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:	**1452/2023**
Heard:	**19/03/2024**
Date delivered:	**24/04/2024**

In the matter between:

ALEXKOR SOC LTD Applicant

and

VAST MINERAL SANDS (PTY) LTD 1st Respondent

In re:

VAST MINERAL SANDS (PTY) LTD Applicant

and

ALEXKOR SOC LTD 1st Respondent
RICHTERSVELD MINING COMPANY (PTY) LTD 2nd Respondent
RICHTERSVELD SIDA !HUB CPA 3rd Respondent
MINISTER OF MINERALS AND ENERGY 4th Respondent

JUDGMENTS: APPLICATION FOR LEAVE TO APPEAL AND SECTION 18(3) OF THE SUPERIOR COURTS ACT, 10 OF 2013

Mamosebo J

[1] Alexkor SOC LTD (Alexkor) brought an application for leave to appeal to the Supreme Court of Appeal (SCA), alternatively, the Full Bench of this Division, against the whole judgment and order

granted on 15 September 2023 essentially granting Vast Mineral Sands (Pty) Ltd (Vast Mineral) access to the prospecting area in order to conduct prospecting activities. Vast Mineral in turn launched an application in terms of s 18(3) of the Superior Courts Act, 10 of 2013, for this Court not to suspend its judgment and order granted on 15 September 2023 pending the final determination of the leave to appeal or appeals against the order. I directed that the two applications be set down for hearing together and were both heard on 19 March 2024. Only Alexkor and Vast Mineral are participants with each opposing the other's application.

Application for leave to appeal

[2] Alexkor filed the Notice of Application for Leave to Appeal with the Registrar on 02 October 2023. Whereas it is settled that the grounds of appeal must be clearly outlined and succinct, Alexkor's grounds of appeal were presented in a form of argument. This is impermissible. See *Songono v Minister of Law and order*[1] .

[3] The following are the surmised grounds set out in the notice of appeal upon which Alexkor relies in alleging that I erred in my judgment:

3.1 That Vast Mineral failed to prove the existence of a right in terms of s 5(3) of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA);

3.2 That the Oudekraal[2] principle is applicable in these circumstances;

[1] 1996 (4) SA 384 (E) at 385C - E

[2] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

3.3 That Vast Mineral must comply with the requirements set out in the Environmental Authorisation;

3.4 That Vast Mineral has no right to prospect;

3.5 That there is an absence of an operating agreement;

3.6 That the costs that were ordered to follow the result.

[4] The test to determine whether leave to appeal should be granted or not is trite[3]. Sec 17(1)(a) of the Superior Courts Act espouses two situations under which a court may grant leave, namely, where the appeal would have reasonable prospects of success or where there is a compelling reason for the appeal to be heard. Leave to appeal may also be granted if it will be in the interests of justice to do so. What needs to be determined is whether Alexkor has satisfied the requirements of this test or not.

[5] Adv Loxton SC, for Alexkor, focused his main argument on the ground regarding Vast Mineral's failure to obtain a water licence; without abandoning the rest of the other grounds. It was argued on behalf of Alexkor that leave should be granted based on the following reasons. For Vast Mineral to conduct prospecting activities, it had to satisfy the Environmental Authorisation (EA) Site Specific Conditions, Condition 3, which requires an Integrated Water Use Licence (IWUL) to be obtained from the Department of Water and Sanitation (DWS) prior to commencement of activity. Alexkor maintains that Vast Mineral's failure to obtain a water use licence as required by the EA resulted in the condition remaining unfulfilled. Alexkor claims that it is on this basis that they maintain that the

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[3] The Mont Chevaux Trust v Goosen 2004 JDR 2325 (LCC); S v Notshokovu & Another [2016] ZASCA 112 (7 September 2016)

principle in *Oudekraal* is applicable, informed by Vast Mineral's election not to apply for a water licence and that leave should thereafter be granted.

[6] Alexkor contends that the final interdict ought not to have been granted because at para 19 of the main judgment I referred to Vast Mineral relying on s 5(3)(c) of the MPRDA; and further that Vast Mineral cannot rely on either s 5(1) or 5(3) of the MPRDA. Alexkor persisted with its argument relating to a breach of s 19(2)(e) of the MPRDA in that Vast Mineral failed to comply with the requirements of the approved environmental management programme maintaining that the right to exercise a prospecting right is subject to other laws, for example, the National Environmental Management Act, 107 of 1998 (NEMA).

[7] The correct approach to interpretation of documents which includes legislation and judgments of the Courts is as espoused in *Endumeni*[4]. Alexkor attacks the existence of Vast Mineral's right to prospect predicated on s 5(3)(c) of the MPRDA and urged this Court to interpret s 5(3)(a) and 5(3)(c) which stipulates:

> *"(3) **Subject to this Act**, any holder of a prospecting right, a mining right, exploration right or production right may-*
>
> *(a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;*
>
> *(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be."*

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[4] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

This Court clearly investigated fully the issue between the parties pertaining to access to the prospecting area.

[8] A case is made out in the pleadings. This is what appears at para 51 of Vast Mineral's founding affidavit to dispel the doubt:

"In terms of s 5(1) of the Mineral and Petroleum resources Development Act 28 of 2002 ("the MPRDA") (which is the legislation in terms of which Prospecting Right NC 1192 PR was granted to Vast Mineral Sands) the Prospecting Right is thus a limited real right in respect of the minerals and the land to which that prospecting right relates. Vast Mineral Sands as the holder of the Prospecting Right is, by virtue of s 5(2) of the MPRDA, entitled to the rights referred to in section 5 and also to such other rights as may be granted to, acquired by or conferred upon Vast Mineral Sands as such holder under the MPRDA or any other law."

A further need for interpretation stems from the opposing submissions by the parties. Vast Mineral contends that its rights are only subject to the MPRDA. Alexkor disagrees with the submission that the correct interpretation is to the effect that it is subject to other laws.

[9] In interpreting the MPRDA, this Court must, according to *Endumeni*[5] attribute meaning to the words used, regard being had to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. More importantly, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not

[5] Ibid at para 18

subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

[10] Taking cue from the analysis of the phrase "*subject to*" by the SCA in *S v Marwane*[6] where it was held:

> *"The purpose of the phrase "subject to" in such a context is to establish what is dominant and what is subordinate or subservient; that to which a provision is "subject", is dominant – in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation."*

The submission by Alexkor can therefore not be correct when it contends that Vast Mineral's rights as set out in s 5(3) are "*subject to*" the EA, the Sesfikile Agreement and the Co-operation agreement which requires Vast Mineral to conclude an operating agreement before commencing with its prospecting activities. In Section 1 of the MPRDA '*this Act*' includes the regulations and any term or condition to which any permit, permission, licence right, consent, exemption, approval, notice, closure certificate, environmental management plan, environmental management programme or directive issued, given, granted or approved in terms of this Act, is subject. It follows therefore that the phrase "*subject to this Act*", in my view, connotes that the MPRDA is the dominant Act and the EA and the agreements are subservient to the MPRDA. I find that s 5(3)(c) was never part of the dispute despite having found its way into my judgment. I find that "*subject to this Act*" in these circumstances refers to the MPRDA. Hence the order granted confirms that Vast Mineral should be granted access because it had made out a case of being denied access despite being the holder of a prospecting right.

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[6] 1982 (3) SA 717 (A)

[11] Notwithstanding that s 19(2)(e) of the MPRDA requires the holder of a prospecting right to comply with the conditions of the environmental authorisation, the following decision and the reasons thereto on the Environmental Authorisation granted to Vast Mineral (Annexure HP8) is noteworthy.

"The Department is satisfied, on the basis of information availed to it and subject to compliance with the conditions of this environmental authorisation, that the applicant should be authorised to undertake NEMA EIA listed activity(ies) specified below. Details regarding the basis on which the Department reached this granting decision are set out in Annexure "I" of this environmental authorisation."

In the first paragraph of Annexure 1: Reason for the decision, under the heading "Background" reads:

"Vast Mineral Sands (Pty) Ltd submitted an application for an EA for activities listed in the EIA Regulations. This company has a signed agreement in place with Alexkor (Pty) Ltd as this prospecting area fall under the diamond mining area of the Richtersveld Mining Company and Alexkor as which is a Joint Venture."

Para 25 of the main judgment considered the averment by Vast Mineral that it would not be engaging in any water use as contemplated in s 21 of the National Water Act[7] and referred to the Act itself under footnote 5. The absence of a water use licence does not bar Vast Mineral as the holder of a prospecting right from gaining entry to the premises to plan prospecting activities.

[12] The contention by Alexkor that allowing Vast Mineral to enter the area will be in contravention of s 5A of the MPRDA, a prohibition relating to the illegal act, cannot be substantiated. The section stipulates:

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[7] 36 of 1998

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

(a) An environmental authorisation."

Alexkor cannot be correct in its stance that Vast Mineral does not have the right to prospect because of the absence of a water use license. As stated earlier the right to prospect is predicated on s 5(3)(a) of the MPRDA and Vast Mineral is still the holder of a prospecting right. In as far as the absence of an operating agreement is concerned, an aspect dealt with in the main judgment, para 27, is clearly not a jurisdictional requirement and continuing to raise it, is an exercise in futility.

[13] The gist of Alexkor's argument centres around the unfulfilled requirement by Vast Mineral to obtain a water use licence thereby failing to comply with Condition 3 of the environmental authorisation. However, what cannot be ignored or overlooked is what was considered by the Department and the Minister prior to granting the application and the relationship between Alexkor and Vast mineral. These parties, together with the Richtersveld community and Richtersveld company were in a joint venture. That is why some of the considerations were informed by the joint venture position. Alexkor never filed any objections to the Department or to the Minister. I said in the main judgment that I have no doubt that Alexkor acquiesced in the entire arrangement and reneged later for unfathomable reasons. This failure to obtain a water licence cannot be read in isolation. Regard being had to s 38A(2) of the MPRDA dealing with environmental authorisations, an environmental authorisation issued by the Minister shall be a condition prior to the issuing of a permit or the granting of a right in terms of this Act. It should be kept in mind that Vast Mineral was

granted a prospecting licence which is now extended from 01 February 2023 to 01 January 2026.

[14] Adv Van Niekerk SC, for Vast Mineral, contended that the right asserted is the right to prospect as contemplated in s 5(3)(a) of the MPRDA. However, Alexkor has never in its papers or during argument attacked the prospecting right granted to Vast Mineral. It also does not attack the environmental authorisation per se, which was also granted to Vast Mineral. The right asserted by Vast Mineral is to enter the land to which the prospecting right relates.

[15] Having carefully and dispassionately considered the application for leave to appeal in order to determine whether there are reasonable prospects that another court would come to a different finding than this court had reached, I have not found any. I am also of the view that there are no compelling reasons to entertain this appeal. I am therefore, satisfied that there are no reasonable prospects of a successful appeal.

In the result the application for leave to appeal to the Supreme Court of Appeal alternatively, to the Full Bench of this Division, must fail.

<u>Application in terms of s 18(3) of the Superior Courts Act, 10 of 2013</u>

[16] The relief that the applicant, Vast Mineral, is seeking, on an urgent basis, is a declarator in terms of s 18(3) for the order granted on 15 September 2023 to be put into immediate operation despite the application for leave to appeal having been filed by Alexkor or any subsequent appeal process that may follow. It also seeks costs of this application which shall include two counsel where so employed.

[17] Section 18 of the Superior Courts Act, dealing with the suspension of decision pending appeal, stipulates:

> "*(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*
>
> *(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.*
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> *(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.*
>
> *(4)*
>
> *(a) If a court orders otherwise, as contemplated in subsection (1)-*
>
> *(i) the court must immediately record its reasons for doing so;*
>
> *(ii) the aggrieved party has an automatic right of appeal to the next highest court;*
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> *(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and*
>
> *(iv) such order will be automatically suspended, pending the outcome of such appeal.*
>
> *(b) 'Next highest court', for purposes of paragraph (a) (ii), means-*
>
> *(i) a full court of that Division, if the appeal is against a decision of a single judge of the Division; or*

(ii) the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division."

[18] Wallis JA in *Knoop NO and Another v Gupta (Execution)*[8], made the following remarks pertaining to s 18:

[45] These provisions have now been considered by this court in three judgments. [University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA) paras 5 -6; Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA) paras 19 – 22 and Premier for the Province of Gauteng and Others v Democratic Alliance and Others [2020] ZASCA 136]. The effect of these is that an applicant for an execution order must prove three things, namely exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made.

[46] Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances. The reason is that the enquiry is a factual one. There is a helpful summary in MV Ais Mamas that has been endorsed both by this court and by the Constitutional Court. In the context of s 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm. The exceptional circumstances must arise from the facts and circumstances of the particular case."

[19] This Court granted Vast Mineral a final interdict on 15 September 2023 granting it permission to enter the Remainder, Portion 8 and Portion 9 of Farm 1 District Namaqualand and Farm 155 District Namaqualand for prospecting purposes following in an urgent application. Alexkor was the only respondent who opposed the application.

[8] 2021 (3) SA 135 (SCA) at paras 45 and 46

[20] A brief background is to this effect. On 30 June 2017 a joint venture formed between Alexkor and the RMC on one hand and Vast Mineral on the other. In that same year, 20 October 2017, Alexkor's acting Chief Executive Officer (CEO), Mr Vimai Bansi, addressed a letter to the CEO of the PSJV, Mr Mervyn Carstens, confirming that Alexkor is aware of, and has given approval for Vast Mineral to mine heavy minerals at the mining operations in Alexander Bay. This was subject to VMS securing the necessary permits from the various government departments. Alexkor remained an interested and vigilant party.

[21] Vast Mineral was granted a prospecting right on 01 February 2018 resultantly making it a holder of a registered Prospecting Right NVC 11923 PR in respect of specified heavy minerals. It was to prospect on Remainder Portion 8 and Portion 9 of farm 1 District Namaqualand as well as Farm 155 District Namaqualand. The same prospecting area falls within the diamond mining area of the Pooling and Sharing Joint Venture (PSJV) which is an Alexkor area. The secretary of the Alexkor RMC JV confirmed on 10 August 2018 that the agreement between Vast Mineral and the Alexkor RMC JV was in good standing.

[22] Vast Mineral was issued with the necessary Environmental Authorisation on 06 September 2018 NCS 30/5/1/1/3/2/1 (11923) EM permitting it to commence with Listed Activity 20 under Listing Notice 1 as published in R.983 of 2014. It was also issued with a Waste Management Licence, NCS30/5/1/3/3/2/1 (10646) EM on the same day. Vast Mineral's Prospecting Right was notarially executed on 07 November 2018 and registered in the Mineral & Petroleum Titles Registration office on 04 December 2018. It thereafter commenced with the collection of samples in the area. By 2019 it had conducted extensive testing and had spent on drilling and

laboratory analysis. In-between Covid 19 happened and thereafter followed an exchange of communication between Vast Mineral and Alexkor for access, which culminated in the urgent application and now this application.

[23] The crisp question that follows is whether there are exceptional circumstances demanding a deviation from the norm of suspending the operation or execution of the order of 15 September 2023 pending the application for leave to appeal or of an appeal process or not.

Exceptional Circumstances

[24] Mr Haroon Pandor, who deposed to the founding affidavit in the application for leave to execute, stated that Vast Mineral's case was exceptional for the following reasons: Vast Mineral is seeking to protect and execute its limited real right to prospect. The primary issue pertains to the limited period remaining within which to complete the prospecting operations. The initial five years have lapsed and it is now granted an extension of three years ending on 31 January 2026 without an option of a further extension. Four of the first five-year term was wasted on the dispute regarding access of Vast Mineral to the prospecting area. The Covid 19 pandemic has also put a spanner in the wheel, negatively affecting operations. So far, Vast Mineral had only ten months to conduct the prospecting activities. Vast Mineral needs to complete the prospecting activities in order to obtain the results that will substantiate its application for the mining right. Should this not occur, it stands to lose its investors. Mindful of the objectives of the MPRDA expanding opportunities to the previously disadvantaged communities to participate in mineral industries and to benefit from the mineral resources, the refusal by Alexkor to grant Vast Mineral access extends to a denial of these benefits to Richtersveld community who need jobs and economic development.

[25] Alexkor's response to the aforementioned is the following. The urgency caused by the limited duration of the prospecting right is Vast Mineral's own doing. Despite the dispute between the parties having arisen in October 2019, Vast Mineral's inaction for the period October 2019 to June 2022 should not be ignored. Alexkor contended that the urgency is self-created and must be rejected as an exceptional circumstance. Vast Mineral's failure to apply for the Integrated Water Use Licence is also of its own doing. It has also not applied for this specific condition to be amended or taken the decision on judicial review, so the argument went. Alexkor further argued that Vast Mineral's further reliance on the economic output to the Richtersveld community should not be accepted as an exceptional circumstance.

Irreparable harm

[26] In substantiation of its argument that it will suffer irreparable harm if the application is refused Vast Mineral submitted the following:

Should Vast Mineral not be able to complete its prospecting activities it will not be able to motivate its application for a mining right. Resultantly, the Richtersveld community will be denied job opportunities. Vast Mineral has already invested a substantial amount of money in this project and stands to suffer financial prejudice as well as lose the financial support of investors.

[27] Whereas the requirement in terms of the section is to show that Alexkor will not suffer irreparable harm should the application be granted, Alexkor did not demonstrate in the papers or in oral argument the harm it will suffer. In its answering affidavit it relies on the harm the PSJV will suffer. Vast Mineral contended that Alexkor has not shown any authority to litigate on behalf of the PSJV. The holder of the mining right is the Richtersveld Mining Company,

cited as the second respondent in the s 18(3) application which has elected not to participate in these proceedings. The Richtersveld Mining Company is actually a vehicle for the economic aspirations of the Richtersveld community. Alexkor's claim that they will suffer prejudice in the PSJV is without substance. Vast Mineral maintains that Alexkor has the duty to maintain protocols for everyone's safety but it much rather pursues an obstructive strategy to keep Vast Mineral out of the premises for as long as it possibly can. Alexkor is not justified in allowing Vast Mineral to operate and conduct its prospecting activities under the umbrella of its existing security, safety and access policies, and later renege on them. A party cannot be allowed to adopt two irreconcilable positions.

[28] This is what Alexkor claimed as reasons for its potential harm. It says the prospecting right is unlawful; there is no health and safety policy in place; there could be a possible death of any employee, official or contractor; any failure to comply with the Mining Health and Safety Act will lead to the mining right being withdrawn resulting in commercial harm; and the operating agreement is not in place.

[29] Regard being had to the submissions by both counsel for and against the existence or not of the three requirements to be met by Vast Mineral in order for leave to execute to be granted, I am satisfied that the following are exceptional circumstances upon which to grant this application:

29.1 Vast Mineral is a holder of a prospecting right;

29.2 It is a limited real right which can only be extended once. The extension will expire on 31 January 2026.

29.3 There is no basis for Alexkor to have granted vast Mineral ten months of prospecting without the purported operating agreement only to renege later without outlining its basis therefor.

29.4 The Integrated Water Use Licence never served as a bar when Vast Mineral was granted access and conducted its activities albeit for a limited duration under the PSJV where Alexkor was involved and never objected at any stage.

29.5 There is a good case made out of irreparable harm to be suffered by Vast Mineral, whereas the irreparable harm purportedly suffered by Alexkor outside the PSJV is not discernible.

I am therefore satisfied that Vast Mineral has met all the requirements for the redress sought. The exceptional circumstances arose from the facts and circumstances of this case. It is for the aforementioned reasons that Vast Mineral stands to succeed in the s 18(3) application.

[30] On the question of costs. Awarding of costs remains within the discretion of the Court which must be exercised judicially. There is no reason why costs should not follow the result.

[31] In the result, the following order is made:

1. The application for leave to appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

2. It is declared that, in terms of s 18(3) of the Superior Courts Act, 10 of 2013, the order granted by this Court on 15 September 2023 be put into immediate operation and effect notwithstanding any appeal or appeals.

3. That the costs of the s 18(3) application, which costs shall include the costs of two counsel where so employed, be paid by Alexkor SOC Ltd.

[redacted]

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant/respondent:	Adv. CDA Loxton SC Adv. TV Mabuda
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