IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED: **NO**

DATE: 3 February 2023

SIGNATURE:_____

Case No: 10531/2022

In the application between:

TRANSASIA 444 (PTY) LTD	Applicant
TRANSASIA MINERALS (PTY) LTD	Intervening Applicant

And

THE MINISTER OF MINERAL RESOURCES	First Respondent
THE DIRECTOR – GENERAL: DEPT OF MINERALS AND ENERGY	Second Respondent
THE REGIONAL MANAGER: KZN REGION	Third Respondent
UMSOMBOVU COAL (PTY) LTD	Fourth Respondent

In re:

UMSOMBOVU (PTY) LTD	Applicant

And

THE MINISTER OF MINERAL RESOURCES	First Respondent
THE DIRECTOR – GENERAL: DEPT OF MINERALS AND	Second Respondent

ENERGY

THE REGIONAL MANAGER: KZN REGION Third Respondent

Coram: Millar J

Heard on: 20 January 2023

Delivered: 3 February 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 12H45 on 3 February 2023

JUDGMENT

MILLAR J

1. On 28 February 2022 Umsobomvu Coal (Pty) Ltd ("Umsobomvu") brought an application in which an order was sought against the respondents for:

> *"1. Directing the Respondents to deliver all the records required in terms of the Applicant's notice of appeal in terms of Section 96 read with Regulation 74 of the Mineral and Petroleum Resources Development Act, 2002 ('**MPDRA'**) and Application for withdrawal of the decision in terms of Section 103(4)(b) and Application for suspension of the decision in terms of Section 96(2)(a) in respect of the decision made by the Director-General concerning the application made by Transasia Minerals 444 (Pty) Ltd (registration number 2011/003954/07) (Transasia 444) for Ministerial consent in terms of Section 11 of the MPRDA for the transfer of the mineral right with reference number KZN30/5/1/2/2/10021MR in respect of the property Farm terrace 3707 Portion 8 of the Farm Winkel no 5054, Remainder of Portion 1 of the Farm Eastkeal no 5138 of the Farm Lot W no. 8610, the Farm Cosby*

*Rock no 11509, Remainder of Portion 3, Remainder of Portion 4 and Portions 12 and 15 of the Farm Hazeldene no 12649 ('**Appeal'**) in compliance with Regulation 74(8) of the MPRDA within 5 days of the granting of the Order.*

2. *…*
3. *…"*

2. The order sought was granted on 28 June 2022. Thereafter, Transasia 444 (Pty) Ltd ("Transasia 444") brought an application for recission of that order. The application for recission was premised upon the fact that it was an interested party in the appeal that Umsobomvu sought to prosecute.

3. The appeal was against the grant of a consent for the transfer of a mineral right and it was contended on behalf of Transasia 444 that besides the fact that they ought in the first place to have been cited in the application, its interest went beyond this because the documents in respect of which the order of 28 June 2022 had been granted included confidential and proprietary information which had been submitted to the respondents which was not relevant to the prosecution of the appeal.

4. I considered the application and had regard to the provisions of *inter alia* s 96 of the Mineral and Petroleum Resources Development Act[1] read together with regulation 74(8) in regard to appeals. The regulation provides:

> *"(8) Upon receipt of the notice of appeal referred to in sub regulation (1), but no later than 10 days thereafter, the Regional Manager must send copies of all records pertaining to the decision or decisions which are the subject of the appeal of the appellant, to all identified affected persons, and to the Director-General or to the Minister, as the case may be."*

[1] 28 of 2002

5. In its terms, the regulation is clear and unequivocal that “all records” “must” be sent to the parties referred to in the regulation. Umsobomvu is such a party.

6. In my view however, this was not the end of the matter. Notwithstanding the obligation on the part of the respondents to furnish all the documents to Umsobomvu for the prosecution of its appeal, I was of the view that there was merit to the contention that confidential proprietary information, not relevant to the appeal, may have formed part of the record.

7. The approach adopted by Umsobomvu when it was argued on its behalf was that in principle it had no objection to the exclusion from the appeal record of confidential proprietary and irrelevant information. An approach in accord with that adopted in Crown Cork & Seal Inc and Another v Rheem South Africa (Pty) Ltd and Others[2] which is on point to the present matter was considered appropriate.

8. In consequence, I then granted an order on 29 August 2022 in the following terms:

> *“1. By 5 September 2022 Third Respondent will deliver to the Applicant and the Fourth Respondent a complete index of all copies of all documents pertaining to the Record of Decision concerning the application made by the Applicant in terms of section 11 of the Minerals and Petroleum Resources Development Act, 2002 (“MPRDA”)(“the Index”).*
>
> *2. By no later than 12 September 2022, the Applicant will instruct the Third Respondent regarding which documents contained in the Index and the Record is / are confidential.*
>
> *3. The documents so identified by the Applicant shall be produced by the Third Respondent as part of the Record, but under a separate folder to*

[2] 1980 (3) SA 1093 (W)

be titled "Confidential Portion of the Record", by no later than close of business on 23 September 2022.

4. *For avoidance of doubt, the confidential and non-confidential parts so complied must contain a copy of each and every document in the Record in its original format (and may not be redacted).*

5. *Only the legal representatives of the Fourth Respondent and the experts employed by the Fourth Respondent who sign the confidentiality undertaking attached as Annexure "A" ("the Confidentiality Undertaking") hereto and submit the Confidentiality Undertaking to the Applicant's attorneys, shall be entitled to receive and inspect the Confidential Portion of the Record.*

6. *For avoidance of all doubt, the Fourth Respondent and its directors and shareholders and employees shall not be entitled to receive or inspect the contents of the Confidential Portion of the Record.*

7. *Insofar as the Fourth Respondent (acting on advice received from its legal representatives and / or experts who have signed the Confidentiality Undertaking), wish to challenge the classification of a particular document as a confidential document, the dispute in this regard will be referred to by the Fourth Respondent and the Applicant to a retired judge who will be appointed by the parties within 24 hours of a dispute being declared. The retired judge so appointed will act as an expert and not as an arbitrator; and will decide his / her own procedure, and whether or not evidence and argument is required and if so how it is to be presented. His / her decision on either of these issues will be final and binding on the parties. If the parties cannot agree to the identity of the retired judge to be appointed within 24 hours, the Chairperson of the Johannesburg Bar shall be required to make such an appointment and shall be requested to do so on an urgent basis. The determination of the dispute will be treated by the parties and the expert as an urgent matter. Any issues concerning the interpretation and / or application of the*

Confidentiality Undertaking which may arise shall be referred to the retired judge on the same basis.

8. *All submissions to the Minister making reference to the Confidential Portion of the Record will be treated confidentially by the Fourth Respondent and submissions will be treated in the same vein as the Confidential Portion of the Record.*

9. *Costs of two counsel from 15 July 2022 to the date of hearing (including the date of hearing) are to be paid by the Applicant to the Fourth Respondent on a party and party scale"*

And the attached Confidentiality Undertaking referred to in paragraph 5.

"In terms of the Court Order under the above case number dated 29 August 2022 ("the Order"):

1. *I, the undersigned _____ hereby confirm that I am a _____ engaged by the Fourth Respondent in the proceedings instituted by the Applicant in the High Court of South Africa, Gauteng Division, Pretoria under case No: 10531/2022.*

2. *Accordingly, in dealing with the Confidential Portion of the Record (as defined in the Order) I undertake:*

    2.1 *To keep the Confidential information provided to me strictly confidential, as it is not generally available or known to others;*

    2.2 *Not to use, exploit, permit the use of, in any manner whatsoever, or apply, the Confidential Portion of the Record disclosed to me pursuant to the provisions of this undertaking for any purpose whatsoever other than for the purpose for which it was disclosed, being these proceedings (including any litigation which may be brought in relation thereto);*

2.3 Not to (in any manner or form, or to any extent whatsoever) divulge, or cause the Confidential Portion of the Record to be divulged to any person, including the Fourth Respondent or any of its employees; office bearers or officials or directors and/or other participants in these proceedings.

2.4 To at all times keep the Confidential Portion of the Record, together with all notes, summaries and/or annotations thereon for purposes of these proceedings (including any appeal), in a safe place and to ensure that it is not available or accessible to any unauthorized persons; and

2.5 At the conclusion of these proceedings (and any related appeal or review), to destroy all documentation, including without limitation, copies, notes, CDs or other electronic formats, containing the Confidential Portion of the Record, in my possession and thereafter notify the Applicant's attorneys accordingly."

10. Transasia 444, dissatisfied that the recission of the order of 28 June 2022 had not been granted, then lodged an application for leave to appeal the granting of the order on 29 August 2022.

11. The application was followed by a number of further applications – on the part of Umsobomvu an application in terms of s 18(3) of the Superior Courts Act and in the alternative an application to hold the respondents in contempt for failure to comply with the order of 28 June 2022. An application was also brought by Transasia Minerals (Pty) Ltd ("Transasia Minerals") to intervene in the present proceedings.

12. For expedience I indicated that I would hear the application for intervention and the application for leave to appeal and it is these two applications that are the subject matter of this judgment.

13. Insofar as any of the other applications may require hearing in due course, these must be set down in accordance with the usual practice.

14. It is the case for Transasia Minerals that it has a *". . . direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal".*[3] It was argued that Transasia Minerals interest was both historical and present and that it also, has a direct material and substantial interest in the same confidential and proprietary information which forms part of the appeal record. Given the nature of this information, it inapposite to deal with the specific type and content of the information. It suffices for me to say that I am satisfied that for the same reasons that I took the view that I did in respect of Transasia 444, this is equally of application to Transasia Minerals and on the same basis that Umsobomvu did not quibble with the protection afforded by the order to be given to Transasia 444, it did not behoove it to place this in issue for Transasia Minerals.

15. In my view, Transasia Minerals should be given leave to intervene in this matter as an applicant and having regard to the order of 29 August 2022, to be in a position at the very least, to exercise its rights together with Transasia 444 *inter alia* in terms of paragraphs 2 and 7 of that order.

16. After the application for leave to appeal was brought, I raised with the parties whether the order granted on 29 August 2022 was an order that was capable of appeal and whether or not the recission of the order of 28 June 2022 had been refused or not. On this aspect, both Transasia 444 and Umsobomvu were ad idem – both took the view that properly construed, the order granted by me on 28 June 2022 was a final order and that notwithstanding that it did not expressly contain a provision refusing the recission of the order of 28 June 2022, this was its effect.

17. It was argued on behalf of Transasia Minerals that the order granted on 29 August 2022, in its terms, was not a final order and was in fact a nullity. This

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[3] **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at paragraph 85**

was predicated on the basis that the first paragraph of the order of 29 August 2022 purported to be a repetition of paragraph 1 of the order of 28 June 2022.

18. I was referred to *Thobejane & Others v Premier of the Limpopo Province & Another*[4] in support of this. I disagree. The first order compels the delivery of "all records". The second order compels the delivery of "complete index of all copies of all documents pertaining to the Record of Decision". They differ – the first requires an unqualified delivery of all documents, the second in paragraph 1, the delivery of an index as a precursor to the succeeding orders.

19. It was also argued on behalf of Transasia Minerals that the order of 29 August 2022 was not a variation of the order of 28 June 2022, specifically in its terms. It was also argued that the substance of the order was changed. I disagree. The second order does not vary the first order but serves, in conjunction with the first order, to impose a regime in terms whereof the interests of Transasia 444 (and also Transasia Minerals) could be represented and protected – in the way that they would have been had either been before the court on 28 June 2022.

20. In this regard, the contention by Transasia Minerals that the order if 29 August 2022 had 'interposed' Umsobomvu's attorney into the matter in a way that they had not been before is similarly without merit.

21. What is made plain from the papers filed in this matter is that the litigation between the parties is acrimonious. It has reached the point where the line between the litigants and their representatives has become blurred. The order of 29 August 2022 is not law firm specific and was formulated to address what I regarded as legitimate concerns *inter partes*.

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[4] (**1108/2019) [2020] ZASCA 176 (18 December 2020) paragraph 5**

22. In deciding whether a judgment is appealable or not, in *Zweni v Minister of Law and Order* [5], it was stated:

> *"A 'judgment or order' is a decision which, as a general principle has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."*

23. It is apparent from the attributes set out in *Zweni* that a court's mere ruling or an interlocutory order is not appealable. However, these three attributes are not immutable and exhaustive as pointed out in *Moch v Nedtravel (Pty) Ltd*[6].

24. In *Liberty Life Association of Africa Ltd Niselow*[7] the Nugent J held;

> *"In effect the question is whether the particular decision may be placed before a court of appeal in isolation, and before the proceedings have run their full course."*

25. In *Nova Property Group Holdings v Cobbett*[8] the court was of the view that ultimately in deciding whether a decision is appealable, the interest of justice is of paramount importance:

> *"It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts. The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us."*

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[5] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J–533A

[6] *Moch v Nedtravel* (*Pty*) *Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F See also *Absa Bank Limited v Mkhize* and others and related matters 2014 1 All SA (SCA) at para 22-23.

[7] (1996) 17 ILJ 673 (LAC) at 676 H.

[8] (2016 (4) SA 317 (SCA) (12 May 2016) at para 9.

26. The approach that has been taken by the courts recently has been flexible and pragmatic.[9] The courts have directed more to doing what is appropriate in the circumstances than to elevating the distinction between orders that are appealable and those that are not to one of the principles, as was the case in *Phillips v National Director of Public Prosecutions*[10]

27. On consideration of the order of 29 August 2022, I am satisfied that it is final in effect. Having come to this finding, I now turn to the application for leave to appeal.

28. The test for the granting of leave to appeal pertinent to the present matter is set out in section 17(1) of the Superior Courts Act[11] as follows:

> *"(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"*

29. I have considered the grounds of appeal and the respective arguments advanced in support of the granting of leave to appeal and for refusing leave to appeal. The crisp issue is whether another court would come to a different conclusion. The provisions of the MPDRA Act and regulations are clear and unequivocal. For an appeal in terms of s 96 to proceed, a record must be furnished.

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[9] National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA)

[10] 2003 6 SA 447 (SCA).

[11] 10 of 2013

30. The order made on 29 August 2022, insofar as the recission of the order of 28 June 2022 was refused, accommodated, without objection by Umsobomvu, the rights and interests of Transasia 444 (and now Transasia Minerals also).

31. I am of the view that no other court would come to a different conclusion and additionally that there is no other compelling reason for the granting of leave to appeal. It is for these reasons that I intend to make the order that I do.

32. The last aspect that I need to deal with is the question of costs. The parties in the present matter, including Transasia Minerals, have a history of litigating against each other. They are all professionally represented.

33. The delay in the hearing of this application was brought about in consequence of the accommodation at different times of each of the parties' representatives and in part so that the intervention application would be ripe for hearing.

34. It is trite that costs are eminently a matter that falls within the discretion of the court. On consideration of the applications before me, I am of the view that there should be no order for costs.

35. In the circumstances it is ordered:

32.1 Transasia Minerals (Pty) Ltd is granted leave to intervene.

32.2 The application for leave to appeal is refused.

32.3 There is no order as to costs.

_____

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	20 JANUARY 2023
JUDGMENT DELIVERED ON:	3 FEBRUARY 2023
FOR THE APPLICANT:	ADV B STOOP SC
INSTRUCTED BY:	HAMMOND-SMITH ATTORNEYS
REFERENCE:	MS U HAMMOND
FOR THE FOURTH RESPONDENT:	
	ADV D FINE SC
	ADV A MILANOVIC-BITTER
INSTRUCTED BY:	EDWARD NATHAN SONNENBURGS INC
REFERENCE:	MR S MBATHA
FOR THE INTERVENING APPLICANT:	ADV T NGCUKAITOBI SC
INSTRUCTED BY:	E MABUZA ATTORNEYS
REFERENCE:	MR E MABUZA

NO APPEARANCE FOR THE FIRST, SECOND OR THIRD RESPONDENTS