

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

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: 429/05

Date heard: 17/02/06

Date delivered: 24/03/2006

In the matter of:

SANDDRIFT DIAMANTE CC

First Applicant

N A T DIAMANTE BK

Second Applicant

CRYSTAL CAVE TRADING 118CC Third Applicant

RICHTERSVELD MUNISIPALE RAAD Fourth Applicant

and

TRANS HEX MYNBOU BEPERK

First Respondent

MINISTER OF MINERALS & ENERGY
TRANS HEX OPERATIONS (PTY) LTD

Second Respondent

Third Respondent

RICHTERVELD SIDA! HUB COMMUNAL
PROPERTY ASSOCIATION

Fourth Respondent

JUDGMENT

TLALETSI J:

1) The applicants have brought an application against the respondents seeking orders *inter alia*, along the following terms.

1.1 that the first respondent is entitled to prospect/win precious stones on certain portions of the Richtersveld as shown on the sketch plan attached to the founding affidavit as annexure 1;

- 1.2 that the first respondent is authorised to abandon the whole or portions of the land in the Richtersveld in which it has rights to prospect/win precious stones;
 - 1.3 that the agreement entered into on 8 April 2000 between fourth applicant and first respondent attached to the founding affidavit as annexure S2, is valid and enforceable;
 - 1.4 that the first respondent is in accordance with his obligations in terms of annexure S2, obliged to take all reasonable steps to ensure that the specified portions of the land as shown with co-ordinate references in the annexures to the agreement are excised out of the mining leased area, and that they do not resort within the mining leased area;
 - 1.5 that the second respondent in the light of the findings in 1.1 to 1.4 above, is obliged to process and reconsider the applications for prospecting permits lodged by first, second and third respondents;
 - 1.6 that first and or third respondents are, pending the final determination of the prayers in paragraph 1.1 to 1.5 above, interdicted from mining activities in the areas respectively marked as 'A', 'B' and 'C' on annexure to 'S2' respectively.
- 2) The application is opposed by first and third respondents. Both the second and fourth respondents have elected to abide by the decision of the court. In addition, the fourth respondent has through its chairperson filed an affidavit bringing to the attention of the court, the position and status of the fourth respondent, as well as the effect the orders as sought by the applicant's may have on them. The deponent states that its members have been in occupation and using the land in the Richtersveld area. They have

consistently claimed ownership of the land and there is a pending claim with the Land Claims Commissioner. The third and fourth respondents were at the hearing of the application joined in as respondents on an unopposed basis.

- 3) The factual background on which the applicants base their application is set out in the affidavit of Gert Van Der Heever. He is a member of the first applicant. Most of the facts set out are either common cause, or not in dispute save for the interpretation and conclusions discerned from the facts. The then Minister of Minerals and Energy Affairs of the Republic of South Africa, had in terms of Section 21 of Act 73 of 1964, awarded the first respondent the right to mine precious stones in certain portions of the Richtersveld area as indicated on the sketch plan kept in the office of the Commissioner of Mines, Springbok under reference RMT number M100/90. A Notarial Mining Lease was as a result registered under Protocol number 185. This agreement gave the first respondent the right to mine precious stones in the said areas.
- 4) The first respondent was in terms of the agreement entitled to abandon the whole or portions of the land in which he had mineral rights. During April 2000 the first respondent entered into a Fencing agreement ('S2') with the entity described as "Richtersveld Oorgansraad". The latter was acting on behalf of the Richtersveld community. Clause 5.3 of "S2" reads as follows:-

“5.3 Uitsluiting van grond uit mynhuur: Landbougronde en ander

5.3.1 *Die 10 landbouerwe en die oop areas tussen die erwe langs die rivier, (aangedui met koördinaatverwysings aanhangsel "C1 en C2") en ook die dorpsgebied Sanddrift, sal uit die bestaande mynhuurgebied gesny word.*

5.3.2 *Die land-erwe by Sanddrif, Stofbakkies, Bloeddrif en Reuning (aangedui met koördinaatverwysings) op aanhangsel D1, D2, en D3) sal, soos reeds ooreengekom tussen die partye, ook uit die bestaande mynhuurgebied gesny word.*

5.3.3 *THM in oorleg met die RG sal die nodige stappe neem om te verseker dat bogenoemde voorwaardes so spoedig as moontlik afgehandel word om te verseker dat die oordrag van die langbougroude(sic) aan die RG kan geskied."*

- 5) The specified portions of the land referred to in clause 5.3 were *inter alia*, ten agricultural erven as well as three open areas between the ten agricultural areas, and will therefore once excised not resort within the fenced mining area. These portions are all situated along the Orange River and are shown with precise co-ordinate references.
- 6) The first, to third applicants applied to the fourth applicant for prospecting opportunities in respect of the open areas between the 10 agricultural erven, respectively. Their applications were recommended with approval by the fourth applicant. As requested by law the first to third applicants applied to the second respondent to be issued with prospecting permits in respect of the three open areas. These applications were not approved by the second respondent. In a letter communicating the disapproval, the Director of Mineral Development, Northern Cape, advised the first to third applicants that the areas they have applied for are situated within the boundaries of the mining lease registered in the name of the fourth respondent; that the said mining lease is still valid and a mining licence has been issued already to the fourth respondent. It is common cause that the first respondent who was the beneficiary in terms of the mining lease, has ceded its rights to the fourth respondent. It is for this reason that fourth respondent was joined in the proceedings, and the prayers sought are to refer to

the fourth respondent as well.

- 7) The applicants contend that in view of the fencing agreement between first respondent and Richtersveld 'Oorgansraad' and the recommendation by the third respondent, they qualify and are entitled to the rights to prospect precious stones in the areas applied for. The applicant's case is centred on the fact that according to them, the first and or third respondents have abandoned their rights in favour of the fourth applicant in terms of the mining lease agreement. That the first and or third respondents continued mining of the area marked C in annexure "S2" will deplete the precious stones leaving the first respondent with nothing to mine, unless the activities are stopped. They contend further that nothing will prevent the first and third respondents from mining additional areas marked 'A' and 'B' in annexure 'S2' and should therefore be interdicted as the first to third applicants will suffer damages should their applications to prospect precious stones in these areas be successful.
- 8) The first and third respondents in response, contend that the agreement relied upon by the applicants envisaged the excision of certain land from the mining lease with a view to the transfer of such land to the Richtersveld community, for agricultural and related purposes. That no mining rights were to be transferred, and that no rights accrued to the first to third applicants who now seek to appropriate such rights. The community representatives, they contend, with whom the first and third respondents are obliged to co-operate, have requested a suspension of the excision of the land in question. The second respondent should therefore not be faulted for refusing the first to third applicants applications for prospecting permits in respect of the land.
- 9) The first and third respondents challenged the first to third

applicants' *locus standi* to the declaratory relief sought in prayers 1 - 5 as well as an interdictory relief sought in prayers 6 of the notice of motion. The basis for the challenge is that these applicants have not shown on their founding affidavit that they have a direct and substantial interest in the subject matter of the suit, which interest must be a legal and not merely a financial one.

- 10) In determining whether or not an order should be made in terms of Section 19(1)(a)(iii) of the **Supreme Court Act** 51 of 1959, the applicant must first satisfy the court that he/she is a person interested in an existing, future or contingent right or obligation. Having satisfied this part, it is for the court to decide whether it is a proper case for the exercise of the discretion conferred on it. (See: **Milani and Another v South African Medical and Dental Council and Another** 1990(1) SA 899 (T) (1) at 902F-I). On the papers the only interest that first to third applicants have shown is the prospect of acquiring a right to prospect for precious stones on the areas described as A, B and C of annexure 'S2' respectively. Their prospects depend on abandonment on the part of first and/or third respondent, of their mining rights in these areas, in favour of the Richtersveld community. It will also depend on whether the Richtersveld community will be in a position to permit these applicants to mine these areas and whether the applicants will meet all the requirements entitling them to the right to mine in due course. The interest the applicants may have, if any, is in my view very remote.
- 11) In **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd** 2005 (6) SA 205 (SCA) at 213A-G it was held:

“[17] It seems to me that once the applicant has satisfied the Court that he/she is interested in an 'existing, future or contingent right or obligation', the Court is obliged by the

subsection to exercise its discretion. This does not, however, mean that the Court is bound to grant a declarator, but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect that, once satisfied that the applicant is an interested person, 'the Court must decide whether the case is a proper one for the exercise of the discretion' should be read in its proper context. **Watermeyer JA** could not have meant that in spite of the applicant establishing, to the satisfaction of the Court, the prerequisite factors for the exercise of the discretion, the Court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something which would constitute the exercise of a discretion as envisaged in the subsection (cf **Reinecke v Incorporated General Insurances Ltd** 1974 (2) SA 84 (A) at 93A - E).

[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

I am convinced that the declarator sought is to advance or protect the first to third applicants prospects of acquiring a right to prospect for diamonds. They have not shown that there are reasonable prospect that they will be able to acquire such rights.

12) The next contention by the respondents is that the applicants in

prayer 5 are asking the court to order the second respondent to process and reconsider their unsuccessful applications respectively, for prospecting rights in respect of the land referred to as C, A and B. They are aggrieved by the refusal of their applications. Counsel for the applicants submitted that this application is not a review application because the second respondent has not made any decision in respect of the prospecting rights applications. He based his argument on the fact that in a letter dated 12 November 2003, the Director: Mineral Development, Northern Cape, addressed to the applicants, it is stated that the office cannot proceed with the application in the light of the reasons supplied and that the application files have been closed. It was however conceded that should it be found that the application is in fact a review then this court is not a proper forum to determine the issue, and the matter should automatically come to an end.

- 13) It is evident from the founding affidavit that the applicants are seeking declaratory orders merely as factors they would rely on in order to challenge the failure to grant their applications for prospecting permits. By the declaratory orders, they seek to respond to the factors which seem to have played a role in them not being granted permits. In the letters the applicants are informed that the areas they have applied for are situated within the boundaries of Mining Lease no: 2/1991, which is registered in the name of the third respondent, and that the aforesaid lease is still valid and that mining licences have been issued already to the third respondent.
- 14) The Constitutional Court in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*** 2004(4) SA 490 CC at p506I -507A had the following to say about the common law review right *vis a vis* the provisions of ***Promotion of***

Administrative Justice Act 3 of 2000 (PAJA) :-

“[25] The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.”

This pronouncement makes it clear that the PAJA has substituted the common law review right and that it is the statute in terms of which review of administrative action should be processed. Section 6(2) lists the grounds upon which a person may rely on for the judicial review of an administrative action.

15) The term ‘decision’ is defined in Section 1 of the PAJA to mean:

“ ... any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) *making, suspending, revoking or refusing to make an order, award or determination;*
- (b) *giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) *issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) *imposing a condition or restriction;*
- (e) *making a declaration, demand or requirement;*
- (f) *retaining, or refusing to deliver up, an article; or*
- (g) *doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;”*

It is in my view, undoubtedly clear that the contents of a letter from the Director Mineral Development, Northern Cape Region, constitutes a decision as defined in Section 1 of PAJA and the reasons underlining the decision have been provided. The contention therefore made on behalf of the applicants that no decision has been made cannot be correct. Furthermore, the applicants themselves have used the word “her-oorweeg” in prayer 5 of the notice of motion. At paragraph 21 of the founding affidavit applicants state *inter alia*,

“Tweede Respondent het nie een van die voormelde aansoeke goedkeur nie...”

and in paragraph 23 they state:

“Ten spyte van verskeie skrywes en pogings deur die Vierde Applikant op aandrang en versoeke van Eerste, Tweede en Derde Applikante weier en/of versuim Eerste en Tweede Respondent in enige opsig saam te werk ten einde Applikante se aansoek suksesvol te verwerk en volhard Eerste en Tweede Respondente met die houding soos uiteengesit in paragraaf 21 hierbo.” (My underlining)

The above is an indication of acceptance by the applicants that their applications have been considered and not approved and they are seriously aggrieved by that decision.

16) Section 7(1) of PAJA provides that the reviews of administrative action must be brought without unreasonable delay and not later than 180 days after the date of the decision. This application was issued on 6 May 2005, a period far in excess of 180 days calculated from 12 November 2003.

17) Another difficulty confronting the applicants is the provisions of Section 7(2)(a) which prohibit a court or tribunal from reviewing an administrative action in terms of the PAJA unless any internal remedy provided for in any other law has first been exhausted. A court or tribunal may however in terms of Section 7(2)(c) in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice. Section 57 of the Minerals Act 50 of 1991, which was the

governing statute in 2003, and in terms whereof the first to third applicants brought their applications for prospecting permits in terms of its Section 6, provided for an appeal against any decision of the Director: Mineral Development to the Director General within one month of the decision. A further appeal lay from the decision of the Director General to the Minister within one month of the decision. The applicants have not shown that they have exhausted the internal remedies available to them. They have also not filed an application for the court to consider exempting them from the obligation to exhaust any or all of the internal remedies in the interests of justice.

- 18) I am of the view that the applicants application as it stands is defective and should be dismissed. Even if it were to be found that the first to third applicants have *locus standi*, and that the entire application is not a disguised review but a legitimate declarator, the applicants, on the merits still face some difficulties which I will briefly deal with henceforth.
- 19) In the first prayer the applicants seek a declarator that the first and or third respondents are entitled to prospect precious stones in the areas as identified in the annexed sketch plan. Prayer two seeks a prayer that first or third respondent are entitled to abandon the whole or portion of the land in the Richerveld in which they have right to prospects precious stones. The declarators sought are not based on any dispute between the parties and are matters which are common cause. Likewise prayer 3 declaring that the fencing agreement between fourth applicant and first respondent is still in force is not a subject of any dispute. One does not seek a declaratory order to interpret the provisions where there is no dispute and are common cause.
- 20) Although the applicants based their argument on the question whether the first and

third respondents have abandoned their rights in respect of the specific land, it has agreed to excise, there is no specific prayer for abandonment. It was incumbent upon the applicants if that was their case to have indicated that they seek such an specific order. Reliance on abandonment was only raised for the first time in the replying affidavit. They rely on the letter dated 26 January 2001 addressed to the Department of Minerals and Energy referring to an agreement to exclude 13 specified areas from the mining lease. It is not disputed that the 13 areas described in that letter did not include the areas described as A, B and C being the areas which first to third applicants applied for prospecting permits. Reliance on this letter was correctly not pursued during argument as it does not assist the applicants case at all. Although the first to third applicants claim that they are merely seeking limited contractual rights, they are themselves not a party to the contract relied upon. Furthermore, they do not seek enforcement of any right in their prayers, but declarators. Neither do they seek an order against first and third respondents to take the necessary steps in terms of the agreement. Their main prayer is for the second respondent to reverse the decision to refuse their prospecting applications.

- 21) I am not satisfied that the applicants have made out a proper case for abandonment of any mining rights or land. They have also not shown that they are entitled to the interdictory orders prayed for. It is not necessary, in my view of the conclusion I have arrived at, to deal with the other issues raised on the papers. To do so will be academic. The application should therefore be dismissed with costs, such costs are to include costs of two counsel.

In the result I make the following order:

The application is dismissed with costs, such costs are to include the costs consequent upon the employment of two counsel.

L P TLALETSI
JUDGE

(Northern Cape Division)

ADVOCATE FOR THE APPLICANTS	:	ADV F J MURRAY
INSTRUCTED BY	:	A KHAN ATTORNEYS (CAPE TOWN)

ADVOCATE FOR THE RESPONDENTS	:	ADV C D A LOXTON SC ADV P R JAMMY
INSTRUCTED BY	:	ENGELSMAN, MAGABANE INC.