



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

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|-----|------------------------------|
| (1) | REPORTABLE: |
| (2) | OF INTEREST TO OTHER JUDGES: |
| (3) | REVISED. |




DATE 14/11/2025

Case number: 021118/2024

Date: 2025

In the matter between:

BEESTEPAN BOERDERY (PTY) LTD

Applicant

and

VANDABYTE (PTY) LTD

Respondent

JUDGMENT

BRAND AJ

Introduction and background

[1] This matter concerns the interpretation of section 54 of the Minerals and

Petroleum Resources Development Act 28 of 2002 (the 'MPRDA') and the question whether a holder of a mining right may enter onto land to which that right applies and commence mining despite the dispute resolution process provided for in section 54 to determine compensation for loss that may result from the mining for the owner of the land not having been exhausted. The matter comprises an application ('the main application'), coupled with an interlocutory application; and a counter application.

[2] With the main application the applicant seeks to prevent the respondent from accessing one of its farms and commencing open-cast coal mining in terms of a mining right that it holds, until the process prescribed in section 54 of the MPRDA to determine compensation for any loss caused the applicant by the mining has been concluded, and such compensation paid; and to gain access to information concerning the respondent's mining right.

[3] In the interlocutory application the applicant seeks leave to file a supplementary affidavit; to join another party (the Minister of Minerals and Energy – 'the Minister'); and to amend its notice of motion in the main application to add prayers for orders related to the respondent's duties concerning rehabilitation of the applicant's land once mining has been concluded.

[4] With the counter application – in essence the flipside of the main application - the respondent seeks to force the applicant to allow it to move onto its farm and commence mining, in exercise of the mining right that it holds, despite that the compensation issue has not yet been resolved.

Background

[5] The applicant is Beestepan Boerdery (Pty) Ltd ('Beestepan'), a commercial farming concern based in Middelburg, Mpumalanga. Beestepan farms crops and stock on several farms in the Steve Tshwete Local Municipality in Mpumalanga. These farms include a portion of the farm Dunbar,¹ which Beestepan owns.

[6] The respondent is Vandabyte (Pty) Ltd ('Vandabyte'), a company based in Centurion, Gauteng but with its sole director, one Deale, resident in Middelburg in Mpumalanga.

¹ The Remaining Extent of Portion 2 of the farm Dunbar, No. 189 Registration Division I.S., Mpumalanga ('Dunbar farm').

[7] Vandabyte holds a mining right to conduct open-cast coal mining on parts of several farms around Middelburg, including Dunbar farm. It obtained this right through the processes prescribed in the MPRDA.

[8] Vandabyte was granted the mining right on 15 June 2023, for a period of 10 years, until 15 June 2033. It is required to execute the mining right (ie, commence mining) within one year after the date of grant. To do so, it requires access to the land to which the mining right applies, including Dunbar farm.

[9] Substantially before the grant of the right, Vandabyte, through its majority shareholder, Dunbar (Coal) (Pty) Ltd ('Dunbar Coal') already entered into discussions with Beestepaan about access to Dunbar farm. While there may be dispute about the content of those engagements and the positions taken by the protagonists (the idea at the time was that Vandabyte would purchase either a part of or the whole Dunbar farm, with disagreement on the purchase price and valuations), the parties are agreed that they engaged either through correspondence or in meetings at least eight times before the mining right was granted.

[10] Once the mining right was granted these engagements continued. On 31 July 2023, Dunbar Coal on behalf of Vandabyte wrote Beestepaan to inform it that it had acquired the mining right. It also indicated that it required access to Dunbar farm to execute the mining right, that its intention to acquire Dunbar farm for that purpose remained and that its previous offer to purchase it was still in place.

[11] Beestepaan responded through its attorneys that Vandabyte's offer was not acceptable. It proposed a meeting to resolve the issue. This meeting indeed took place on 4 September 2023, but no agreement resulted, with the sticking point still the purchase price.

[12] On 13 September 2023, Beestepaan submitted a notice in terms of section 54 of the MPRDA to the Regional Manager of the Department of Minerals and Energy ('the DME') informing him that Beestepaan was likely to suffer damages or loss as a result of Vandabyte's proposed mining on Dunbar Farm and that the parties, despite attempts at reaching a resolution concerning compensation for that loss or damage, were unable to do so. On 26 October 2023, Vandabyte for its part, also in terms of section 54 of the MPRDA, notified the Regional Manager that in its view, Beestepaan was making unreasonable demands in return for access to Dunbar farm. It requested

the Regional Manager to set in motion the dispute resolution process provided for in section 54 to resolve the impasse between it and Beestepan.

[13] The Regional Manager responded to Vandabyte's notice on 22 November 2023, requesting Beestepan and Vandabyte to attend a meeting on 29 November 2023 to try to reach agreement. In the meantime, on 23 November 2023, Beestepan wrote Vandabyte with another offer to purchase a portion of Dunbar farm. This offer was rejected as Vandabyte did not accept the purchase price.

[14] The meeting with the Regional Manager took place on 29 November 2023. There Vandabyte and Beestepan agreed each to obtain and exchange independent valuations of Dunbar farm by 31 January 2024 and then to meet on 12 February 2024 to try to reach agreement. In the event this failed, the Regional Manager would be informed.

[15] Both parties obtained and then exchanged their independent valuations. The valuations were markedly different. In this light, the planned meeting of 12 February did not take place. Instead, on 13 February 2024, Vandabyte informed Beestepan in writing that, because they had proven unable to agree on an amount of compensation, it had decided to refer the determination of compensation to arbitration or a competent court, 'as anticipated by the provisions of section 54(4) of the [MPRDA]'.

[16] On the same day, Vandabyte also delivered a notice to Beestepan in terms of section 5A(c) of the MPRDA. In this notice, it informed Beestepan that it intended commencing with mining on Dunbar farm on 18 March 2024 and would for that purpose enter onto Dunbar farm on that date.

[17] Beestepan responded in writing on 17 February 2024 that it denies Vandabyte access to Dunbar farm. It also requested an undertaking from Vandabyte that it would not attempt to access and commence mining on Dunbar farm until proper consultation concerning compensation for loss occasioned by the mining had taken place and such compensation had either been agreed or determined in terms of section 54 of the MPRDA.

[18] Vandabyte responded on 22 February 2024 that there was no reason why access could be withheld and that the consultation process concerning compensation could proceed parallel to commencement of mining.

[19] To this Beestepan replied on 23 February, that in light of Vandabyte's refusal

to provide the undertaking sought, it would launch proceedings to interdict Vandabyte from entering onto Dunbar farm and commencing mining there. True to its word, Beestepan filed and served its application for this interdict (the main application in this matter) on 26 February 2024.

[20] On 29 February 2024 Vandabyte wrote Beestepan that it undertook not to access Dunbar farm until the then current maize crop had been harvested, which was estimated to be around the end of July 2024. It also repeated its proposal that the matter of compensation be referred for arbitration, but while mining commences.

[21] On 28 February 2024, Vandabyte noted its opposition to the main application. On 5 March it filed its answering affidavit to the main application and at the same time (and on the basis of the same affidavit) launched its counter application in which it sought an order granting it access to Dunbar farm and prohibiting Beestepan from interfering with such access. Although both the main and counter application were originally urgent, the parties later agreed that they should instead proceed in the ordinary course.

[22] This was no doubt at least in part prompted by the fact that the parties had reached agreement on referring the determination of compensation to an arbitrator. During the first half of April 2024, the arbitration agreement was finalised, and the arbitrator was appointed. From there the arbitration process proceeded parallel to the still pending litigation. Statements of claim and defence were finalised and the arbitration hearings commenced on 14 March 2025. Indeed, when this matter came before me for hearing on 14 and 15 May 2025, the arbitration hearing was ongoing and it was in fact set to conclude on 16 May, one day after the hearing before me.²

[23] As could be expected, the parallel litigation and arbitration processes dealing with ostensibly different (but obviously closely related) aspects of one and the same dispute, could not be hermetically sealed from one another.

[24] Once the arbitration process took shape, the object of the parties' engagement changed. Prior to this, they negotiated about an appropriate purchase price for Dunbar farm, on the assumption that Vandabyte wished to acquire ownership of the farm to enable mining to commence. In the arbitration the object became determination of compensation for loss that Beestepan as owner of Dunbar farm would suffer as a

² In the event, the arbitration award was delivered on 1 October 2025.

consequence of Vandabyte's mining.

[25] To Beestepan, this indicated that Vandabyte no longer wished to acquire Dunbar farm and that it stood to remain owner of Dunbar farm for the duration of the execution of Vandabyte's mining right, and after its conclusion after 10 years. In its view, this meant that it no longer faced only the loss occasioned by the interference in its farming activity on Dunbar farm, which could perhaps have been fully recompensed through an appropriate purchase price. It also incurred the risk of potential liability for a possible failure by Vandabyte properly to rehabilitate the farm once mining has been concluded.

[26] In part to anticipate and cater for this potential risk, Beestepan then launched its interlocutory application on 20 December 2024. In this application Beestepan sought leave to file a supplementary affidavit. This supplementary affidavit was intended to serve as founding affidavit for its interlocutory application, placing facts before court related to the new potential harm Beestepan perceived, and as a supplementary answering affidavit to Vandabyte's counter application. Beestepan in the interlocutory application also sought several additional orders that would enable it, on its version, to mitigate and manage the risk occasioned by it remaining owner of Dunbar farm.

[27] The interlocutory application triggered the exchange of several sets of additional affidavits. In addition to the supplementary affidavit for which Beestepan sought leave to admit in the interlocutory application there followed three opposing/replying/further affidavits from Vandabyte; and two replies from Beestepan.

[28] All of this contributed to the further burgeoning of an already voluminous set of papers. In this light not surprisingly, when this matter came before Basson J on its first hearing date, 12 February 2025, it was transferred to a Special Motion Court and by agreement postponed to 14 and 15 May 2025.

Issues

[29] As stated at the outset, I am called upon against this background to decide a main application; coupled with an interlocutory application; and a counter application. Below I address the interlocutory application first and then the main and counter applications. But before I do so, it pays to identify what the issues in this matter are. These cut across and are determinative of all three applications.

[30] Despite the seeming complexity of this matter that prompted the parties to expand the papers to such an extent that a hearing before a special motion court was warranted, the main and counter applications relate to the same basic question, namely whether or not Vandabyte is entitled to enter onto and commence mining operations on Dunbar farm before the dispute between the parties concerning compensation for loss that will be caused to Beestepan through Vandabyte's mining on Dunbar farm has been resolved through the processes provided for and to the extent required by section 54 of the MPRDA. More precisely, only two concrete substantive issues arise:

[30.1] whether Vandabyte is entitled to access Dunbar farm to execute its mining right before compensation for Beestepan has been either agreed to or determined, and in particular before an arbitration process concerning this, initiated in terms of section 54(4) of the Minerals and Petroleum Resources Development Act 28 of 2002 ('the MPRDA') has been concluded; and

[30.2] whether Vandabyte is entitled to access Dunbar farm to execute its mining right before whatever compensation has been either agreed to or determined, has been paid to Beestepan.

[31] To be sure, these two basic issues raise several sub-questions concerning the interpretation of section 54 of the MPRDA and the nature and extent of the entitlements that arise for its holder from a mining right. But these must be determined only in aid of determining the two main issues above.

[32] What is not before this court for determination is in the first place the quantum of any compensation Beestepan is entitled to; and secondly for which items of loss, potential in the longer term or imminent now, Beestepan is entitled to claim. These are issues that stood to be determined in the arbitration the parties have agreed to subject themselves to and as a result of which an award was delivered on 1 October 2025, not by this Court.

The interlocutory application

[33] Beestepan's interlocutory application comprises three substantive prayers. First, Beestepan seeks leave to file a supplementary affidavit. Second, Beestepan wishes to join the Minister of Minerals and Energy ('the Minister') as party, due to a supposed interest in the additional relief Beestepan seeks to introduce through the

amendment of its notice of motion, concerning Vandabyte's rehabilitation duties. Third, Beestepan seeks the amendment of its notice of motion in the main application, through addition of several prayers directed at itself and the Minister concerning Vandabyte's rehabilitation duties. Below I address each of these three aspects of the interlocutory application in turn.

The supplementary affidavit

[34] Ordinarily in motion proceedings only three sets of affidavits are allowed: a founding, answering and replying affidavit. However, in terms of Uniform Rule 6(5)(e), a court may, in its discretion, allow further affidavits. Further affidavits will ordinarily be allowed only upon application for leave to the court and whether to grant such leave is in the discretion of the court. This discretion must be exercised judiciously, in light of all the relevant facts³ but on the understanding that leave will be granted only in exceptional circumstances.⁴

[35] The following factors may play a role in the exercise of the court's discretion:⁵

- The reason the evidence was not produced earlier.
- The materiality of the evidence.
- The possibility that it may have been filed to 'relieve the pinch of the shoe'.
- The balance of prejudice if the application is refused or granted.
- The stage of the litigation.
- The possibility of an appropriate cost order to address the late filing.
- The need for finality in judicial proceedings.
- The appropriateness of visiting attorneys' faults upon the heads of their client.

Of course, not all these factors will be relevant to every case – below I address only those that indeed clearly relate to this one.

[36] The purpose of the supplementary affidavit Beestepan seeks now to have admitted is twofold. First, it serves as a supplementary answer to Vandabyte's counter application. Second, it founds the remainder of the interlocutory application – the

³ *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at 165A-C.

⁴ *Impala Platinum Ltd v Monageng Mothiba N.O. and Others* (JR2567/13) [2016] ZALCJHB 475 (10 June 2016 at para [4].

⁵ *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C).

prayers to join the Minister and to amend the main application through adding additional relief. On both these counts the affidavit contains evidence concerning the extent of Vandabyte's planned mining operations and Vandabyte's compliance and capacity in future to comply with its statutory obligations to rehabilitate Dunbar farm once mining on it has been concluded. This evidence relates to what on Beestepan's version is the liability that it as owner of Dunbar farm will incur for rehabilitation should Vandabyte not comply with its rehabilitation obligations.

[37] Beestepan submits that the reason for it providing this evidence only at the late stage that it did is likewise twofold. First, it avers that when it launched the main application it did not have insight into Vandabyte's Environmental Impact Assessment (EIA) and its Environmental Management Programme (EMP). It also did not yet have available its own expert report on the adequacy of Vandabyte's rehabilitation plans nor its own statement of claim (SOC) in the arbitration proceedings that it later agreed to. Because all of these things on Beestepan's version are relevant to the main application, once it did become available at a later stage it had to be placed before court.

[38] Second, Beestepan avers that, prior to it launching the main application, Vandabyte had throughout indicated that it wished to buy Dunbar farm, so that the issue in dispute between them was only the appropriate purchase price. However, once the main application had been launched, Vandabyte made what Beestepan calls an 'about-turn', no longer willing to acquire Dunbar farm but only willing to negotiate about compensation. It was only then that Beestepan, on its version, realised that its potential loss resulting from the mining could also include a possible liability for the failure of Vandabyte properly to rehabilitate Dunbar farm; and it was only then that it realised that the evidence concerning that potential liability was relevant to the main application and must be placed before court.

[39] Neither of these two reasons hold water. In its affidavit in opposition to the interlocutory application Vandabyte through its deponent avers that Beestepan 'had sight' of the EIA and the EMP long before it had even started preparing, let alone finalising and launching its main application. It shows with supporting documentary evidence, that these documents were provided to Beestepan in draft form on 16 October 2019 and again on 12 November 2021 (to both one of Beestepan's directors, a Mr Kane-Berman and its lawyers, as now Webber Wentzel Inc). When Vandabyte's

EIA was approved on 15 September 2022 and its Integrated Environmental Authorisation (EA) granted on the same date, Beestepan was likewise notified, including of its right of appeal against those decisions.

[40] Against Beestepan's bare averment that it had not had sight of the EIA or the EMP prior to launching its main application these detailed and documented denials of Vandabyte's version must prevail, not only because this is indicated in terms of the *Plascon Evans* rule⁶ (with Vandabyte's version that of the respondent) but also because Vandabyte's version is clearly documented while Beestepan's is simply asserted.

[41] Given that it had these documents available before it started preparing its main application, Beestepan has only itself to blame for its failure to obtain an expert opinion of its own concerning the adequacy of Vandabyte's rehabilitation plans at an earlier stage. It was not prevented from obtaining its own expert opinion earlier and presenting it to this Court earlier – it either decided not to do so itself or neglected to do so when it could have.

[42] It is unclear why the fact that Beestepan did not have its own SOC in the arbitration proceedings at its disposal when it launched its main application is a reason motivating admission of a supplementary affidavit containing references to that SOC now. The reasoning concerning this seems entirely circular – Beestepan offers its wish to have this evidence admitted as a reason for its submission.

[43] Beestepan's averment that Vandabyte surprised it with a sudden 'about-turn' to compensation instead of purchasing Dunbar farm after Beestepan had already launched its main application doesn't accord with the common cause facts. The last time that purchasing Dunbar farm was still in issue between the parties was on 12 February 2024, when they were supposed to meet to compare and discuss their respective valuations of Dunbar farm. After this meeting failed to take place because the two valuations differed too dramatically, the dispute turned into one about compensation more broadly.

[44] On 13 February 2024 Vandabyte informed Beestepan in writing that, because they had proven unable to agree on an amount of compensation, it would refer the

⁶ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

determination of *compensation* to arbitration or a competent court in terms of section 54(4) of the MPRDA. Every interaction between the parties after that referred explicitly to compensation rather than purchase of Dunbar farm. This culminated in Beestepan launching its main application on 22 February 2024. Tellingly, in its notice of motion it too refers to compensation rather than an appropriate purchase price for Dunbar Farm. In sum, it stretches credulity that Beestepan did not know before it launched its main application that the dispute between the parties was no longer about settling on an appropriate purchase price, but more broadly about compensation for loss occasioned by mining.

[45] Beestepan also does not meet the requirement concerning the degree of materiality of the evidence it seeks to place before this Court through its supplementary affidavit. In *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty)*⁷ Davis J made it clear that at issue here is not simply relevance in general, but the question of what bearing the new evidence at issue would have on the outcome of the application concerned. If the new evidence has a ‘significant bearing on the outcome of the ... application’⁸ then that is a strong indication in favour of its admission.

[46] Mr Franklin SC submitted on behalf of Beestepan that the evidence in the supplementary affidavit should be admitted as it is relevant to determining the main application and specifically the balance of convenience, irreparable harm and interest of justice aspects for the interdict.

[47] The more than 300 pages of evidence pertaining to the extent of Vandabyte’s planned mining on Dunbar Farm and the potential liability for deficient rehabilitation arising from that for Beestepan contained in the supplementary affidavit certainly is relevant in general terms to the determination of the nature, scope and extent of the loss that Vandabyte’s mining could cause Beestepan, and in that way to determination of the compensation to be paid Beestepan.

[48] But it is at best tangentially relevant and certainly not material to the main application. What is at issue in the determination of the balance of convenience, irreparable harm and interest of justice in the main application is the extent to which

⁷ *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) (*Porterstraat 69 Eiendomme*).

⁸ *Porterstraat 69 Eiendomme* (above) at 617H-I.

Beestepan's capacity to recoup any losses it may suffer as a result of Vandabyte's mining will be affected should the mining be allowed to commence before the nature and quantum of loss (and so compensation) has been determined. What should be before this court concerning loss and compensation to determine that issue, is at best for Beestepan an indication of the different kinds or items of loss that are likely to arise for it from Vandabyte's mining. The reams of evidence in the supplementary affidavit concerning the scope and size of Beestepan's potential liability for Vandabyte's potential failure properly to rehabilitate Dunbar farm post-mining need not.

[49] In this matter the most important consideration determining admissibility of the supplementary affidavit is the stage of the litigation at which it was introduced. The interlocutory application containing the supplementary affidavit was launched on 23 December 2024, slightly more than 10 months after the main application.

[50] The interlocutory application not only had the effect that Vandabyte had to file several additional affidavits of its own to answer to the supplementary affidavit (something that can of course be remedied with an appropriate order as to costs). It also caused Basson J at the originally allocated hearing date to postpone the matter to place it on the special motions roll for 14 and 15 May 2025, to accommodate the additional submissions required by the more than 300 pages of additional evidence. Given that this matter, originally prosecuted by both parties as urgent, despite the fact that it was since moved by agreement to the ordinary roll, remains manifestly time-sensitive for Vandabyte, this delay caused by the attempt to admit the supplementary affidavit is significant.

[51] More importantly, by the time Beestepan sought to introduce the supplementary affidavit through the interlocutory application the parties had long since agreed to refer the question of the scope and quantum of compensation due Beestepan to arbitration. Indeed, Beestepan's statement of claim (that is of course referred to in the supplementary affidavit) had already been finalised and in general the issues and evidence that would be subject to the arbitration had been agreed. This places this court in an invidious position: if the supplementary affidavit is to be admitted, I will be required to consider and evaluate evidence that at the same time is being considered and evaluated by the appointed arbitrator and that, in the event were eventually decided by the arbitrator before this judgment was handed down, on 1 October 2025.

[52] This cannot be countenanced. It is in part to avoid this very problem – ‘a situation where different [tribunals] pronounce on the same issue with the risk that they may reach differing conclusions’⁹ – that in general the same parties, in terms of the doctrine of *lis alibi pendens*, are not allowed to litigate the same issues and evidence at the same time in two or more different fora.

[53] Although a plea of *lis pendens* was not raised and would not apply in this matter, it would be imprudent for this court by admitting the supplementary affidavit to put itself in a position where it might make findings of fact and draw conclusions from facts that may conflict with the findings made and conclusions drawn by the arbitrator about the very same facts. For this and the other two reasons set out above, taken together but also each on its own, the leave sought to admit the supplementary affidavit cannot be granted.

The amendment of the notice of motion

[54] Beestepan applies to amend its notice of motion in the main application through insertion of the following prayers:

2A The Applicant is directed to submit all information relevant to the Respondent's rehabilitation obligations on the Remaining Extent of Portion 2 of the farm Dunbar No 189 Registration Division I.S. Mpumalanga, measuring 637,5316 Hectares, held by Deed of Transfer T16868/2016 ("the Property") to the Department of Mineral Resources and Energy.

2B The Department of Mineral Resources and Energy is permitted to call for additional information from the Applicant and/or the Respondent concerning the Respondent's rehabilitation obligations on the Property.

2C The Minister of Mineral and Petroleum Resources, responsible for mineral resources is directed to consider, under section 47 of the Mineral and Petroleum Resources Development Act No 28 of 2002 ("MPDRA"), whether the Respondent has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under the MPDRA concerning the Respondent's Mining Right on the Property and whether the Minister should cancel or

⁹ Per Wallis JA in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite CC* (741/12) [2013] ZASCA 129 (26 September 2013) at para [2].

suspend the Mining right.

2D The Minister of Mineral and Petroleum Resources, responsible for mineral resources is permitted, in his discretion, and after having considered the information provided by the Applicant and called for by the Department of Mineral Resources and Energy, to direct that the Respondent's environmental management programme, including the Respondent's financial provision to the Department of Mineral Resources and Energy according to the requirements of Section 24PA of the National Environmental Management Act No 107 of 1998 ("NEMA") concerning the Property, be adjusted in such a way as the Minister or the MEG may require.

2E. The Minister of Mineral and Petroleum Resources, responsible for mineral resources is permitted, in his discretion, to require that the Respondent make financial provisions to the Department of Mineral Resources and Energy according to the provisions of Section 24PA of NEMA read with the Financial Provision Regulations, 2015, promulgated in terms of NEMA, to the reasonable satisfaction of the claimant, for the costs to remedy the environmental degradation caused by the Respondent's proposed opencast mining activities on the Property, in the aggregate of- -

2E(i) The potential rehabilitation liability for Opencast 1, being R473 860 647, minus the Respondent's estimation and guarantee of R13 330 768.07 (Excl. VAT), which equals R460 829 879 plus VAT, alternatively an amount to be determined by the Department of Mineral Resources and Energy; and

2E(ii) The potential rehabilitation liability for Opencast 2 and other intended mining activities on the remainder of the Property in the amount of R473 860 647 plus VAT, or such other amount which the Applicant will quantify upon receipt of the Respondent's mining plan regarding Opencast 2 and other intended mining activities on the remainder of the Property, alternatively an amount to be determined by the Department of Mineral Resources and Energy."

[55] If the opposing party does not agree to it, amendment of a notice of motion will usually be permitted upon it being applied for to court, 'unless it is made *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order

for costs or by some other suitable order such as a postponement'.¹⁰

[56] Mr Wickins SC for Vandabyte suggested both in written heads of argument and during the hearing before me that Beestepan had brought its interlocutory application, including the application to amend the notice of motion *mala fide*, with the intention to delay and frustrate the due prosecution of the main and counter applications. Although, as found above it is difficult to discern what reason other than that Beestepan had for launching the interlocutory application there is not enough before me to conclude that the amendment of the notice of motion is indeed motivated by such bad faith.

[57] Nonetheless, the amendment sought cannot be permitted because in at least two important ways it causes prejudice that can be remedied neither by an appropriate order as to costs nor by a postponement, nor by any other apparent means.

[58] In *Imperial Bank Ltd v Barnard and Others* NNO Mpati P provided as one example of an instance where an amendment would cause undue prejudice, cases where the amendment 'has the effect of introducing a new cause of action'.¹¹ For the amendment to be permitted it must relate to substantially the same cause of action as the main application, in the sense that it is 'recognisable or identifiable' in the original cause of action and goes no further than clarifying or correcting the previous pleading in which the original cause of action is set out.¹²

[59] The cause of action of the main application is what on Beestepan's version is its statutory right in terms of section 54 of the MPRDA to deny Vandabyte access to Dunbar farm to commence mining until compensation that may be due it has been agreed or determined (and paid) and a threatening breach of that right through Vandabyte's intention to indeed enter Dunbar farm and start mining. The main application is an application for a prohibitory interdict that would prevent such breach of that right.

[60] Although somewhat difficult to make sense of (more on this below), the

¹⁰ *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (N) at para [15] ('*Four Tower Investments*') cited with approval in *Imperial Bank Ltd v Barnard and Others* NNO 2013 (5) SA 612 (SCA) ('*Imperial Bank*') at para [8].

¹¹ *Imperial Bank Ltd v Barnard and Others* NNO 2013 (5) SA 612 (SCA) ('*Imperial Bank*') at para [8].

¹² *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 474A; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15J-16D (the amendment must not amount to more than a clarification ('opklaring') of the previous pleading in which the original cause of action is set out).

amendment, apart from prayer 2A in which Beestepan seeks relief against itself, comprises an application for several declaratory orders concerning the Minister's powers related to Vandabyte's rehabilitation duties and what appears to be an order directing the Minister to exercise certain of his statutory powers and to exercise them in a certain way. The orders sought all relate to the validity and sufficiency of Vandabyte's undertakings concerning rehabilitation of the land on which it seeks to mine, and the Department's and Minister's oversight functions and powers concerning those.

[61] As such the amendment is not a clarification, amplification or correction of the main application, substantially related to the cause of action in the main application. It is instead, as ably submitted by Mr Wickens SC for Vandabyte, an entirely new and distinct application with a new cause of action, albeit difficult to discern: provisions of the MPRDA other than section 54 and of related environmental legislation that impose rehabilitation duties on Vandabyte and the perceived danger that the provision Vandabyte made for rehabilitation is somehow inadequate and might lead to liability and loss for Beestepan in the future. It should have been brought separately, not as an amendment to the existing main application.

[62] Beestepan's amendment cannot be permitted also for a second reason: all five proposed prayers are bad in law and will be excipiable should they be allowed. In the first prayer – 2A – Beestepan asks this court to direct it to provide certain information to the Minister. That is, it seeks directory relief against itself. No more needs be said.

[63] Prayers 2B, D and E are alike. They are all prayers for what look like declaratory orders, that the Department and/or the Minister is 'permitted' to do certain things. These prayers all three face the following intractable bind: A public entity such as the Department or the Minister can only exercise those powers that are explicitly or by necessary implication conferred on it by legislation. If legislation does not so confer authority on the Department to 'call for additional information from the Applicant and/or the Respondent concerning the Respondent's rehabilitation obligations on the Property', or on the Minister to 'direct that the Respondent's environmental management programme be adjusted' and to 'require that the Respondent make financial provisions to the Department of Mineral Resources and Energy according to the provisions of Section 24PA of NEMA read with the Financial Provision Regulations, 2015, promulgated in terms of NEMA, to the reasonable satisfaction of

the claimant, for the costs to remedy the environmental degradation caused by the Respondent's proposed opencast mining activities on the Property' then they do not have that authority and this court cannot through its orders confer that authority on them. But if legislation does in fact confer those powers on them, then these prayers are wholly superfluous, and this court should not entertain relief that has no practical purpose. Either way, if permitted, they will certainly be excipiable.

[64] Likewise prayer 2C. In prayer 2C, Beestepan seeks an order directing the Minister to exercise its statutory power in terms of section 47 of the MPRDA. There is a particular remedy in our administrative law through which one obtains an order directing an administrator to exercise a statutory power. Under the common law it used to be called an application for a mandamus. Currently it is an application for the review of the administrator's failure or refusal to exercise the relevant power, in terms of section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 ('the PAJA').

[65] Both at common law and under the PAJA such an application to direct the exercise of a statutory power must follow a particular process and be presented in a particular form. Apart from the fact that this remedy is available only when an administrator was under a duty to exercise the power and then failed to do so within a reasonable time, currently it can only be accessed through the process for the review of an administrative action as prescribed in the PAJA and in terms of Uniform Rule 53. None of these processes and requirements have been followed or complied with concerning prayer 2C. As such, it is also legally incompetent and if admitted, would certainly be excipiable.

[66] In light of the above, this is one of those exceptional cases where the amendment of the notice of motion applied for cannot be permitted.

The Minister's joinder

[67] A party may be joined to an existing application only if it has a direct or substantial interest in the relief sought, or alternatively a legal interest. Clearly, the Minister has no interest in Beestepan's main application, which in fact does not concern the Minister at all – Beestepan made no claim to the contrary.

[68] Beestepan sought the Minister's joinder because of a perceived interest in the amended prayers for which admission was sought in the interlocutory application. On the face of it, it does seem as if the Minister is directly implicated in several of the

amended prayers (prayer 2D is specifically directed at it) but I need not come to any conclusion on this. Given that I have already held above that the amendment of the notice of motion of the main application is not permitted, any interest that the Minister may have had in this matter had the amendment been permitted, falls away. Accordingly, also the application for the joinder of the Minister must fail and the interlocutory application in its entirety must be dismissed.

The main and counter applications

[68] The central issue in both the main and the counter application is the same: access for Vandabyte to Dunbar farm, to commence mining there. Beestepan seeks orders that would prevent such access and commencement until compensation has been agreed or determined and paid; Vandabyte with its counter application seeks orders that such access and commencement must be allowed forthwith, despite the arbitration to determine compensation still being pending.

[69] The two applications in this sense are two sides of the same coin. Dismissal of the main application would inevitably mean that Vandabyte would be allowed to enter onto Dunbar farm and commence mining. Grant of the main application in turn would inevitably mean that the counter application fails. Moreover, the issues that arise in both applications are generally the same. In this light it would make little sense to address the two applications separately. Instead, I proceed below to consider and decide the issues for both applications together. I am aided in adopting this approach by the fact that concerning the issues raised for both applications, the salient facts are mostly common cause, so that the application of *Plascon Evans*¹³ presents no problems.

[70] One preliminary issue must be disposed of first. Beestepan brings its main application as one for an interim rather than a final interdict, on grounds that, should it be granted, the interdict sought will only be in place pending agreement or determination, and payment of compensation. Vandabyte disputes this characterisation, submitting instead that the interdict applied for is final. Mr Wickens pointed out that what renders an interdict final rather than interim in nature, is not the period for which it will apply if granted, so that an interdict that applies only until some other intervening fact occurs at a later stage (such as here) will for that reason be

¹³ *Plascon Evans* (above).

interim rather than final. Instead, an interdict is final if it determines the rights of the parties finally, for whatever period those rights once determined would then apply. An interim interdict by contrast is one that determines the rights of the parties in the interim until they may be determined finally in a further proceeding. As much was held in *Pikoli v President of the Republic of South Africa*¹⁴ where Du Plessis J described it as follows:

[An] interim interdict does not involve a final determination of the parties' rights and it does not affect such final determination. When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case.

[72] With this application, although the interdict prohibits Vandabyte's entry and commencement of mining for an interim period (only until such time as compensation has been agreed or determined, and paid), were the interdict to be granted, Beestepan's right to exclude would be determined finally, countering Vandabyte's right of entry equally finally. The interdict applied for is accordingly final.

[73] I agree with this characterisation: The interdict Beestepan seeks is indeed final. Nonetheless, as becomes clear below, my conclusions remain the same whether I apply the more stringent requirements for final or the more lenient ones for interim relief.

[74] The requirements for a final interdict are a) a clear right; b) an injury actually being committed or reasonably apprehended; and c) the absence of an adequate alternative remedy.¹⁵ I consider each of these requirements on the facts of this matter below.

A clear right

[75] The clear right that an applicant relies on in an application for a final interdict must both be established as a matter of law and proven indeed to accrue to the applicant on the evidence, on a balance of probabilities.¹⁶

[76] The right that Beestepan asserts for purposes of this first leg of the interdict enquiry is its right as owner to deny Vandabyte access to Dunbar farm to commence mining until such time that compensation for the injury Vandabyte's mining activity on

¹⁴ 2010 (1) SA 400 (GNP) (*'Pikoli'*) at 403I.

¹⁵ See for a recent statement of this well-settled set of requirements *Equistock Properties 8 (Pty) Ltd and Another v Oosthuizen and Others* [2025] ZASCA 06 (*'Equistock'*) at para [17].

¹⁶ *Equistock* (above) at para [17].

Dunbar farm may cause Beestepan has been either determined or agreed and has been paid. It grounds this right in section 54 of the MPRDA, which it says creates a procedure for determining or agreeing to such compensation, that the Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources*¹⁷ held must be exhausted before a holder of a mining right such as Vandabyte may gain access to the land to which that mining right applies and commence mining. It proposes that the section 54 process is only exhausted once compensation has either been agreed or determined and paid (which on the facts of this case for it means once the arbitration has been finally concluded).

[77] The right that Vandabyte relies on for its counter application is its right to execute its mining right by entering onto land to which it applies and commencing mining, once that right has been granted and after it has given the owner or lawful occupier of the land to which its right applies 21 days advance notice of its intention so to do. It grounds this right in section 5(3) read with 5A(c) of the MPRDA.

[78] Whether either of these rights exist in law depends on the proper understanding of the relationship between section 54 on the one hand, and section 5(3) read with 5A(c) of the MPRDA. That relationship was decided by the Constitutional Court in *Maledu*, a judgment that Beestepan and Vandabyte understand differently. This means that the existence of either of these (mutually exclusive) rights depends on the interpretation this court affords the judgment in *Maledu*.

[79] Section 54 of the MPRDA determines the following:

54. Compensation payable under certain circumstances

(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-

- (a) refuses to allow such holder to enter the land;
- (b) places unreasonable demands in return for access to the land; or
- (c) cannot be found in order to apply for access.

(2) The Regional Manager must, within 14 days from the date of the notice referred to

¹⁷ *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) (25 October 2018) ('*Maledu*').

in subsection (1)-

- (a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;
- (b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;
- (c) set out the provisions of this Act which such owner or occupier is contravening; and
- (d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.

(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavor to reach an agreement for the payment of compensation for such loss or damage.

(4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by a competent court.

(5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2(c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.

(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.

(7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of

the prospecting or mining operation, in which case this section applies with the changes required by the context.

[80] The relevant parts of sections 5(3) and 5A(c) in turn read as follows:

5. Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof

...

(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;

(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted

...

...

(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.

5A. Prohibition relating to illegal act

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—

...

(c) giving the landowner or lawful occupier of the land in question at least 21 days written notice.

[80] The interplay of these sections and the manner in which they provide resolution to the tensions between the rights of mining right holders and the holders of surface rights to land to which mining rights apply were authoritatively described by the Constitutional Court in *Maledu*. In *Maledu*, the mining right holder had sought to exercise its rights in terms of section 5(3) first by simply unilaterally entering onto the land in question and commencing preparation for mining. Once it was stopped from

doing this through a successful application for a spoliation order brought by the surface right holders, it obtained an order for their eviction in the Limpopo division of this court. Crucially, it did so having given notice to the Regional Manager that the surface rights holders were in its view unreasonably withholding access to the land and requesting its intervention, but without having made any prior or resultant effort to engage with the surface right holders and obtain a resolution through mediation or negotiation (apart from having given them the required notice in terms of section 5A(c)) or to take the section 54 mediation process through the Regional Manager any further.

[81] In this light the issue before the Constitutional Court on appeal against the eviction order was whether a mining right holder that had given notice in terms of section 5A(c), was by virtue of section 5(3) entitled to evict surface rights holders to commence mining despite that the section 54 dispute resolution process had been initiated but taken no further and in the absence of any other attempts at good faith negotiation with the surface rights holders about the impact that mining would have on their rights. Petse AJ (as he then was) held as follows concerning this:

[S]ection 54 itself provides for a speedy dispute resolution process that is premised on parties reaching some sort of agreement through mediation. It also provides that if parties fail to reach an agreement, then they may approach a court. It is unclear why, pending the finalisation of *this process* [emphasis added], a mining rights holder should be entitled to mine. On the contrary, to allow them to do so will undermine the purpose of section 54 and the MPRDA: to strike a balance between the interests of the mining right holder and the owner.¹⁸

[82] The crucial part of this passage for this case is the highlighted phrase ‘this process’ and the question when it is that this process has been finalised so that the mining right holder is ‘entitled to mine’. Beestepan holds the position that Vandabyte is precluded from commencing with mining until the amount of compensation it is entitled to has been either agreed or finally determined and paid. It interprets the word ‘process’ used by Petse AJ to refer not only to the engagement between the parties under direction of the Regional Manager referred to in sections 54(1), (2) and (3), but to also include the arbitration or litigation that may ensue should the parties be unable to reach agreement on compensation and the matter is referred to court or arbitration

¹⁸ *Maledu* (above) at para [92].

in terms of section 54(4). *In casu* on this basis its claim is that Vandabyte is precluded from mining until the arbitration between them has been finally concluded.

[83] In support of this interpretation Beestepan submits that the impact of the award of a mining right on surface rights to the land to which it applies (such as its ownership of Dunbar farm) amounts to or is at least akin to expropriation, in that it causes the loss of those rights in their entirety, or of central aspects of those rights. Relying on section 25 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), it then proceeds to point out that expropriation of any property right can only occur for or against 'just and equitable' compensation. Such compensation, it continues, must be finally determined *before* the expropriation itself (the actual 'taking' of the right in question) occurs. It cites the matter of *Haffejee NO and Others v Ethekekwini Municipality and Others*¹⁹ in support of this final contention and also claims that *Maledu* supports it.²⁰ The 'process' that in terms of *Maledu* must be concluded before mining may commence must in this light, so it concludes, include the arbitration or court process ensuing from a section 54(4) referral, as, unless it is agreed, compensation will only finally be determined once those processes as applicable in any given case have been concluded.

[84] Vandabyte in turn says that the 'process' Petse AJ referred to in *Maledu* concludes sooner – on the facts of this matter in its view, as soon as it transpires that the parties are unable to reach resolution of their dispute through the mediation required in terms of sections 54(1) to (3). This means for it that its section 5(3) right to enter onto Dunbar farm and commence mining became operative the moment that it was clear that parties were not going to reach agreement and would have to resolve the issue of compensation through arbitration, while Beestepan's right to deny it access ceased at that same moment.

[85] For Vandabyte, section 54 is intended to create an informal mediative process, conducted under the direction of the Regional Manager, to allow the mining right and surface rights holders to resolve their disputes (whether about access, conflicting land use, compensation for loss or damage caused by mining or whatever else arising from the fact of competing rights exercised concerning the same piece of land) through

¹⁹ *Haffejee NO and Others v Ethekekwini Municipality and Others* 2011 (6) SA 134 (CC) ('Haffejee') at para [21]

²⁰ *Maledu* (above) at para [90] to [92].

negotiation aimed at reaching an agreement. It is only this process that, while it is ongoing, suspends the mining right holder's entitlement to access and commence mining. When this process fails to result in a solution by agreement, it concludes. Section 54 then provides two different and distinct alternative processes through which the issues causing the deadlock and conclusion of the mediation process can be resolved (expropriation in terms of section 54(5) and referral of the determination of compensation to arbitration or a competent court in terms of section 54(4)).

[86] Against this background it is for Vandabyte clear that the process that Petse AJ refers to in *Maledu* that suspends the exercise of a mining right is only the mediation process shepherded by the Regional Manager, as that is the process that section 54 was created for, with the other processes (arbitration, litigation, expropriation, all extraneous to the MPRDA) ensuing only when the section 54 process has failed and so concluded. Once this process had concluded through its failure, on Vandabytes view it was free to commence mining.

[87] This question of until when the execution of a mining right remains suspended by the operation of the section 54 process has been considered and decided by two different divisions of this court, in *Sydney on Vaal Property Association v Theta Mining (Pty) Ltd*²¹ and *Stuart Coal (Pty) Ltd v Regional Manager of the Department of Mineral Resources and Energy, Mpumalanga & Another*,²² judgments to which Messrs Woodrow SC (in heads of argument) and Wickens SC (at the hearing) helpfully referred me.

[88] In *Sydney on Vaal*, the applicant ('the CPA'), a communal property association and beneficial owner of land concerning which the first respondent ('Theta'), a mining concern held a mining right, sought *inter alia* an order prohibiting Theta from entering onto its property and commencing mining there, until the compensation to be paid to the CPA for loss or damage occasioned by Theta's mining had been determined by agreement in terms of section 54.

[89] The CPA, to establish its clear right to exclude Theta from its land pending determination of compensation, relied squarely on the above quoted passage from

²¹ *Sydney on Vaal Property Association v Theta Mining (Pty) Ltd* 2020 JDR 0519 (NCK) ('*Sydney on Vaal*').

²² *Stuart Coal (Pty) Ltd v Regional Manager of the Department of Mineral Resources and Energy, Mpumalanga & Another*

Maledu to argue that execution of Theta's mining right through entry onto the land and commencement of mining was suspended until compensation had been determined by agreement in terms of section 54.

[90] Williams J disagreed. To her, *Maledu* could be distinguished in that it did not concern a dispute about compensation. Instead, on her reading *Maledu* was about 'two competing rights in the context of evictions', the surface rights holders' right of occupation to the land for which they had statutorily protected tenure rights and the mining right holder's statutory right to commence mining, in a context where these two rights could not co-exist, in the sense that 'it was not possible for the respondents to undertake their mining operations while the applicants remained in occupation of the farm'.²³ For her, that is, *Maledu* was purely about access and occupation and not about compensation. As such, Petse AJ's remark concerning access and commencement of mining being suspended until the section 54 process had been concluded, were made on an understanding of that process as dealing with disputes about access and commencement of mining. Those remarks do not apply to disputes concerning compensation. On this basis she then proceeded to hold that the CPA does not have the right it claims, so that the interdict application failed.

[91] In *Stuart Coal*, the mining right holder sought an interdict providing it with access to the land to which its mining right applied and prohibiting the landowner from preventing such access and/or the commencement of mining. In this matter the parties had utilised section 54 in an attempt to reach agreement about access and compensation but were unable to reach agreement. This then prompted the mining right holder to approach the High Court for determination of compensation. The landowner continued to refuse access on the basis that access and commencement of mining remain suspended until compensation has been finally resolved, whether by agreement or determination in court as it is only then that the section 54 process would be concluded in terms of *Maledu*.

[92] Langa J rejected this interpretation of section 54 and *Maledu*, as follows:²⁴

[29] In my understanding section 54 only creates and facilitates a quick dispute resolution process led by the Regional Manager in respect of compensation ... The Regional Manager is in charge of this process which, if it fails, must be dealt with by

²³ *Sydney on Vaal* (above) at para [23.4].

²⁴ *Stuart Coal* (above) at para [29] *et seq.*

arbitration or a court. Consequently, once there is a deadlock, the involvement of the Regional Manager in the mediation process comes to an end and so does the section 54 mediation process. In my view the section 54 process would have become exhausted at this stage.

[30] ... [O]nce the negotiations have failed, and the issue [is] referred to arbitration or court, it is out of the ambit of section 54. So, there is only one process provided for by section 54 which is mediation and once it fails the matter either goes to arbitration or court.

[31] ... The argument that the section contemplates a final determination of the compensation payable first cannot be correct. Nowhere in the section or the MPRDA is it provided that the compensation must be determined first before mining operations can commence.

[93] While I do not share the distinction that Williams J seeks to draw between disputes about mutually exclusive rights and access on the one hand and those about compensation on the other to reach it, I agree with the conclusion in both these judgments, that section 54 does not contemplate nor is *Maledu* authority for the proposition that access and commencement of mining is suspended until compensation has finally been determined, whether by agreement, arbitration or court.

[94] I do so for several reasons. First, the text of section 54 indicates this. The only dispute resolution process that is created anew for purposes of the MPRDA in section 54 is the notification and mediation process referred to in sections 54(1) to (3). The other processes referred to in section 54(4) and (5) (arbitration; litigation; expropriation) are pre-existing processes regulated by other legislation that resort may be had to only once the section 54 process has failed to achieve resolution.

[95] Tellingly, also in support of the position that these other processes when resorted to no longer suspend exercise of the mining right, section 54(6) determines that only in the exceptional case where the Regional Manager determines that the failure to resolve the dispute about compensation is the fault of the mining right holder, the Regional Manager may prohibit the commencement of mining until arbitration or a determination through a court has concluded. Clearly, unless this determination is made by the Regional Manager, the suspension of execution of the mining right lifts as soon as the matter is referred to arbitration or a competent court. Section 54(6) would be wholly superfluous were this otherwise.

[96] Second, in my view the passage from *Maledu* that Beestepan relies on for its understanding that access and mining are suspended until compensation has been finally determined, in fact means the opposite. The first sentence of that passage reads as follows: '[S]ection 54 itself provides for a *speedy dispute resolution process* [emphasis added] that is premised on parties reaching some sort of agreement through mediation.' Petse AJ then proceeds to say that '[i]t [section 54] *also* [emphasis added] provides that if parties fail to reach an agreement, then they may approach a court.' The 'also' in the second sentence quite clearly indicates that Petse AJ regards the arbitration and court process referred to in section 54(4) as separate from – ie not part of – the 'speedy dispute resolution process' that section 54 'provides for', which is in turn the process that Petse AJ refers to when he continues in the third sentence to say that '[I]t is unclear why, pending the finalisation of *this process* [emphasis added], a mining rights holder should be entitled to mine.' Here it should also be kept in mind that in *Maledu*, while the mediation process in terms of section 54(1) to (3) had been initiated it had not proceeded any further than that, so that it cannot be said to have been concluded in any sense. Also, the eviction application that the mining right holder had brought was not a referral of a compensation dispute to court in terms of section 54(4) – indeed, Petse AJ concludes that the eviction application was an impermissible circumvention of the statutory remedy provided to the mining rights holder in section 54.²⁵ All this indicates that Petse AJ did not contemplate the process that he holds suspends access and commencement of mining to be anything more extensive than the mediation process provided for in sections 54(1) to (3).

[97] But third, and most importantly, there is also a substantive reason why the interpretation that Beestepan advances cannot stand. There seems to me to be a particular reason why it is necessary for access and commencement of mining to be suspended specifically while the 'speedy dispute resolution process that is premised on parties reaching some sort of agreement through mediation' that sections 54(1) to (3) provides for is ongoing. A negotiation through which parties in conflict attempt to reach agreement to resolve the dispute between them can only be a real and effective negotiation if both parties have some element of bargaining power. If one party holds all the cards, then there can be no negotiation – the other then simply places itself at the mercy of the holder of all the cards. In the context of section 54, the only real card

²⁵ *Maledu* (above) at para [109].

that a surface right holder has to play against the mining right holder's statutory entitlement to commence mining is its capacity to withhold access and prevent commencement of mining. Without that, it is at the mercy of the mining right holder.

[98] That Petse AJ regards the section 54 mediation process as a process of mediated negotiation of conflicting interests and rights where a mutually beneficial agreement to the satisfaction of both parties is the goal, is clear. He describes the purpose of section 54 as 'to strike a balance between the interests of the mining right holder and the owner'²⁶ and he commences his judgment (citing the earlier Constitutional Court judgment in *Bengwenyama*)²⁷ by reminding that all the consultative and mediative processes prescribed by the MPRDA, including section 54 should be understood as intended to reach a mutually beneficial accommodation of the respective interests and rights of the mining right holder and surface right holder.²⁸

[99] The section 54 mediation process can only be this if the surface rights holder still has its only card – withholding access – to play. However, the same is not true once that process has concluded and the determination of compensation is referred to arbitration or a court in terms of section 54(4). The processes of arbitration or litigation in court are not negotiations. Instead, both are processes where parties place their dispute before an independent, objective and impartial adjudicator for determination on the law and the facts. As no bargaining occurs there, no bargaining chips are required. In contrast to during the mediation process, there is no substantive reason why a surface rights holder must still be able to withhold access and prevent commencement of mining once the dispute has been referred to either arbitration or court. Accordingly, I hold that, while a mining right holder such as Vandabyte's section 5(3) right to enter onto land and commence mining is indeed suspended once the dispute resolution process provided for in sections 54(1) to (3) has been initiated and is still ongoing, that suspension is lifted as soon as this process concludes, and in particular no longer applies once the dispute has been referred to either arbitration or court for determination in terms of section 54(6).

²⁶ *Maledu* (above) at para [92].

²⁷ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 63.

²⁸ *Maledu* (above) at para [78] to [81].

[100] Beestepan's attempt to base its counter-interpretation of section 54 on section 25 of the Constitution and the notion that just and equitable compensation must be determined before expropriation occurs has no wings. While it may well be so that in case of expropriation, compensation must always be determined before the right in question is taken, Beestepan's obstacle here is that Petse AJ held in *Maledu* that the award of a mining right, while clearly subtracting in significant respects from the *dominium* of a landowner or holder of other surface rights does not constitute expropriation of such rights.²⁹ This means that section 25 and the authority cited by Beestepan doesn't apply. For sake of completeness, concerning Beestepan's claim that in case of expropriation, compensation must not only be determined beforehand, but also actually paid: Beestepan provides no authority for this proposition so that it too must be rejected.

[101] To be sure, Beestepan might (and did) complain that it was not agreed that the mediation process had failed so that the compensation dispute had to be referred to arbitration by virtue of section 54(4). Even were this so (the facts show differently) then there was a remedy in section 54 at its disposal that it should have utilised at the time: It could have approached the Regional Manager and requested it to exercise its power in terms of section 54(6) to determine that access and commencement of mining would remain suspended while the arbitration unfolded as the failure of mediation was Vandabyte's fault. This section 54(6) remedy is an important mechanism to prevent mining right holders from referring matters to arbitration or court prematurely, without having made a good faith effort first to resolve the dispute through mediation in terms of section 54(1) to (3). But Beestepan did not invoke it, so that it no longer has the right to withhold access and prevent commencement of mining.

[102] It follows that, given that in this matter the section 54(1) to (3) process had concluded through failure and arbitration had commenced, Beestepan no longer has the clear (nor even the *prima facie*) right it requires to found its interdict. On that basis, the main application fails.

[103] The converse is true for Vandabyte. There is no dispute that Vandabyte possesses the clear right to enter onto Dunbar farm and commence mining, in terms of its mining right and by virtue of section 5(3) of the MPRDA. While Beestepan was

²⁹ *Maledu* (above) at para [103].

correct that this right was suspended while the section 54(1) to (3) mediation process was ongoing, once it ended in failure and arbitration ensued as required by section 54(6) its clear right became operative and could be exercised. It has established the clear right it requires for its interdict in the counter application.

[104] While my conclusion that Beestepan has failed to establish either a clear right or one that is *prima facie*, although open to some doubt means that its main application has reached the end of the road, Vandabyte's has not. I continue to consider the remaining two requirements for a final interdict concerning the counter application.

An injury committed or reasonably apprehended

[105] For an applicant for a final interdict to succeed it must show that it has either actually suffered an injury (in the form of irreparable harm) or reasonably apprehends such an injury.³⁰ An injury in this context refers to a prejudicial invasion of or interference with an applicant's right.³¹

[106] Beestepan continuing to prevent Vandabyte from accessing Dunbar farm and commencing mining operations undeniably interferes with Vandabyte's established clear right in terms of section 5(3) of the MPRDA – it completely prevents the exercise of that right and so renders it nugatory for the time being. It is also an unlawful interference: As concluded above, once the section 54(1) to (3) mediation process had failed and ended, Beestepan no longer had any right in law to withhold access and prevent mining.

[107] It can also not be gainsaid that this unlawful interference with Vandabyte's right causes it irreparable prejudice. It is common cause that Vandabyte's mining right has been awarded it for a finite period of 10 years only. Every day that Vandabyte is unable to proceed with mining is one day less of the potential life of the mine, with a clear resultant loss in overall profit. This loss is irreversible (those days of potential production cannot be recouped) and it has a range of spin-off effects on Vandabyte's profitability as a business and its capacity to expand and maintain itself. I conclude

³⁰ *Equistock* (above) at para [17].

³¹ *V&A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* (392/2004) [2005] ZASCA 87; [2006] 3 All SA 523 (SCA); 2006 (1) SA 252 (SCA) (26 September 2005) ('*V&A Waterfront*') at para [21].

therefore that Vandabyte has shown the injury actually committed that is required of it.

[108] For the sake of completeness: Had I concluded above that Beestepan indeed possessed the *prima facie* right it claims for purposes of what it styles as its interim interdict, its application would have failed at this second hurdle, in that it would not have been able to show the irreparable harm reasonably apprehended that is required. While it is clear that in such case Beestepan's right would have been imminently threatened with invasion, Beestepan would not have been able to show that this invasion and the resultant prejudice is irreparable, as it must be to found an interim interdict.³² Beestepan, before it approached this court had at its disposal the mediation process provided for in section 54(1) to (3) of the MPRDA through which to agree to compensation for any loss it may suffer and thereafter has been by agreement engaged in the arbitration with the very purpose of determining the compensation it is due. These processes were designed precisely to ensure that its harm is indeed repaired.

Absence of an adequate alternative remedy

[107] It remains to consider this last requirement for the award of a final interdict in relation to Vandabyte's counter application. In *Hotz v University of Cape Town*³³ the Supreme Court of Appeal per Wallis JA held that an alternative remedy, to be adequate and so to prevent the grant of an interdict, must be a legal remedy (ie, one a court may grant) and must be one that affords substantially the same relief and achieves substantially the same purpose as the interdict sought would.³⁴

[108] The only claim that Beestepan makes of a remedy alternative to the interdict at Vandabyte's disposal is the rather circular one that Vandabyte can continue to subject itself to the process that it has been participating in for determination of Beestepan's compensation and once that is concluded and compensation has been determined, it will gain the access it seeks.

[109] Patently, this, if it is a remedy at all, is not adequate in the sense described by Wallis JA in *Hotz*. The purpose with which Vandabyte applies for its interdict is nothing

³² *Setlogelo v Setlogelo* 1914 AD 221.

³³ *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) (20 October 2016) ('*Hotz*').

³⁴ *Hotz* (above) at para [36].

other than to obtain the assistance of this court to order Beestepan to allow it to exercise its right of access and commencement of mining *while the process to determine compensation is ongoing*. Simply to allow that process to unfold to conclusion does the opposite of achieving Vandabyte's interdict's purpose – it subverts it. Accordingly, I conclude that there is no adequate alternative remedy at Vandabyte's disposal.

[110] As Vandabyte has succeeded in establishing a clear right, an injury actually committed and the absence of an alternative remedy, its counter application succeeds and must be granted.

Costs

[111] Above I have concluded that a) Beestepan's interlocutory application as a whole is dismissed; b) Beestepan's main application is dismissed; and c) Vandabyte's counter application succeeds. What remains is to determine the issue of costs.

[112] Concerning the interlocutory application, I see no reason why costs should not follow the result and that it should not be awarded simply on a party-to-party basis. I did during the hearing rule that the third additional affidavit filed by Vandabyte in response to the interlocutory application is not admitted, but given that the interlocutory application that gave rise to this multiplication of affidavits has failed, this ruling has no bearing on costs. While some references were made in passing both in the heads of argument and at the hearing that Beestepan brought the interlocutory application in bad faith, consciously to delay proceedings further, these were not seriously pursued so that I cannot find that any form of punitive costs order at a higher scale applies.

[113] For the main application I likewise conclude that costs should follow the result on the ordinary scale. While it remains unclear to me why it was necessary for Vandabyte to launch and persist with its counter application rather than simply to oppose Beestepan's main application I cannot conclude that it was unnecessary for it to do so. Vandabyte's success there indicates that the unsuccessful party, Beestepan should carry the costs for the counter application, again on the ordinary scale.

[114] For all three applications the complexity and scope of the matter warrants the briefing of two counsel and costs for such counsel at scale C.

Order

[115] Accordingly, I order as follows:

1. The applicant's ('Beestepan's') interlocutory application is dismissed with costs, which costs include that of two counsel at scale C.
2. Beestepan's main application is dismissed, with costs, which costs include that of two counsel at scale C.
3. The respondent's ('Vandabyte's') counter application is granted, with costs, which costs include that of two counsel at scale C:

3.1 Access is granted to Vandabyte to the property described as Portion 2 of the Farm Dunbar 189 IS, within the magisterial district of Bethal, Mpumalanga ('the property'), for purposes of executing Vandabyte's mining right, as contemplated by the Minerals and Petroleum Resources Development Act 28 of 2002.

3.2 Beestepan, its representatives, employees and anyone associated with it or acting upon its instructions are interdicted from interfering with and/or preventing and/or restricting in any manner, Vandabyte, and its employees, contractors, representatives and anyone involved with or related to Vandabyte's mining operations, to enter upon the property to establish and execute mining operations in terms of Vandabyte's mining right.



JFD Brand
Acting Judge of the High Court
Gauteng Division, Pretoria

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DATE OF THE HEARING:	14 and 15 May 2025
DATE OF JUDGMENT:	14 November 2025