

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES.

16 May 2025

Case No: 2023-031181

GIDEON PETRUS ANDERSON

First Applicant

JOHANNA CATHARINA ANDERSON

Second Applicant

and

SILVER UNICORN COAL AND MINERALS (PTY) LTD

First Respondent

SCRIBANTE NEW GEN MINING (PTY) LTD

Second Respondent

KERNSIG TWAALF (PTY) LTD

Third Respondent

**THE MINISTER, DEPARTMENT
WATER AND SANITATION**

Fourth Respondent

**THE MINISTER, DEPARTMENT OF
MINERAL RESOURCES AND ENERGY**

Fifth Respondent

THE MINISTER, DEPARTMENT OF

Sixth Respondent

FORESTRY, FISHERIES AND THE ENVIRONMENT

MEC FOR AGRICULTURE, RURAL DEVELOPMENT,
LAND AND ENVIRONMENTAL AFFAIRS,
MPUMALANGA

Seventh Respondent

OLF MINING (PTY) LTD

First Intervening Party/
Eighth Respondent

KALAMIN (PTY) LTD

Second Intervening
Party/

Ninth Respondent

MENAR CAPITAL (PTY) LTD

Third Intervening Party/
Tenth Respondent

JUDGMENT

SK HASSIM J

[1] Portion 3 (“portion 3”) of the Farm Olifantslaagte 378 JS (“Olifantslaagte”) is owned by OLF Farms (Pty) Ltd (“**OLF Farms**”).¹ The applicants are the owners of erven which lie close to portion 3. They apply to interdict the first respondent, Silver Unicorn Coal and Minerals (Pty) Ltd (“**Silver Unicorn**”), a coal mining company, from conducting open cast coal mining on portion 3.

[2] The first applicant, Mr. Anderson, is the registered owner of portions 9, 10, 13, 14, 17, 19, and the remaining extent of Olifantslaagte. His wife, the second applicant, is the registered owner of portion 4 of Olifantslaagte. The applicants live on portion 17. Mr. Anderson conducts agricultural operations on the various portions of the farm Olifantslaagte owned by him and his wife. Portion 3 lies next to some portions of the Farm Olifantslaagte owned by the first applicant.

¹ Kernsig Twaalf (Pty) Ltd, the third respondent was the previous owner of portion 3. It sold the property to OLF Farms on 18 January 2023.

[3] Silver Unicorn was the holder of the mining right over the Farm Olifantslaagte 378 JS. It successfully applied under section 102 of the Mineral and Petroleum Resources Development Act, Act 28 of 2002 (**“the MPRDA”**) for an amendment to the mining right to extend its area to include amongst others portion 3. It commenced open-cast coal mining on portion 3, during January 2023.

[4] Menar Capital (Pty) Ltd (**“Menar”**) has launched an application to review the decision to amend the mining right.

The respondents

[5] OLF Mining (Pty) Ltd (**“OLF Mining”**) is a contractor appointed by Silver Union. That relationship is a holder-contractor relationship contemplated in section 101 of the MPRDA. Kalamín (Pty) Ltd (**“Kalamín”**) is financing the mining activities under a written agreement between it and OLF Mining.

[6] OLF Mining, Kalamín and Menar have intervened as the eighth, ninth and tenth respondents, respectively, by agreement. OLF Mining and Kalamín support Silver Unicorn’s opposition to this application and oppose the Andersons’ application. They counter-apply for a structural interdict in the event the mining operations on portion 3 are interdicted.

[7] Menar contends that in light of its successful application ² for a prospecting license in respect of portion 6, ³ the run of mine (**“ROM”**) and coal mined by Silver Unicorn are part of the resource over which it enjoys a prospecting right. It therefore claims to have an interest in the cessation of mining activities on portion 6. Menar is optimistic that it will obtain prospecting rights over portion 3 and will consequently have the exclusive right to exploit the coal reserve. It contends that Silver Unicorn is appropriating Menar’s coal reserves causing it prejudice.

² The decision to grant the prospecting license to Menar is the subject of an internal appeal by Silver Unicorn. The internal appeal was pending when this application was argued.

³ Menar has prospecting rights in respect of certain portions of the farm Olifantslaagte 378, Middelburg which included prospecting rights with regards to portions 3,4,5,7,8,9,11,12,13,14,15,16,17,18 as well as the remainder of farm Olifantslaagte 378, Middelburg.

[8] As mentioned, Menar is also the applicant in an application to review the decision made under section 102 of the MPRDA to extend Silver Unicorn's mining right to portion 3. The review application was pending when this application was launched and argued.

[9] Menar supports the Andersons' application for an interdict, but wants the scope of the relief claimed by the Andersons expanded to prohibit Silver Unicorn from disposing of the run of mine ("ROM") and stockpiles on portion 6.

[10] The second respondent abides the decision in this application. The third, and fourth to seventh respondents have not participated in the proceedings. In summary, Silver Unicorn, OLF Mining, and Kalamín oppose the application. Menar supports the application and moves for an order expanding the relief claimed by the Andersons to interdict Silver Unicorn from disposing of run of mine and coal stockpiles which have been extracted and placed in the yard on portion 3 and which Silver Unicorn plans on removing to avoid an environmental emergency.

[11] Silver Unicorn avers that the obligation under NEMA to obtain an environmental authorisation does not apply if prospecting and mining activities had been conducted before the statutory requirements were imposed. It argues that because prospecting and mining operations had been conducted on portion 3 since 1986, it did not have to obtain an environmental authorisation. It thus commenced mining activities on portion 3 in the belief that it did not require prior environmental authorisation. It avers elsewhere in the answering affidavit that it was under the impression that the environmental authorisation issued to it on 20 March 2022 in respect of portions 4 and 19 had been amended in November 2008 to include portions 3, 11 and 12 thereof. In March 2023, some two months after mining operations had commenced on portion 3, Silver Unicorn discovered that this was not the case. On 3 April 2023, it applied under section 24G of NEMA to rectify the unlawful commencement of mining (**"the section 24G rectification application"**).

[12] Regarding a water use license, Silver Unicorn argued that it believed that a water use application submitted in 2011 covered all portions of the farm Olifantslaagte. When it discovered that portion 3 was not included, it applied for a

new water use license in April 2023. The new application for a water use license was pending when this application was heard. Silver Union claims that the water use license will be issued. The Andersons on the other hand express doubt.

[13] The applicants seek the following relief in the notice of motion:

- (a) “An interdict restraining the first and/or second respondent from conducting any mining activities and any activities preparatory, ancillary or incidental to mining, including without limitation any cutting or clearing of vegetation, any establishment of roads, any construction or installation of buildings, infrastructure or equipment and any drilling, excavation, digging, removal of soil, coal, ore or any mineral on portion 3 of the farm Olifantslaagte JS, district Middelburg unless and until at least, cumulatively, the following have transpired regarding statutory authorisations relating to portion 3 of the farm Olifantslaagte JS:”
 - (i) “A valid water use license ...authorised by the Department of Water and Sanitation in terms of section 21 of the National Water Act, No 36 of 1998 (“**the NWA**”); and/or”
 - (ii) “An Environmental Authorisation (“**EA**”) ... authorised in terms of section 24 of the National Environmental Management Act No. 107 of 1998 (“**NEMA**”) by the Minister of Mineral Resources and Energy.”

[14] The Andersons notified the respondents of their intention to amend the notice of motion. They objected to the amendment. Consequently, the Andersons applied to amend the notice of motion by the insertion of the following paragraphs:

"2.3 Pending the first respondent's attempts to obtain a valid Water Use Licence and Environmental Authorisation over Portion 3 of the farm Olifantslaagte, and in the light of the current illegal and unauthorised mining project being carried out over the farm, the first respondent is compelled, within fourteen (14) days after this Order to take the following steps under the management and control of the fourth to seventh respondents to regulate and rehabilitate any environmental issues as follows:

- 2.3.1 to appoint a suitable professional with at least 15 years' experience within seven (7) days of this Order, to compile a rehabilitation action plan within a further seven (7) days of appointment with regard to its unlawful activities.
- 2.3.2 the rehabilitation action plan must entail and include, amongst others –
- (a) actions to be implemented to assess and address the impact and risks associated with the mining activities on water resources and the environment;
 - (b) Immediate actions to be implemented to address any immediate risks pending finalisation and implementation of the full rehabilitation action plan;
 - (c) to indicate the estimated cost of the implementation of the entire rehabilitation action plan and process;
- 2.4 to submit the rehabilitation action plan to the fourth to seventh respondents for consideration;
- 2.5 implement any recommendation or directive of the fourth to seventh respondents subject to their powers and objects under the National Environmental Management Act, 107 of 1998 ("**NEMA**") or the National Water Act, 36 of 1998 ("**the NWA**") in respect of the mining activities which were unlawfully conducted on the farm."

[15] The application for the amendment was opposed. For reasons that will emerge I do not have to consider the application nor do I have to consider Kalamín's conditional counterapplication.

[16] The joint practice note filed by the parties prior to the hearing records the following facts to be common cause:

- (a) "Silver Unicorn is the holder of the mining right in respect of portion 3";
- (b) "Silver Unicorn, through its mining contractor, OLF Mining, is mining on portion 3 and the mined coal has been stockpiled on portion 3".
- (c) "Silver Unicorn does not hold an EA and a WUL".
- (d) "Silver Unicorn brought an application in terms of section 24G of NEMA for the grant of an EA to continue mining, which application is pending.

Silver Unicorn disputes that the application was brought to continue mining.”

[17] The application is aimed at the cessation of mining operations on the basis that without the requisite authorisations, the mining operations on portion 3 are unlawful. The Andersons seek to restrain mining activity “at least until [Silver Unicorn] has complied with the requirements imposed by [NEMA], the [MPRDA] and the [NWA] and related legislation”. According to the Andersons the area where Silver Unicorn is conducting mining is environmentally a highly sensitive area. They aver that the unlawful commencement of mining activities on portion 3 will be environmentally catastrophic and will cause irreparable harm to the environment, to their agricultural operations, and those of local communities. And therefore, the unlawful mining should be restrained until a water use license and/or an environmental authorisation is issued.

The rights and obligations under the relevant statutory instruments applicable to mining activities, the consequences flowing from, and interplay between, them

[18] An environmental authorisation is a condition prior to a mining right being granted under the MPRDA. Mining is prohibited in the absence of an environmental authorisation and a mining right (section 5A of the MPRDA). However, the holder of a mining or other right, or permit under the MPRDA who conducts an operation in contravention thereof, or contravenes a condition in an environmental authorisation, is allowed an opportunity to remedy the contravention, or breach (section 47(3) of the MPRDA). In the event that a person, despite being directed under section 47 to remedy the breach or failure, failing to do so, the Minister of Minerals and Petroleum Resources has the right to cancel or suspend the mining right or permit.

[19] Section 24F of NEMA prohibits the commencement or continuation of mining activities without an environmental authorisation. If such activities have commenced, section 24G allows the person concerned to apply for an environmental authorisation. And, the Minister responsible for Environmental Affairs and the Minister responsible for Minerals and Petroleum Resources, whichever applicable, is

empowered to direct the applicant to do a wide range of things set out in section 24G(1)(c)(aa) ⁴. These include the immediate cessation of the mining activity, the remediation of any adverse effects of the activity on the environment, cease modify or control any act, activity process or omission causing pollution or environmental degradation, eliminate any source of pollution or degradation. In deciding an application under section 24G the relevant Minister may take into account whether the directive issued under section 24G(1) was complied with. Section 24G(4) ⁵ sets

⁴ “**24G Consequences of unlawful commencement of activity**

(1)(c) ...

the Minister, Minister responsible for mineral resources or MEC concerned, as the case may be-

(aa) must direct the applicant to-

- (A) immediately cease the activity pending a decision on the application submitted in terms of this subsection, except if there are reasonable grounds to believe the cessation will result in serious harm to the environment;
- (B) investigate, evaluate and assess the impact of the activity on the environment;
- (C) remedy any adverse effects of the activity on the environment;
- (D) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation;
- (E) contain or prevent the movement of pollution or degradation n of the environment;
- (F) eliminate any source of pollution or degradation;
- (G) undertake public participation which is appropriate to bring the unlawful commencement, undertaking or conducting of a listed, specified or waste management activity to the attention of interested and affected parties, and to provide them with a reasonable opportunity to comment on the application in accordance with relevant elements of public participation as prescribed in terms of this Act; and
- (H) compile a report containing-
 - (AA) a description of the need and desirability of the activity;
 - (BB) an assessment of the nature, extent, duration and significance of the consequences for, or impacts on, the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;
 - (CC) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for, or impacts on, the environment of the activity; and
 - (DD) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed, if applicable; and

(bb) may direct the applicant to compile an environmental management programme or to provide such other information or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.”

⁵ “A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R10 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection (2) (a) or (b).”

out the consequences of the commencement of an activity in contravention of section 24F. One of these is the requirement that the person who applies under section 24G for an environmental authorisation must pay an administrative fine before an environmental authorisation, subject to conditions which the relevant Minister deems necessary, may be issued.

[20] Section 5(3) of the MPRDA entitles the holder of a mining right to use water from any natural spring, lake, river, or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration, or production on such land. The right is however not absolute. The use must be authorised under a license, or authorisation, issued under the NWA.

Interdictory relief

[21] It is not clear from the papers, neither the affidavits nor heads of argument, whether the Andersons are seeking final or interim interdictory relief. The lack of clarity is compounded by averments of irreparable harm⁶ to land, water resources, and surrounding ecosystems. It was held in Setlogelo,⁷ and been repeatedly confirmed, that an applicant for interdictory relief on the basis of a *prima facie* right, not a clear right, must establish irreparable harm. This appears from the following passage in the judgment of Innes CJ in Setlogelo:

“The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy...

But it was urged that ... no irreparable injury had been sustained. That was not the ground upon which the learned judge based his refusal; but in any event it is not a ground which can avail the respondent in this case. The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known

⁶ An applicant who has established a clear right need not prove any irreparable damage. If it establishes only a *prima facie* right, then it must prove irreparable damage in addition to a well-grounded apprehension of injury. Cf. Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co. Ltd and Another GM Co 1961 (2) SA 505 at 515A-D

⁷ Setlogelo v Setlogelo 1914 AD 221 at 227

passage in Van der Linden's *Institutes* where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though *prima facie* established, is open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course, is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party: Van der Linden, *Inst.* (3, 1, 4, 7)."

[22] The opposing respondents contend that the Andersons are seeking a final interdict. Mr Louw SC, who appeared for Menar Capital in his written argument, discusses why Menar Capital also holds the view that the relief claimed is final. I agree that the relief claimed by the Andersons is final. Even though an interdict may be operative for a fixed or determinable period, it may still be final in its nature and effect.⁸ Though the order as couched will endure until, and unless, the requisite authorisations are issued to Silver Unicorn, the relief is final in its nature and effect. The immediate objective of an interim interdict is to preserve or restore the *status quo* pending the final adjudication of the parties' rights.⁹ There will be no later and final determination of the parties' rights.¹⁰ The Andersons seek to interdict Silver Unicorn from carrying on mining in perpetuity without the necessary authorisations, namely (i) a valid water use license under section 21 of the NWA; and/or (ii) an environmental authorisation under section 24 of NEMA. The Andersons must therefore establish a clear right and the question whether irreparable harm would be caused to them if an interdict is refused does not arise.

[23] Accordingly, the Andersons must establish (i) a clear right; (ii) an unlawful interference with that right, actually committed or reasonably apprehended; and (iii) the absence of any other satisfactory remedy.¹¹

⁸ Airoadexpress v LRTB, Durban 1986 (2) SA 663 at 681E-F.

⁹ See Prest *The Law and Practice of Interdicts* 1996, p.2.

¹⁰ Airoadexpress at 681D-E.

¹¹ Setlogelo v Setlogelo 1914 AD 221 at 227.

[24] I cannot discern the right which the Andersons seek to protect or prevent interference with. It is averred in the founding affidavit:

- “7. [Silver Unicorn] cannot lawfully mine on [portion 6]. There are two primary reasons why this is so:
- 7.1 Firstly, [Silver Unicorn] does not have a valid Water Use License (WUL);
- 7.2 Secondly, [Silver Unicorn] does not have a valid Environmental Authorisation (“EA”).
8. The applicants thus have a clear right, alternatively a *prima facie* right. The impact of the unlawful commencement of mining activities on the environment and surrounding areas will be environmentally catastrophic and will cause irreparable harm to the environment, the agricultural operations of the applicant, and local communities. The applicants are justified in seeking an urgent interdict to prevent this irreparable harm to this highly sensitive area.”

[25] The founding affidavit mentions the various rights listed in section 24 of the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”). But, the right, clear, or *prima facie* that the Andersons want to protect from infringement is not specifically identified. It is unclear whether they are asserting that the “unlawful” mining confers upon them a right to restrain Silver Unicorn from continuing mining operations, or whether they are asserting that they have a right to prevent “environmentally catastrophic” impacts and “irreparable harm to the environment and [their] agricultural operations”, and seemingly the agricultural operations of local communities.

[26] My understanding of the Andersons’, and Menar’s, argument is that the mere carrying on of mining activities without the requisite authorisations, vests in them the right to compel Silver Unicorn to cease mining activities on portion 3.

[27] I do not agree with the Andersons, nor Menar that mining activities without the necessary statutory authorisations creates a right which the Andersons, or Menar can enforce through interdictory relief. The MPRDA (section 47) as well

NEMA (section 24G) address the situation where mining is carried out without the requisite authorisations.

[28] Section 24G (1)(c)(aa) of NEMA empowers and obliges the Minister of Mineral Resources and Energy to direct the person who commenced mining without an environmental authorisation to immediately cease mining. The person is allowed the opportunity to rectify the contravention and take the steps the Minister has directed. The section envisages a situation where albeit that mining commenced without an environmental authorisation, the Minister would not direct the cessation of mining “if there are reasonable grounds to believe the cessation will result in serious harm to the environment”. Where such grounds exist the Minister who is given the power and obligation to direct the cessation of mining cannot do so. This suggests that the right (and power) to stop mining rests with the Minister. And mining without an authorisation does not create or confer a right on someone other than the Minister to apply for interdictory relief. Section 47 of the MPRDA empowers the Minister to cancel a mining right if mining is conducted without an environmental authorisation. However, that power cannot be exercised unless the Minister has notified the holder of the right of his intended action, given reasons therefor, and has afforded the holder of the right an opportunity to show why the right should not be cancelled. Section 53 of the NWA affords to the person who contravenes the provisions of Chapter 4, which includes section 22, to rectify the contravention. As far back as Patz v Green¹² it has been established that:

“Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage - some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage.”

¹² 1907 TS 427 at 433.

[29] NEMA, the NWA and MPRDA fall within a category of statutes that prohibit the doing of acts which affect the public. I am not satisfied that Silver Unicorn has established, nor for that matter that Menar has established, some special damage.

[30] Horn J in Interwaste (Pty) Ltd and Others v Ian Coetzee¹³ dealt with the question whether the applicants could restrain and interdict the operation of a landfill site until such time as the requisite licence or permission had been obtained. The applicants contended that because the respondents were operating a land fill site without a licence, they were entitled to interdict the respondents from doing so. The following passages from the judgment are instructive in this case:

“[26] An important aspect of the appellants’ [sic] case, is their reliance on the failure by the respondents to obtain a licence in terms of the provisions of the Waste Act to operate the landfill site. Insofar as it concerns the applicants’ reliance on the lack of a licence, I am not convinced that this *per se* gives the applicants a clear right for the purpose of a final interdict.

[27] In my view the applicants are confusing the situation where a licence is required for a particular activity and the operation of that activity. The mere failure to obtain a licence will not necessarily satisfy the *essentialia* required for a final interdict. The clear right must lie with the applicants, not with the respondents’ failure to obtain a licence. The clear right does not become established simply because the respondents are contravening a statutory provision. The contravention of a legislative requirement does not *per se* infringe on the rights of the applicants. The mere fact that there has been a failure to obtain a licence in terms of the legislation does not, for the purpose of obtaining a final interdict, establish a clear right *vis-à-vis* the applicants.

[28] A person should not take it upon himself to play policeman and seek to enforce laws which fall squarely within the domain of the environmental authorities who are after all directly responsible for the enforcement of the environmental legislation.

...

[38]

38.1 In *Lazkey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) Binns-Ward AJ (as he then was) found, with respect, correctly in my view, that the Environmental Conservation Act was enacted for the benefit of the public. At p. 56 (par (16) of the judgment he says:

‘The aforementioned contextual considerations support the conclusion that the regulations were intended to provide for the controlled utilisation of the environment and matters incidental thereto for the general benefit of the public.’

38.2 It is trite that where legislation has been enacted for the public benefit, an applicant in interdict proceedings has to show actual harm committed or reasonably apprehended (p. 55, par (13) of the judgment of Binns-Ward AJ in *Lazkey supra*). Insofar as the judgment of Van Reenen J in the unreported case of *Tergniet and Toekoms Action Group and Another v Outeniqua Kreosool Pale (Pty) Ltd and Others*, Case no 10083/2012 dated 29 January 2009, is in conflict with the judgment of Binns-Ward AJ in *Laskey (supra)* in respect of this aspect, I prefer the findings of Binns-Ward AJ.

38.3 There can be no doubt that the provisions of the Waste Act and NEMA, which really take their example from the Environmental Conservation Act, were enacted for the benefit of the public. Consequently the applicants, in particular the second and third applicants, had to prove actual harm committed or reasonably apprehended. In my view they have failed to do so.”

[31] I am not satisfied that the Andersons have established a right, neither clear nor even *prima facie*, worthy of protection at law. With the result that wrongful conduct vis-à-vis the Andersons (or an interference with their rights) has not been established by them. Simplistically, I would put it as ‘no right, no infringement or injury’. In these circumstances, I cannot find that Silver Unicorns’ mining activities

constitute an interference with the Andersons' rights. The failure to establish a clear right is dispositive of the application for a final interdict.

[32] Lest I have erred in finding that the Andersons have not established a right, clear or *prima facie*, the application must still fail for a different reason. The Andersons have not met the second requirement for a final interdict either.

[33] The test in determining whether an applicant has established a reasonable apprehension of an infringement of its rights was set out by Williamson J in Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another¹⁴

A reasonable apprehension of injury, in my view, is one which a reasonable man might entertain on being faced with certain facts. ...[An] applicant only ha[s] to show that it [is] reasonable to apprehend that injury would result"

[34] The Andersons refer, in their affidavits, to a motley of harmful consequences that mining activities generally cause to the environment, water resources, human health, and aquatic biota (vegetation, birds, microorganisms and fauna). In the written submissions it is contended that the Andersons' living, and living environment, is threatened by the open cast mining on portion 3.

[35] They rely on a report prepared by a specialist in water-and environmental governance, Ms Catharina Bosman ("Ms Bosman") to establish a reasonable apprehension of an interference with its rights, and resultant prejudice. Silver Unicorn has produced a report from Mr Van Staden, an ecologist and aquatic ecologist. Mr Van Staden reviewed Ms Bosman's report and attended a site inspection at Silver Unicorn's Mine on portion 6 to verify the risk of environmental degradation and contamination of the water resources as a result of mining activities. He disagrees with Ms Bosman's views on the impact of the mining operations on water resources and the environment. Mr Johan Maré was instructed by the Andersons to review Ms Bosman's and Mr Van Staden's report. Mr Maré's

¹⁴ 1961 (2) SA 505 (W) at 518A-C.

evidence is introduced in the Andersons' replying affidavit. Mr Maree disagrees with Mr van Staden. There are material disputes of facts which cannot be decided on the papers.

[36] Aside the disputes, I cannot find on the Andersons' expert evidence that Silver Unicorns' mining operations infringe on, or interfere, with rights protectable in law. Nor does the evidence establish a reasonable apprehension of an infringement with resultant prejudice.¹⁵ (Prest p. 44).

[37] Ms Bosman's instructions were to:

“...evaluate the situation as it relates to the activities and operations undertaken by [Silver Unicorn] specifically with regard to impacts on water resources caused by these activities on properties adjacent to and downstream of [portion 3] regarding the authorisation of what uses associated with these activities and operations, based on publicly available and open source information”.

[38] Notwithstanding an invitation from Silver Unicorn, Ms Bosman did not visit the site of the mining activities. Nor did she conduct any physical investigations. She describes in her report the source of her facts:

“

- “1) Relevant site-specific information and documentation such as property details, applicable authorisations, records, reports, etc, was obtained from the Client as well as from open-source information on the internet and the latest available Google Earth imagery...
- 2) A desktop investigation by means of evaluations of Google Earth® aerial imagery and Windeed searches was undertaken to confirm property details and ownership of properties on which water uses may occur. The available information and documentation were reviewed in order to identify sensitive environmental components and socio-economic activities that may be affected

¹⁵ Prest at 44.

by the mining operations, as well as to identify activities undertaken by the mine that may have detrimental effects on water resources, or that may be regarded as water uses.

- 3) The site-specific situation at Silver Unicorn was analysed, and is described with regard to activities, facilities and operations that may have a detrimental effect on water resources.
- 4) Based on the available information, activities at Silver Unicorn were evaluated to determine if any of these can be regarded as water uses as described in section 21 of the NWA, and each identified water use was described in terms of its description in the NWA, and the property on which it is occurring, or may be occurring. The type of authorisation in terms of Chapter 4 of the NWA that is applicable to each identified water use was determined based on the available information.
- 5) Conclusions and recommendations are made based on the outcome of the assessment.”

[39] The objective of the assessment she conducted was “to (a) outline the potential impacts on water resources resulting from the activities and operations at the mine in order to establish it [sic] poses [sic] a risk of pollution and (b) to identify the activities that take place at [Silver Unicorn’s] Colliery that may be regarded as water uses described in section 21 of the NWA, and determining the type of water use authorisation (Schedule 1, GA, ELU, WUL) that is required for each identified water use, where possible, in order to establish which activities require authorisation by means of a WUL.”

[40] In her own words, she conducted “[a] desktop investigation”. She did not conduct an independent investigation of the impact of the mining activities. She assessed potentially applicable environmental sensitivities using the Department of Fisheries, Forestry and Environmental Affairs’ web-based screening tool. She asserts that this tool indicates very high sensitivities in relation to water sources, agricultural land capability potential, unique bird species, palaeontological features, aquatic biodiversity, and terrestrial biodiversity. And she had regard to the Mpumalanga Biodiversity Conservation Plan.

[41] Ms Bosman's report is theoretical and academic. It is not a report on Silver Unicorns' mining operations on portion 6 and the impact of those activities. It is a discussion of the general impacts of mining on the environment. It collects and collates information from various sources. And is an exposé of the various statutory instruments, and other instruments regulating certain activities that impact the environment to give effect to the right under section 24 of the Constitution. It explains the relationship between mining legislation and environmental legislation and summarises the rights and obligations of various stakeholders. The report is perhaps best described as a compilation. Ms Bosman reviewed available information and documentation "in order to identify sensitive environmental components and socio-economic activities that may be affected by the mining operations, as well as to identify activities undertaken by the mine that may have detrimental effects on water resources that may be regarded as water uses.". Her views on the impact of the mining operations are based on what was publicly and openly available. Her views on the impact of the mining activities on water sources appear to have been informed by the proximity of the mining operations to a water source. She states in her report that "[the] operations of the mine are primarily located in close proximity to the tributaries of the Selons River (a tributary of the Olifants River), and has [as such] the potential to detrimentally affect the surface water in this water resource downstream from its operations, as well as have a detrimental effect on groundwater in the vicinity of the operations. This in turn will have a detrimental effect on the uses of surface-and ground water resources".

[42] My understanding of her report is that mining operations in general have a detrimental effect on water resources, that water use licenses are aimed at controlling potential impacts on water resources. And this control is exercised through conditions that prescribe and control the implementation of management and monitoring measures to prevent potential detrimental effects on water resources resulting from the mining activities.

[43] I am not satisfied that the Andersons have established a reasonable apprehension of an infringement of its rights.

[44] Turning to the expanded relief which Menar wishes to secure, assuming that Menar's application for a prospect right creates a clear right enforceable through interdictory relief, Menar has not established the second requirement for a final interdict, namely an injury actually committed or reasonably apprehended. It has also not established why a claim for damages would not constitute a satisfactory remedy.

[45] As far as the third requirement for a final interdict is concerned, the MPRDA and NEMA, have mechanisms for measures to address the contraventions, and also to remedy and rectify them. Both Silver Unicorn and Menar have the right to demand that the relevant authorities enforce the provisions of the legislation.

[46] Leaving aside the material disputes of facts on expert evidence on a reasonable apprehension of harm or injury which cannot be decided on the papers, I believe that neither the Andersons, nor Menar has discharged the onus in respect of the fundamental requirements for a final interdict. In view of this, I do not have to consider the Andersons' application for the amendment of the notice of motion. Nor Kalamín's conditional counterapplication. I add that even if an interim was claimed, Silver Unicorn and Menars cannot succeed. Neither have established irreparable harm.

[47] Before turning to costs, I must address the two applications brought by Silver Unicorn under rule 6(5)(e) to introduce additional evidence after argument was concluded. One was delivered in November 2023 and the other in February 2024. The applications and the responses thereto produced a large volume of paper, close to 300 pages, if not more. I extended an invitation for a meeting with the parties to determine how those applications should be managed. I gained the impression that not all the parties had an appetite for a meeting. I subsequently issued directions for the delivery of affidavits in response to those applications. The last set of responses were filed in June. Considering the order I intend making I do not consider it necessary to consider those applications.

[48] Turning to costs. I have decided to depart from the general rule that costs should follow the result. There is a reluctance to make orders for costs against

litigants whose motivation to institute legal proceedings is to give effect to the rights in section 24 of the Constitution, and legislation that gives effect thereto. The enforcement of environmental rights and the implementation of measures to protect the environment and human health and well-being are for the public good. Environmental issues seldom affect only an applicant. And a favourable decision benefits not only the contesting litigants. The impact of a favourable decision could stretch beyond any single applicant. Environmental issues in South Africa are still in a developmental stage. While legislation is in place, legal issues arising from the legislation are slowly making their way to the courts. Decisions in favour of applicants as well as those in favour of respondents, decide issues leading to certainty as to the rights and obligations of society in general. This, especially so, because environmental law is still in its infancy. Adverse costs orders would discourage persons and organisations from asserting rights in their own interest or in the public interest. Those who embark on litigation to protect environmental rights, much like those who embark on litigation to protect socio-economic rights, are usually not large commercial entities. The development of an environmentally responsible culture is largely reliant on non-profit organisations and private individuals litigating. In the absence of *mala fides* and an ulterior motive to the application, it is not in the interest of justice to order the Andersons to pay the costs of the application. My approach may have been different had it been shown that the Andersons were acting in bad faith or with an ulterior motive.

[49] It is common cause that Silver Unicorn was carrying on mining activities without the requisite authorisations and therefore contrary to environmental laws. A costs order in favour of a party who has conducted activities prohibited by a statute is unconscionable and not in the interests of justice.

[50] I am mindful that unlike Silver Unicorn, OLF Mining and Kalamín are not acting contrary to legislation. However, their participation is self-serving, and to bolster Silver Unicorns' opposition. Their interests were not directly implicated.

[51] Menar entered the fray late in the day. I cannot find that its participation was in bad faith or had an ulterior motive. Unlike the other intervening parties, its participation was to protect its direct interests and not simply to benefit the

Andersons. Menar's papers have not been voluminous, and the oral submissions were crisp and short. It will not be fair and reasonable for Menar to pay the costs of the other parties.

[52] In the result, the application is dismissed. The parties shall pay their own costs.

S K HASSIM

Judge of the High Court of South Africa
Gauteng Division, Pretoria

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This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 May 2025