

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
27/01/2025	
DATE	SIGNATURE

CASE NO: 2024-149729

IN THE MATTER BETWEEN

PP GEMSTONES MINING AND
EXPORTING (PTY) LIMITED

Applicant

and

ASSMANG (PTY) LIMITED

First Respondent

BLACK ROCK MINE OPERATIONS

Second Respondent

MINISTER OF POLICE

Third Respondent

**THE COMMISSIONER OF THE SOUTH AFRICAN
REVENUE SERVICES**

Fourth Respondent

**MINISTER OF MINERALS AND PETROLEUM
RESOURCES**

Fifth Respondent

JUDGMENT

BENSON AJ

INTRODUCTION

- [1] This matter was heard before me on the urgent court roll on the 3rd of December 2024, being New Years' Eve.
- [2] On the 10th of January 2025, I gave an Order in the following terms:
- [2.1] The application is dismissed for lack of urgency.
- [2.2] The applicant is to pay the costs of the first, second and fourth respondents, on a party and party scale, with such costs to be taxed on Scale C of the Uniform Rule of Court 67A (as amended).
- [2.3.] Reasons shall follow this Order.
- [3] The reasons for the Order are now set out below.

BACKGROUND & ANALYSIS OF ARGUMENT

- [4] The applicant launched an urgent application on or about the 20th of December 2024 for direct interdictory relief as against the first, second and fourth respondents.
- [5] Whilst the relief sought is couched as “*pending the final decision of this application*” and ostensibly interim in nature, the application is not brought on the ordinary ‘Part A and B’ basis, and as drafted, would in the event that it was granted, constitute final relief, and would be dispositive of the merits¹. The relief sought was opposed by the first, second and fourth respondents. No appearance was entered into on behalf of the third and fifth respondents.
- [6] The applicant’s case, in summary, is that it is a mining company with a mining permit to extract and dispose of the mineral known as ‘sugilite’ which “co-exists” with another mineral, manganese, on the Farm N’Chwaning No 267, Black Rock (“the Farm”), in the Kuruman District in the Northern Cape. In addition to these permits, the applicant argues, “its subsidiaries” (of only one is mentioned, namely the Matebetsi Family Trust) hold an Environmental Management Permit granted by the fifth respondent². The Matebetsi Trust is however not a party to these proceedings and its actual status and relation to the applicant is not entirely clear. What its share of the sugilite extraction may be is not explained.
- [7] Briefly, and for purposes of understanding the dispute between the parties herein (albeit not directly relevant to the reasons set out below for this Court’s Order), sugilite is a relatively rare cyclosilicate mineral that ranges from colour

¹ Notice of Motion, particularly prayers 7 to 12, CaseLines, pp 02-4 to 02-5

² Annexure PP7 to the Notice of Motion

from light lavender to deep purple. The first large deposits of deep purple sugilite were discovered in South Africa in 1979 in the Kuruman area. Sugilite is mined from a strata-bound manganese deposit, and is found in a matrix with other minerals. Owing to its scarcity, sugilite is often mistaken for other minerals, and in particular, amethyst.

- [8] The first and second respondents, according to the applicant, were the first entities to be granted permits to mine manganese on the Farm, and were also the first to sink their shaft into the land situate thereat. The fact that the manganese and sugilite are comingled underground within the same orebody, has led to various disputes as amongst the parties, as to the entitlement, quantity and value of the sugilite that has been extracted, produced and allegedly sold, at the Farm.
- [9] According to the applicant, it came to its attention as early as February 2024, that the first and second respondents have allegedly been mining and extracting manganese and disposing of same, for their own account and to the exclusion of the applicant, without accounting to the applicant for its share of the compensation owed to it for the sugilite component of such extracted manganese (the share which may be owing to the other 'subsidiaries' is not mentioned). In support of this contention, and the far reaching conclusions reached by the applicant in the founding affidavit, the applicant places its main reliance upon a statement purportedly deposed to by one Mr Chang Chingfu ("Chingfu")³.

³ Annexure PP9 to the Founding Affidavit, CaseLines 02-83

- [10] Upon closer scrutiny of this document, it appears that it was prepared on the 10th of May 2024 at the Douglasdale Police Station, Fourways, Johannesburg, in relation to what appears to have been a matter dealing with the seizure by the fourth respondent of a consignment of sugilite at Oliver Tambo International Airport ("ORT"), from an entity known as Asuca Internation (Pty) Limited ("Asuca"), and whilst its consignment was being held by a carrier identified therein as 'Air Menzies International Forwarding Services'. In the document, the author claims that Asuca had "transacted" the sugilite from the second respondent, but was not advised that it required the requisite permit to import or export sugilite. Asuca is not joined as a respondent to these proceedings, and the extent of its involvement in the alleged trade of sugilite cannot be verified by this Court in relation to the applicant's case. How this document came into the possession of the applicant, and the purpose for which it was prepared, cannot be readily ascertained from the papers.
- [11] To further its contentions that the first and second respondents are conducting themselves in the unlawful manner complained of, the applicant further relies on a host of documents which it contends constitute clear evidence that the first and second respondents are conducting themselves unlawfully in relation to the trade of sugilite. However, and when one considers Annexures PP10 to PP15 to the founding affidavit⁴, it is not clear whether such documents relate to a criminal investigation or otherwise relating to the first and second respondents' suspicions of suspected theft at their premises by their staff of their own 'product'. In addition, interspersed reference is made throughout these

⁴ CaseLines at pp 02-99 to 02-111

annexures to “MASS” (Manganese Associated Specimen Stones), “manganese” and “sugilite”, which is of no particular assistance in identifying exactly which mineral is being referred to in each document. None of these documents are capable of being tested and give rise to a myriad of speculative conclusions.

- [12] Whilst broad and sweeping statements are made on behalf of the applicant throughout the founding and replying affidavits, and albeit amidst highly suspicious circumstances that may warrant criminal investigations by the relevant authorities as to the illicit national and international trade of manganese, sugilite or other minerals in South Africa at large— the identity of the subject matter to which the applicant lays entitlement in this application, cannot be identified by this Court. The status of the investigations (if any) that may have prompted the production of these additional documents appended to the founding affidavit, has not been disclosed by the applicant, which may have had a critical bearing on the outcome of this application.
- [13] In addition to the above, the applicant justifies its urgency (pertinently on New Year's eve), as having arisen pursuant to becoming aware of a case of theft per Tarlton CAS No. 19/12/2024 and as appears from Annexure PP4 to the founding affidavit⁵. This document appears to be a copy of a subpoena issued out of the Kuruman Magistrate's Court in relation to an apparent charge of theft (against an unknown entity or individual), and which is directed to the fourth respondent for additional information required from the prosecutor, following what appears to be a forfeiture of a consignment of unidentified minerals at

⁵ CaseLines at pp 02-41

ORT. Relying on a further statement by the deponent to the founding affidavit, one Pitsoyagae Gabriel Matebesi, ("Matebesi") it is alleged that the applicant first learnt of the 'arrest of Chinese Nationals on the 8th of December 2024', which prompted the actions of the applicant which followed⁶. Matebesi's statement to the South African Police Services ("SAPS") was made on the 11th of December 2024, some two days after hearing of the arrests.

- [14] It is not explained at any point why this urgent application was brought at this late stage and upon such a stringent basis to allow for meaningful opposition. This is exacerbated by the fact that most entities - whether private or public - are not operational over the annual December/January festive season, or function with exceptionally limited staff.
- [15] Be that as it may, scant information is furnished as to the significance or relevance of the 'arrest of the Chinese Nationals' and why this necessitated urgency in the extreme on the part of the applicant. What the applicant fails to set out in its founding affidavit, however, is the fact that the product confiscated by the fourth respondent from Asuca (and Chingfu by implication - which must have prompted the preparation of Annexure PP9) occurred as early as February to May 2024. This was conceded in argument.
- [16] To date, the product, which was confiscated from Asuca, and on other occasions, is alleged to be sugilite. No expert confirmation to this effect is available, and the applicant cannot confirm it as such. This too was conceded in argument on behalf of the applicant, and the figure of 619 kg initially relied upon in the Notice of Motion was whittled down and subsequently reduced to

⁶ CaseLines, Annexure PP3, p 02-38

an alleged 30 kg to which the applicant now lays claim. This reduced quantity, of course, has a significant bearing on the question of urgency, owing to the significant reduction in the commercial value of the alleged right which the applicant relies upon, and the absence of an alternative remedy as against the respondents it seeks direct and compensatory relief against.

[17] More significantly however, is the fact that the applicant failed to disclose in its founding affidavit that prior to Matebesi making his statement referred to above to SAPS, and on the 10th of December 2024, the applicant had launched an application in the ordinary course for essentially and substantially the same relief, in the Gauteng Division of the High Court, Pretoria⁷ under case number 146107/2024, as against the same respondents. After the applicant had brought the initial application, it's attention was drawn by the fourth respondent to the provisions of section 96 of the Customs and Excise Act, No 91 of 1964 ("the Customs Act") on the morning of the 19th of December 2024⁸. The applicant nevertheless deemed it appropriate to proceed to hastily complete the founding affidavit in this matter and issue the application on the 20th of December 2024.

[18] The urgent application was only served on the first respondent on the 23rd of December 2024, and on the second respondent on the 24th of December 2024, the latter being Christmas eve. Whilst it appears that the fourth respondent filed its Notice of Intention to Oppose on the 23rd of December 2024, it is not clear when it was served with the application. Be that as it may, it bears mentioning that in the stringent time frames afforded to the respondents to

⁷ First and second respondents' answering affidavit, para 17, Annexure AA2, CaseLines at p 02-193

⁸ CaseLines 02-350 to 02-354

oppose this application, this Court was only afforded the opportunity to consider the replying affidavit to the fourth respondent's answer at approximately 02h00 on the morning of the 3rd of December 2024.

STATUS OF APPLICANT'S ENVIRONMENTAL AUTHORISATIONS AND MINING PERMIT

- [19] Although the Matebesi, the Matebesi Family Trust and the applicant were granted Environmental Authorisations in terms of section 24L of the National Environmental Management Act 107 of 1998 ("NEMA"), for an activity which requires a mining permit in terms of section 27 of the Mineral and Petroleum Resources Development Act, 2002 ("MPRDA")⁹, the exercise of an environmental authorisation is dependant on the granting of a mining permit authorising the activities for which the environmental authorisation has been issued.
- [20] For a party to mine lawfully, an environmental authorisation is required for relevant listed activities. Section 24(2) of NEMA provides that the Minister of DFFE may identify activities which may not commence without environmental authorisation from the competent authority. Government Notice number R327 of 7 April 2017 identifies activity number 21 as *"an activity requiring an environmental authorisation, being any activity including the operation of that activity which requires a mining permit in terms of section 27 of the MPRDA"*.

⁹ An environmental authorization is defined in section 1 as the authorization by a competent authority of a listed activity in terms of NEMA.

[21] Pertinently omitted from the founding affidavit, is the fact that previously, and by Order of the 20th of November 2023, upon application by the first respondent in these proceedings to the Gauteng Division (Pretoria), Van Der Schyff J. reviewed and set aside the three environmental authorisations so granted. Leave to appeal by the Regional Manager: Mineral Regulation, Northern Cape Regional Office was subsequently sought, which was dismissed on the 18th of November 2024 by the Court *a quo*. This was not long before the first application was launched by the present applicant in that same division. Whether any application has been made to challenge the judgment, to the Supreme Court of Appeal, is not clear. Accordingly, the issue of the applicant's entitlement to the sugilite as asserted, is further placed in question. Whether the applicant even has the requisite permits to export sugilite is also not on the papers before this Court.

[22] In terms of section 96(1) of the MRPDA:-

“(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this act may appeal within 50 days becoming [sic] aware of such administrative decision in the prescribed manner...”

[23] In terms of section 96(3) of the MPRDA:-

“No person may apply to the court for the review of an administrative decision contemplated in section (1) until that person has exhausted his or her remedies in respect of that subsection.”

- [24] Whilst the Constitutional Court has acknowledged that a litigant has no obligation to exhaust such internal remedies to appeal in terms of section 96 where the Department makes it clear that the matter should be decided by the Court or where the Department requests non-exhaustion of the remedy, this is not the issue I am asked by the applicant to determine¹⁰. In any event, the first respondent has lodged an appeal to the Director General of Mineral Resources and Energy in terms of section 96(1) of the MPRDA read with regulation 74, and dated 16 May 2024¹¹, which appeal is pending. It is accordingly not necessary for me at this juncture, – and in the absence of being asked to do so by the applicant in any event – to determine whether this Court would enjoy jurisdiction to determine whether the applicant has a lawful mining permit or not under the present circumstances, although it is doubtful that our Courts would arrive at such a conclusion.
- [25] Be that as it may, as argued by Mr. Peter on behalf of the fourth respondent, and even assuming in the applicant's favour that the substantive validity of the grant of the environmental authorisation was not necessary for the issue of the mining permit, but rather only the *factual* existence of the environmental authorisation - irrespective of whether or not it was validly issued - the mining permit only had legal effect until 17 November 2023 when the environmental authorisations were set aside¹².
- [26] Aside from this difficulty the applicant has failed to provide evidence of when and where the alleged sugilite was mined. Even if it had been extracted at a

¹⁰ *Dengetenge Holdings (Pty) Limited v Southern Sphere Mining and Development Co Ltd & Others* 2014 (5) SA 138 (CC) at 91 to 93

¹¹ First and second respondents' answering affidavit, CaseLines at p 02-262

¹² *Oudekraal Estates (Pty) Limited v City of Cape Town & Others* 2004 (6) SA 222 (SCA) at 243-244 par 31

time when the applicant's permit was valid (or that of its 'subsidiaries'), it would be incumbent upon the applicant to make out a case and provide evidence to the Court that the extraction took place in the area for which the applicant's permit was issued. The applicant has failed to deal with either the timing or the location of the alleged extraction relied upon.

- [27] In the absence of the applicant meaningfully dealing with these critical aspects of its mining rights and requisite environmental authorisations at all, it has failed to set out the *prima facie* or clear right that would entitle it to the interdictory relief it seeks. Simply put, it has failed in this application to establish ownership of the sugilite in question and failed to disclose critical facts that would have a direct bearing on its application. What compounds issues is that the applicant cannot even establish when last any mining activity took place in the 4.9 ha area referred to in its permit¹³.
- [28] The applicant's reliance in this regard to the decision in ***Trojan Exploration Company (Pty) Ltd & another v Rustenberg Platinum Mines Ltd***¹⁴ & others is misplaced. Firstly, in that matter the founding of co-ownership of the parties was as a consequence of a cession agreement, and the imputed intention of the parties that they would jointly acquire such co-ownership. There is no such agreement in this case. Secondly a co-owner who performs mining and separation of minerals is entitled to sell the other minerals (albeit not for its own account) but must still account to the other co-owner whose minerals are so sold. Such a sale leads to a loss of ownership rights in the minerals themselves, and all that is retained is an obligation to account to the co-owner whose

¹³ CaseLines 02-133/38.5 and 138/46

¹⁴¹⁴ 1996 (4) SA 499 (A) at

minerals may have been sold or the ‘beneficiation’ of the minerals¹⁵. The *Trojan* decision does not constitute authority for preservation of ownership, nor a claim for vindicatory relief as argued by Mr. Ntsewa on behalf of the applicant.

CONCLUSION & COSTS

[29] The High Court has inherent jurisdiction to prevent abuse of its process. The applicant launched the present application in exceptionally truncated times (especially given the time of the year) in circumstances where there is no justification for the urgency on the papers¹⁶.

[30] Notshe AJ stated in *East Rock Trading 7 (Pty) Limited v Eagle Valley Granite*¹⁷ that:

“[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.”

[31] Not only does the applicant have a pending application in the Pretoria High Court that can be heard in due course on its own merits (and as may be duly amplified upon or duly supplemented in due course if necessary or permitted), but on the applicant’s own version and in addition to the pending litigation the

¹⁵ *Trojan supra* at 82

¹⁶ *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies*

¹⁷ [2011] ZAGPJHC 196 (23 September 2011) at 7

alleged confiscated sugilite is in the custody of the fourth respondent. It cannot be said that the fourth respondent will be unable to satisfy any alternative claim for damages in the event that the applicant can establish that the confiscated items are indeed sugilite and that it has some form of entitlement thereto in due course. As pointed out by Ms. Eksteen for the first and second respondents, the applicant has presented no evidence to suggest that without being heard and granted relief by this Court, that it will not be able to obtain substantial recourse or redress at some future date.

- [32] It was further argued on behalf of the fourth respondent that before even dealing with the absence of any case for urgency that this court simply lacks the jurisdiction to grant any relief against the fourth respondent by reason of lack of compliance with section 96 of the Customs Act on the part of the applicant. To this end, it was further argued that section 96 is peremptory, and that non-compliance therewith cannot be condoned.
- [33] Section 96(1)(a) makes clear provision that no process by which any legal proceedings are instituted against the Commissioner may be served before the expiry of one month after the delivery of a notice in writing, setting forth clearly and explicitly the cause of action of the litigant and certain other details.
- [34] It was argued on behalf of the applicant in reply (which is not contained in the affidavits) that in the event that section 96 is peremptory, and that non-compliance therewith cannot be condoned, that it is unconstitutional and should be subjected to the scrutiny of the Constitutional Court.
- [35] However, considering that the application is stillborn on urgency and that the applicant has failed to demonstrate its entitlement to claim relief as against the

Commissioner in terms of the Customs Act (bearing in mind it is neither the exporter or the clearing house from which the minerals in question were seized) - coupled with the fact that the exporters, importers and clearing houses that may have an interest in the outcome of this application are not before this Court - it is not necessary for the urgent court to decide such vexed legal issues at this time.

- [36] In addition it is not necessary that the fourth respondent's application to strike out certain offending portions of the founding affidavit be dealt with, as the outcome of same is moot.
- [37] I see no reason to revise the Order previously given, in dismissing the application for lack of urgency. Nor do I deem it appropriate to deviate from the normal principle that costs follow the result. Considering the facts, I am not persuaded that the first, second and fourth respondents should be deprived of their costs in opposing this matter. Owing to the complexities which have arisen in this matter, and the need to employ senior counsel over the festive season, I am satisfied that the applicant pays the first, second and fourth respondents on a party and party scale, with such costs to be taxed in accordance with Scale C, of the Uniform Rules of Court.



G.Y. BENSON
ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances:

Date of hearing : 31 December 2024

Date of judgment: : 27 January 2025

For the Applicant: ADV. K. NTSEWA
Instructed by: Moloko Mokobi Attorneys

For First & Second Respondents: Adv. E. EKSTEEN
Instructed by: Werksmans Attorneys

For Fourth Respondent: ADV. J. PETER SC
Instructed by: Ramashu Mashile Attorneys

For the Third & Fifth Respondent: No appearance