



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Not Reportable

Case no: 2671/2024

In the matter between:

AVENG MOOLMANS (PTY) LTD

1st Applicant

BLACK MOUNTAIN MINING (PTY) LTD

2nd Applicant

and

TAU MINING CONTRACTORS (PTY) LTD

Respondent

In re:

TAU MINING CONTRACTORS (PTY) LTD

Applicant

and

AVENG MOOLMANS (PTY) LTD

1st Respondent

BLACK MOUNTAIN MINING (PTY) LTD

2nd Respondent

Coram: LEVER J.

Heard: 26 January 2026.

Delivered: 06 February 2026.

Summary: Leave to appeal – Section 17(1)(a) of the Superior Courts Act 10 of 2013 – Appeal must have reasonable prospects of success or compelling reason to be heard – Both established – Application for leave to appeal succeeds.

ORDER

1. The first applicant is granted leave to appeal to the Supreme Court of Appeal on the grounds set out in the first, third, fourth, fifth, sixth and seventh grounds pursued by it as set out in this judgment.
2. The first applicant is refused leave to appeal on the second ground of appeal it pursued as set out in this judgment.
3. The second applicant is granted leave to appeal to the Supreme Court of Appeal on the grounds set out in its first, second, third, fourth, sixth and eighth grounds of appeal pursued by it as set out in this judgment.
4. The second applicant is refused leave to appeal on the fifth, seventh and ninth grounds of appeal it pursued as set out in this judgment.
5. The costs in relation to this application for leave to appeal are to be costs in the appeal.

JUDGMENT

Lever J

- [1] This is an application for leave to appeal, by both the present applicants (the applicant/s), against a judgment and order I granted on 1 November 2024. In that judgment, I granted the present respondent (the respondent) a *spoliation* order returning to its possession a portion of the Gamsberg mine, referred to in the original application and in these proceedings as the ‘mining area’ as distinct from the entire mine. In the original *spoliation* proceedings, I also granted an order in favour of the respondent for the return of certain mining equipment and other movables.
- [2] The relevant mining area was defined by means of an aerial photograph which demarcated the said mining area within a red line which had been overlaid on the said photograph. This photograph was annexed to the founding papers as annexure “FA4”. The definition of the mining area and the way my order was framed in relation to the said mining area was one of the grounds of appeal pursued by the applicants.
- [3] The first applicant was a mining contractor on the Gamsberg mine. The second applicant is the holder of the mining right in respect of the Gamsberg mine. The respondent was also a mining contractor on the Gamsberg mine prior to the granting of the said *spoliation* order.
- [4] A dispute between the respondent and the second applicant relating to the respondent’s overall performance developed prior to the respondent being despoiled of the relevant mining area. On the respondent’s version, it was

despoiled of the relevant mining area when the second applicant ordered the first applicant to conduct mining activities on a portion of the relevant mining area.

- [5] In short, in the *spoliation* judgment, I held that the respondent had the necessary physical and mental elements required to possess the relevant portion of the mine for the purposes of the *mandament van spolie*. The aforesaid, I held, was established by virtue of the respondent's responsibilities under the mining contract with the second applicant itself, taken together with certain statutory obligations imposed on the respondent's statutorily appointed officer/s on the Gamsberg mine.
- [6] That prior to being despoiled and on the termination of the mining contract between them, on the version of the termination put forward by the respondent, its intention to possess the said mining area had changed. Such possession was no longer intended for the respondent to fulfil its obligations under the said mining contract taken together with the statutory obligations of its officer/s mentioned above. Instead, the possession of the relevant mining area was intended to assert both a debtor-and-creditor lien as well as an enrichment lien.
- [7] All these issues have been raised, in one form or another, as potential grounds of appeal.
- [8] At this point, it is necessary to mention the status and standing of the first applicant. As already mentioned, the first applicant was a mining contractor at the Gamsberg mine. The first applicant is part of a group of companies known as the 'Moolmans Group'. Effective from 1 April 2025, the mining contract with the second applicant was taken over by another corporate

entity in the Moolman's Group, namely Moolmans S.A. In these circumstances, I hold that the first applicant has legal standing in this application for leave to appeal by virtue of the order I made against it on 1 November 2024. At this point, the relevant court order against it still stands. I believe the first applicant has an interest in pursuing an appeal beyond merely involving costs and in that sense the matter is not moot.

[9] The first applicant filed a Notice of Application for Leave to Appeal dated 2 November 2024. Subsequently, the first applicant filed a supplementary notice in its Application for Leave to Appeal, adding to its grounds for appeal. The said supplementary notice is dated 5 November 2025. The grounds of appeal raised by the first applicant in both Notices of Application for Leave to Appeal are as follows:

- 9.1. The court erred by finding that the respondent (Tau) was in peaceful and undisturbed possession of the mining area;
- 9.2. The 'mining area' (as defined in annexure "FA4") was not a sufficient point of reference to define the territorial extent of the order;
- 9.3. The order relates to an area (being the 'mining area', as defined in annexure "FA4") which is unjustifiably large;
- 9.4. The court erred by failing to exercise its discretion against granting spoliatory relief;
- 9.5. The spoliatory relief granted is fundamentally inconsistent with the Mineral and Petroleum Resources Development Act¹ (MPRDA);
- 9.6. The order unjustifiably grants the respondent (Tau) exclusive possession of the mining area; and

¹ 28 of 2002.

9.7. The court failed to deal appropriately with the respondent's (Tau's) abuse of the urgent proceedings.

[10] The second applicant filed a Notice of Application for Leave to Appeal on 1 November 2024. The grounds of appeal advanced in the said notice are as follows:

- 10.1. The court erred in the manner in which it dealt with urgency and in particular, erred by enrolling the matter and granting an order in circumstances where it ought to have either dismissed the matter for lack of urgency, alternatively ought to have struck the matter off the roll for lack of urgency;
- 10.2. The court erred in finding that the respondent had been in peaceful and undisturbed possession of the relevant 'mining area' in the sense required for the respondent to qualify for spoliatory relief;
- 10.3. The court erred in not finding that in effect, the respondent sought enforcement of a contractual right of access, which is not protected by the *mandament van spolie*;
- 10.4. The court erred, having regard to the contractual relationship between the second applicant and the respondent, in finding that the respondent had been despoiled;
- 10.5. The court erred in failing to find that the respondent had abandoned the 'mining area';
- 10.6. The court erred in granting the order in circumstances that firstly, exceeded the bounds of the relief contemplated in a *mandament van spolie* and secondly, constituted unworkable, impractical and unattainable relief incapable of being implemented and/or enforced;
- 10.7. The court erred in finding that the respondent enjoyed any right to a lien where the requirements necessary to establish such right had not been established by the respondent;

- 10.8. The court erred in failing to exercise its discretion against granting the spoliatory relief in circumstances where both the first and second applicants herein set out the prejudice they would suffer in their respective answering affidavits in the *spoliation* application; and
- 10.9. The court erred in granting interdictory relief in respect of the first applicant herein in circumstances where the respondent herein disavowed such relief in its replying affidavit, which relief also fell outside the ambit of the *mandament van spolie* and which in any event was not urgent.

[11] The test of what needs to be established in order to be granted the necessary leave to appeal is now set out in section 17(1) of the Superior Courts Act,² the relevant provisions of which read as follows:

- “17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
- (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) The decision sought on appeal does not fall within the ambit of s 16(2)(a); and ...”

[12] On the face of it and on the wording of the said section of the Superior Courts Act as quoted above, the requirement for granting leave to appeal is thus more stringent than was previously required. This is in fact what Bertelsmann J held in the case of *Mont Chevaux Trust v Tina Goosen and Others*³. Bertelsmann J held that the test now is not whether another court might come to a different conclusion, but in using the word ‘would’ in the said section of the Superior Courts Act, the test now is that there is a

² 10 of 2013.

³ 2014 JDR 2325 (LCC) para 6.

measure of certainty that another court will reach a different conclusion to the court of first instance.

- [13] Having regard to the change from ‘could’ to ‘would’ as is apparent in section 17(1)(a)(i) of the Act, there existed some differing approaches on how ‘reasonable prospects of success’ would be determined. Such controversy as might have existed appears to have been settled in the case of *Ramakatsa and Others v African National Congress and Another*,⁴ where Dlodlo JA set out the position as follows:

“...The test for reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”⁵ (References omitted.)

- [14] As can be seen from the grounds of appeal set out above, there is a degree of overlap between the grounds pursued by the first and second applicants. In such instances, I shall only deal with the relevant topic once and will refer to the arguments raised by the respective counsel to the extent that this is required.

- [15] Mr Hollander, who appeared for the respondent, in his supplementary heads of argument, raised the issue of the appeal being moot in relation to the first applicant. He makes this submission on the basis that the first applicant disclosed in its further affidavit that it is no longer contracted to

⁴ (Case No: 724/2019) [2021] ZASCA 31 (31 March 2021).

⁵ *Supra* para 10.

mine at the Gamsberg mine, but that a related entity called Moolmans S.A. has now entered into a contract with the second applicant. On these facts Mr Hollander sought to invoke section 17(1)(b) and section 16(2)(a)(i) of the Superior Courts Act on the basis that the first applicant no longer has an interest in the application for leave to appeal and that insofar as the first applicant is concerned, any appeal will no longer have a practical effect.

- [16] On the facts of this case, I made an order granting spoliatory relief against the first applicant in the *spoliation* application. Despite the fact that the first applicant is no longer a mining contractor on the Gamsberg mine, due to the nature of the proceedings and the order I made against the first applicant, I believe it has an interest in pursuing leave to appeal. Further, I believe it has the legal standing to do so by virtue of the order I made against it.
- [17] In dealing with each of these grounds set out as a basis for leave to appeal, I believe that it would be convenient to set out and dispose of those grounds where I believe that there are clearly no reasonable grounds for granting leave to appeal.
- [18] The second ground of appeal set out by the first applicant is to the effect that the ‘mining area’ as defined in annexure “FA4” was not a sufficient point of reference to define the territorial extent of the order. On this issue, I believe that the red line delineated on annexure “FA4” sufficiently defines the territorial effect of the order concerned. I do not believe that a rational basis has been set out on this point to show that another court could come to a different conclusion.

- [19] Turning now to ground five raised by the second applicant. This involves the argument that the respondent had abandoned the relevant mining area. This was premised on the respondent removing its employees from the mining area. In and of itself, removing employees from the mining area, without more, does not necessarily mean that the respondent had given up such possession of the relevant mining area that it might have. Taken in conjunction with other factors such as the disputes turning around how and when the contract concerned was terminated and the respondent's assertion of the lien, I cannot find that the second applicant has reasonable prospects of persuading another court to come to a different conclusion on this ground of appeal.
- [20] Turning to the second applicant's seventh ground for leave to appeal, where the second applicant contends that the court erred in finding that the respondent was entitled to a lien in circumstances where it had failed to establish such lien. In the *spoliation* application, I never determined or found that the respondent was entitled to a lien. I was not called upon to make such a finding in the *spoliation* application.
- [21] The date and manner that the relevant mining contract between the second applicant and the respondent terminated was disputed. However, all agreed that such contract had been terminated prior to the *spoliation* application. In these circumstances, I referred to the lien that the respondent asserted only to demonstrate that the respondent had established a different reason as the basis for the mental element of possession after the contract had terminated, and before instituting the *spoliation* application.

- [22] Accordingly, the second applicant's seventh ground of appeal has no reasonable prospects of succeeding and leave to appeal on this ground is refused.
- [23] The second applicant's ninth ground of appeal is to the effect that the court erred in granting relief in respect of the first applicant because the respondent had disavowed such relief in its replying affidavit in the *spoliation* application. In my view, the second applicant has taken the relevant passage of the respondent's replying affidavit out of context. I do not believe that there is a reasonable prospect that another court would come to a different conclusion on this ground of appeal. Accordingly, on this ground, leave to appeal is refused.
- [24] The first applicant's first ground of appeal is to the effect that the respondent had not established the peaceful and undisturbed possession required to seek spoliatory relief in respect of the relevant mining area. This overlaps with the second applicant's second ground of appeal. Ms Cane SC, who appeared for the first applicant herein, whilst not abandoning this ground of appeal, concentrated her efforts elsewhere. It seemed that there had been a division of labour between her and Mr La Grange SC. Mr La Grange appeared for the second applicant, he analysed the authorities on the nature of the possession required and how such possession would be established.
- [25] The question posed by Mr La Grange is, was the possession the respondent may have had, both peaceful, undisturbed and to the exclusion of others at the material time? This is a factual enquiry. On this question, both the first and second applicants have set up a rational basis to argue that another court could reasonably come to a different conclusion. In the

circumstances, and after reconsidering the facts set out in the *spoliation* application, I find that another court could reasonably come to a different conclusion on this issue. Accordingly, both the first and second applicants are granted leave to appeal on this ground.

- [26] The first applicant's third ground of appeal is to the effect that the order in terms of the mining area as defined by annexure "FA4" is unjustifiably large. In respect of this ground of appeal, I was referred to annexure "AA40" to the answering affidavit. This annexure is another aerial photograph of the same area as annexure "FA4", it has the same thick red line overlaid on the photograph as the one portrayed on annexure "FA4". However, within the thick red line, there are five pockets delineated by a thin red line, and in the answering affidavit, it is contended that the respondent was only in possession of these five pockets. This was not effectively rebutted in reply. Accordingly, on these facts, the first applicant has established a rational basis for asserting that another court might come to a different conclusion. Accordingly, I find that the first applicant should be granted leave to appeal on this ground as well.
- [27] The first applicant's fourth ground of appeal is to the effect that the court erred in failing to exercise its discretion against granting spoliatory relief. This ground of appeal is also pursued by the second applicant as its eighth ground of appeal. I interpreted the discretion I had very narrowly. After reconsidering the facts, it is possible that another court might find that I interpreted such discretion too narrowly or failed to exercise it for the wrong reason. In these circumstances, I believe it is reasonably possible that another court might reach a different conclusion. Accordingly, leave to appeal ought to be granted on this ground as well.

- [28] The first applicant's fifth ground of appeal is to the effect that the spoliatory relief granted is fundamentally at odds with the provisions of the MPRDA. Ms Cane referred this court to section 54(7) of the MPRDA. Ms Cane's submission was that the underlying debts upon which the respondent asserted its liens had to be dealt with under the process envisioned by section 54 of the MPRDA before it could assert its common law right to a lien and the subsequent common law right to spoliatory relief. Ms Cane urged me to have regard to section 4(2) of the MPRDA when assessing this argument.
- [29] Mr Hollander, for the respondent, argued that the first applicant had not pleaded section 54 of the MPRDA in the papers that comprise the *spoliation* application. I do not believe that this is a bar to raising the issue in the present circumstances. Mr Hollander also argued that a lien was not a right as contemplated by section 54 of the MPRDA. It may well be that a lien is not a right contemplated by section 54 of the MPRDA, but Ms Cane's argument relates to the underlying debt that gives rise to the lien.
- [30] In my view Ms Cane's argument forms a rational basis to conclude that another court might reasonably come to a different conclusion on whether a *spoliation* order was appropriate and allowed in the circumstances. Accordingly, the first applicant will be granted leave to appeal on this ground as well.
- [31] The first applicant's sixth ground of appeal is to the effect that the order granted in the *spoliation* judgment unjustifiably grants the respondent exclusive control over the relevant mining area. This ground of appeal overlaps with the second applicant's sixth ground of appeal. Although the

second applicant's sixth ground of appeal goes a little further, it is convenient to consider them together.

- [32] The argument made by the applicants in respect of this ground is that under the provisions of the contract that had existed between the second applicant and the respondent, read together with the MPRDA, the respondent was never entitled to exclusive possession of the relevant mining area.
- [33] Furthermore, in terms of the mining licence issued to the second applicant, the second applicant had to carry out mining in accordance with the mining work programme. It was demonstrated that the mining work programme formed part of the mining licence. Further that the second applicant could not simply mine another area of the mine because it would be in breach of its mining licence. There was also a financial aspect to this argument that went as follows: Different areas of the mine were developed in a sequence so as to ensure a steady supply of ore to the processing plant; that this steady supply of ore to the processing plant ensured the necessary cash flow to keep the second applicant's mine on a sound financial footing; and that any unplanned change to the mining work programme put the mining licence at risk under the provisions of the MPRDA as well as creating unnecessary financial risk to the second applicant by putting its cash flow at risk.
- [34] Considering all the aspects set out above, I believe the applicants should be granted leave to appeal on the grounds set out in the first applicant's sixth ground of appeal as well as the second applicant's sixth ground of appeal.

- [35] The first applicant's seventh ground of appeal overlaps with the second applicant's first ground of appeal. These grounds of appeal are to the effect that, on the question of urgency, I dealt with the application in an inappropriate manner. Although I exercised a discretion on this question, another court might reasonably conclude that I exercised such discretion for an inappropriate reason given the circumstances. Accordingly, I grant leave to appeal to the applicants on this ground as well.
- [36] This leaves the second applicant's third and fourth grounds of appeal that still need to be considered.
- [37] The second applicant's third and fourth grounds of appeal overlap and are to the effect that: Third, the court erred in not finding that in effect the respondent sought enforcement of a contractual right of access, which is not protected by the *mandament van spolie*; Fourth, the court erred, having regard to the contractual relationship between the second applicant and the respondent, in finding that the respondent had been despoiled.
- [38] In respect of these grounds Mr La Grange submitted that under the provisions of the contract between the respondent and the second applicant, the second applicant retained ultimate responsibility in terms of the provisions of the MPRDA. That the respondent's statutorily appointed officers under the MPRDA were subservient both in respect of their authority and obligations to the statutory officers of the second applicant.
- [39] Mr La Grange further argued that the contractual provisions relating to payment for the work done and the dispute resolution provisions precluded the situation where the respondent could claim either a debtor-and-creditor lien and an enrichment lien. Considering these provisions in the contract, I

believe there are reasonable prospects that a different court could come to a different conclusion. Accordingly, leave will be granted to the second applicant to appeal on both the third and the fourth grounds for appeal set out herein.

[40] The court to which the appeal is to be directed is governed by the provisions of section 17(6)(a)(i) and (ii) of the Superior Courts Act. These provisions provide that when important questions of law are at play or that the administration of justice requires it, the matter should be referred to the Supreme Court of Appeal (SCA). Further that, in other cases where the court of first instance is a single judge, the matter should be referred to the full court of the division concerned.

[41] Amongst the issues raised by the applicants is the issue of the provisions of the MPRDA being fundamentally at odds with the common law relief provided by a *mandament van spolie*. The issues involved in this ground of appeal involve important issues of law which should be referred to the SCA. The issue of when and how the discretion not to grant a *spoliation* order is also one of importance and it is also in the interests of justice, generally, that the SCA should consider this question. Accordingly, leave is granted to the applicants to appeal to the SCA.

[42] In the circumstances the following order is made:

1. The first applicant is granted leave to appeal to the Supreme Court of Appeal on the grounds set out in the first, third, fourth, fifth, sixth and seventh grounds pursued by it as set out in this judgment.
2. The first applicant is refused leave to appeal on the second ground of appeal it pursued as set out in this judgment.

3. The second applicant is granted leave to appeal to the Supreme Court of Appeal on the grounds set out in its first, second, third, fourth, sixth and eighth grounds of appeal pursued by it as set out in this judgment.
4. The second applicant is refused leave to appeal on the fifth, seventh and ninth grounds of appeal it pursued as set out in this judgment.
5. The costs in relation to this application for leave to appeal are to be costs in the appeal.


L.G. LEVER

JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

Appearances

For 1st applicant: Adv Cane (SC), Adv Schafer & Adv Ndlovu
Instructed by: Duncan & Rothman Inc.

For 2nd applicant: Adv WG La Grange (SC) & Adv DS Hodge
Instructed by: Duncan & Rothman Inc.

For respondent: Adv L Hollander & Adv J Harmse
Instructed by: Van De Wall Inc.