



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

Case No: 2671/2024

In the matter between:

TAU MINING CONTRACTORS (PTY) LTD

Applicant

and

AVENG MOOLMANS (PTY) LTD

1st Respondent

BLACK MOUNTAIN MINING (PTY) LTD

2nd Respondent

Coram: LEVER J

JUDGMENT

Lever J:

1. This is an application for leave to appeal the refusal of relief under section 18(3) of the Superior Courts Act (the Act).¹ The matter started as an urgent application, which was heard on the 24 October 2024.

2. In the said urgent application the applicant claimed it had been in peaceful and undisturbed possession of a certain identified portion of the Gamsberg mine in the region of Aggenys in the Northern Cape. The applicant claimed that the first and second respondents despoiled it of this peaceful and undisturbed possession of the relevant portion of the Gamsberg mine. I granted the applicant a *mundament van spolie* in respect of the relevant portion of the said mine in my judgment handed down on the 1 November 2024 (the spoliation judgment). Part of the applicant's claim in the spoliation application, which was upheld in the spoliation judgment, is that it possessed the relevant portion of the mine to exert both a debtor-and-creditor lien as well as an enrichment lien.

3. Both respondents sought leave to appeal the spoliation judgment. In response the applicant sought the right to enforce and execute the spoliation judgment under the provisions of section 18(3) of the Act, despite the applications for leave to appeal.

¹ Act 10 of 2013.

4. For various reasons there were significant delays in hearing both the relevant applications for leave to appeal and the section 18(3) application. Which of the parties were responsible for the delays is to some extent contentious. However, this is not an issue that I need to determine in the present circumstances. The said applications were finally heard on the 26 January 2026. Judgments in both the relevant applications for leave to appeal and the section 18(3) application were handed down on the 6 February 2026.
5. In the result, I granted both respondents leave to appeal the spoliation judgment on various grounds. In a separate judgment also handed down on 6 February 2026, I refused the applicant relief under section 18(3) of the Act and dismissed such application. The refusal of the 18(3) relief under the Act is the subject of the present application for leave to appeal.
6. The applicant now seeks leave to appeal the dismissal of the application for relief under section 18(3) in terms of section 17(1)(a)(i) of the Act. The applicant seeks leave to appeal to the full Bench of this Division. The applicant does not rely on the provisions of section 17(1)(a)(ii) of the Act.
7. The substantive grounds of appeal upon which the applicant relies are set out in their Notice of Application for leave to appeal as follows:

7.1 The court *a quo* ought to have found and erred in not finding that:

7.1.1 The life of the mining area as opposed to the mine, and in respect of which mining area the Applicant sought to assert its liens, is 30 months. The life of the mine, 10 years, is not relevant to the liens that the Applicant sought to assert.

7.1.2 Given the life of the mining area, the mining of ore in the mining area would, by the time that the appeals of the Respondents are finalised, result in the loss of the liens and the security afforded thereby, being the leverage correctly identified by the learned Judge.

7.1.3 The Applicant sought restoration of possession in order to assert its liens and the leverage afforded thereby. It was such possession for such purpose that was restored to the Applicant in terms of the Order granted by the learned Judge on the 1st November 2024.

7.1.4 The loss of the liens and the leverage in respect thereof as a result of the mining of ore results in the loss of the remedy that was afforded to the Applicant in terms of the Order granted on the 1st November 2024.

7.1.5 The loss of the remedy in respect of the Order granted on the 1st November 2024 and the leverage afforded by the liens is absolute. Once the liens and the leverage afforded thereby is

lost, there is no replacement for the remedy. Whilst the Second Respondent is facing winding-up proceedings, the applicant is left remediless and thereby its harm is irreparable.

7.1.6 Whilst the harm to the Applicant is irreparable, there is no irreparable harm to the Second Respondent as the Second Respondent is able to mine ore elsewhere which includes the mine (as opposed to the mining area) and Deeps and Swartberg.

7.1.7 The prospect of success of the First and Second Respondents in their appeals did not militate against granting the Applicant the relief sought by it in terms of the section 18(3) application.

7.1.8 The learned Judge ought to have granted the section 18(3) application, with costs, and erred in not doing so.

8 The substantive requirements of what needs to be established to be granted the necessary leave to appeal is now set out in s 17(1) of the Superior Courts Act², 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

² Act 10 of 2013.

(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 ...”

9. Having regard to the change from ‘could’ to ‘would’ brought about by 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 & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER*³, 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.”⁴ (references omitted)

10. Mr Symon SC appeared for the applicant in this application for leave to appeal. Mr Symon argued on behalf of the applicant that: In contrast to what the second respondent asserts, a lien does have value; Reference was made to

³ *RAMAKATSA & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER* (Case No: 724/2019)[2021] ZASCA 31 (31 March 2021).

⁴ *Ramakatsa* case above., para [10].

section 83(11) of the Insolvency Act⁵, which authorised a trustee of an insolvent estate to take possession of *inter alia* an immoveable property where the possessor exercised a right of retention against the insolvent; The possessor who exercised a right of retention over the relevant immoveable property was obliged in terms of the said section of the Insolvency Act to surrender the relevant property to the trustee subject to the holder of the right of retention placing a value on his security; The court was also referred to the matter of KAHAN NO v HYDRO HOLDINGS (PTY) LTD⁶ where the said section of the Insolvency Act was applied; Then the argument proceeded that in the founding papers in the spoliation application, the financial wellbeing and standing of the second respondent was called into question; Instead of providing evidence to refute the contentions relating to the financial wellbeing of the second respondent, the second respondent merely provided vague assurances and conclusions without evidence relating to its financial wellbeing; It was argued that the evidence that mattered in this context was the audited financial statements of the second respondent; These audited financial statements were not put into evidence; It was further argued that the claims the applicant and second respondent assert against each other are for huge amounts that run into billions of Rands; and In this context, it was submitted that the court *a quo*'s judgment in the section 18(3) application

⁵ Act 24 of 1936.

⁶ 1980 (3) SA 511 (TPD).

forced the applicant to give up a real right, which the enrichment lien was, in return for a *spes* that it can execute against the mine during its estimated economic lifespan should it succeed in an enrichment claim against the second respondent.

11. The debtor-and-creditor lien is not referred to in the argument because the second respondent has furnished security in the amount of R28 million in respect of this claim.

12. The import of this argument raised by the applicant is that the loss of the real right, constituted by the enrichment lien, formed the basis of both the exceptional circumstances and the irreparable harm in the context of section 18(3) of the Act. That, given the circumstances, another court would come to a different conclusion than the court *a quo*.

13. Mr La Grange SC, who appeared for the second respondent herein, responded to the above argument as follows: The irreparable harm that applicant originally contended had a narrow compass; The applicant has broadened this substantially in its oral argument; It was argued that in the founding papers in the spoliation application, there was simply a terse reference to the winding-up application brought by the applicant itself; It was contended that this winding-up application constituted an abuse of the process of this court; In

this context it was submitted that there was no *prima facie* case relating to the second respondents financial wellbeing that the second respondent was required to meet; Second respondent drew the courts attention to the fact that it could not simply mine elsewhere and avoid the portion of the mine covered by the lien, as it was bound to the mining plan and was answerable under the MPRDA if it did not adhere to the mining plan; This formed part of the irreparable harm that second respondent would suffer if relief was granted to the applicant under section 18(3); It was pointed out that the basis for the applicants application and the submissions made on its behalf related to the issues around the depletion of the lien by virtue of the ore underneath that area of the mine being mined out; It was argued that a lien simply gives a defence to a property owners claim, it does not give the lien holder a cause of action against the property owner or the property over which the lien is exercised; The lien itself has no independent or inherent value; There is no correlation between the value of the lien holder's underlying claims and the value of the property subject to such right of retention; The court was referred to the case of ROUX EN ANDERE v VAN RENSBURG NO⁷, which dealt with the KAHAN case; It was submitted that both of the said cases did not support the aforesaid correlation; The court had to find the aforementioned correlation in order for the applicant to establish applicant's irreparable harm; The value of

⁷ 1996 (4) SA 271 (AD).

the property subject to the lien is irrelevant; and the applicant, on these grounds had no reasonable prospect of success.

14. Mr Symon replied to this that he accepts that a lien is a shield and is not a cause of action, but that the second respondent's submissions were far removed from commercial reality.

15. I understood from Mr Symon's reply that if the property subject to the lien had no value it would have no effect or compulsion on the said debtor to pay his debt and clear his property from the right of retention. That in effect the right of retention would have no practical use in circumstances where the property subject to the right of retention had no value. In those circumstances the right of retention would afford no actual security.

16. After considering the arguments from both the applicant and the second respondent in this matter, it is clear to me that in the section 18(3) application, I did not consider the factor that the applicant would lose a 'real' right which the judgment in the section 18(3) application held would be adequately compensated by the hope of executing any enrichment found to be payable to applicant against the mine itself during its expected lifespan. Another court might find that this constitutes both 'exceptional circumstances' and

‘irreparable harm’ in the context of section 18(1) as read with section 18(3) of the Act.

17. In the circumstances, I must find that the applicant has established a sound rational basis to show that there are prospects of success on appeal. Accordingly, I must grant leave to appeal.

18. The next question is to which court the appeal should be referred. Mr Symon submitted that the matter is principally an issue of fact and, accordingly, it should be referred to the full Bench of this division. Mr La Grange, on the other hand, submitted that the SCA is already involved in the appeal in respect of the related spoliation matter. Furthermore, there are novel issues that warrant the SCA's attention. In my view, Mr La Grange is correct, and the applicant will be granted leave to appeal to the SCA.

19. The last issue is the issue of costs. Both Mr Symon and Mr La Grange agreed that if leave to appeal is granted, costs should be costs in the appeal. That is indeed the order that will be made in this case.

20. In the circumstances, the following order is made:

- 1) Leave is granted to the applicant to appeal to the Supreme Court of Appeal in respect of the section 18(3) judgment herein.
- 2) The costs of this application for leave to appeal will be costs in the appeal.



L.G. LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

Appearances

For the applicant: Adv S Symon (SC) & Adv L Hollander
Instructed by: Van De Wall Inc.

For the respondent: Adv W La Grange (SC) & Adv D Hodge
Instructed by: Duncan & Rothman Inc.

Judgment Heard: 01 June 2026
Judgment Delivered: 05 June 2026