Vrysoutpan from 2006 to 2009. She further gave evidence that she knew Botha from the Noenieput police station and De Koker from the Witdraai police station. She even knew Botha's nickname which was related to his once red hair. Pienaar maintained that she never saw Botha or De Koker on Vrysoutpan. That she had never opened the door of Zondagh's house to Botha and that she had not given Botha a document. Pienaar maintained she would not scratch around Zondagh's work things.

122. Pienaar's evidence is also not without its flaws. She appears almost too ready to state things as absolutes. She had never seen a permit. There was no permit. This when nobody disputed that Zondagh was given a copy of MP169/04 in a frame that hung on a wall in his house. That Botha and De Koker had never been on Vrysoutpan. But Mr Duminy's justification for the faults in Zondagh's evidence would fit far more comfortably on Pienaar. Here was a woman that had been born, raised and educated in the far reaches of the Kalahari. She was a domestic worker, had no business with permits or licences of any kind. Licences were not her concern, her job was to clean the house.
123. Mr Duminy submitted that Pienaar had a motive to lie in that she believed she ought not to have given the document to Botha and that she would be in trouble if she admits to it. This submission is not impressive because Pienaar had left Zondagh's employ several years ago. There can be no meaningful repercussions for Pienaar at this stage.
124. Pienaar may also have been mistaken about the date that she left Vrysoutpan. Nevertheless taking an overall view of her evidence and performance in the witness box and comparing it with the overall evidence and performance of both Zondagh and Botha, it is my view that Pienaar's evidence is more probable and more reliable. It is on this basis that I accept Pienaar's evidence insofar as it relates to the permit not being given to Botha.
125. Despite my finding in Pienaar's favour there is a further aspect regarding the permit MP169/03 that deserves mention. It emerges from the evidence that second defendant was given a copy of MP169/03 at the meeting that took place on the 6th December 2006. Zondagh's evidence as to dates and when he was allegedly given this permit is so unreliable that it must be ignored. Botha's evidence was that his investigation took place in 2007. So even if I am wrong in accepting Pienaar's evidence in this regard and even if Botha did obtain the permit MP169/03 from Pienaar in the circumstances he testified to, in these circumstances it may not be the "smoking gun" that it is alleged to be.

126. Mr Duminy also latched on to a period where there was no correspondence or contact between the department and Van Den Heever or his office during May 2004. Mr Duminy pointed out that before this period there was correspondence and file notes relating to telephone calls but during this period of approximately three weeks there was what he termed “radio silence”. Mr Duminy insinuated that this was suspicious. In answer to this I need only refer back to the point made earlier, which is even more valid at this stage of the saga. At this stage everyone agreed that not only was second defendant entitled to an old order right, it had an old order right. At this stage it would make no sense to forge MP169/04 as second defendant could simply apply for a conversion under the MPRDA.
127. Considering the evidence, and for the reasons set out above, I do not believe that plaintiff has discharged the onus of establishing that its version is consistent with all of the known or established facts and that on a balance of probabilities it is the most probable version. In my view plaintiff has not established fraudulent conduct on the part of either the first or the second defendants.
128. In these circumstances plaintiff’s case must fail. Also in these circumstances it is not necessary to decide the special plea of prescription or the failure to give full notice under the Institution of Action Against Certain Organs of State Act. Nor is it necessary to give consideration to the issues of causation.
129. The last issue relates to costs. It was common cause that the costs in respect of the applications to recall Zondagh and to re-open the plaintiff’s case and call Botha should follow the result. This is a practical and pragmatic approach and in the circumstances I agree with it. It was also common cause that any costs order should include the costs of two counsel as all legal teams had in fact employed two counsel. In the circumstances of this case I can see no reason to depart from the norm that costs should follow the result.

In the result the following order is made:

- 1.) The plaintiff's case is dismissed with costs.
- 2.) Such costs to include the costs of the applications to recall Zondagh and to re-open the plaintiff's case and call Botha as well as the costs occasioned by the employment of two counsel.

LEVER AJ

APPEARENCES:

Plaintiff: Adv. Duminy SC & Adv. Tredoux

1st Defendant: Adv. Trengove SC & Adv. Voster

2nd Defendant: Adv. Grobler SC & Adv. Gildenhuys

Dates of Hearing: 26, 27, 30 August 2013; 5, 6, 8, 9, 12, 13, 14, 15 May 2014; 3, 4, 5, 6, 7, 10, 11 November 2014; 10, 11, 12, 13 February 2015

Date of Judgement: 24 April 2015

