**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO: 361/2023P**

In the matter between:

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| **MATATIELE LOCAL MUNICIPALITY** | **APPLICANT** |
| and | |
| **ZINCEDE NGOKWAKHO (PTY) LTD** | **FIRST RESPONDENT** |
| **STONEWELL QUARRY (PTY) LTD T/A DORNING CRUSHERS** | **SECOND RESPONDENT** |
| **MINISTER OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY** | **THIRD RESPONDENT** |

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**ORDER**

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**The following order shall issue:**

1. It is declared that there is no valid lease agreement between the applicant and the first respondent.
2. The first and second respondents, and anyone else occupying the applicant's property, namely Erf 1, Matatiele Commonage, also known as Postershoek Quarry, through them are hereby directed to vacate the property within one (1) calendar month of this order.
3. The first respondent is hereby ordered to take steps to rehabilitate the applicant's property upon vacating the property at its own costs.

4. The first and second respondents are ordered to pay the costs of this application.

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**JUDGMENT**

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**Sipunzi AJ**

**Introduction**

[1] In this application the applicant seeks relief arising from the expiry of a lease agreement that was entered into between itself and the first respondent. The focus, therefore, is on the consequences of the expiry of the lease agreement as well as the effect of a cession of a mining right concluded between the first and second respondents on that agreement.

[2] As outlined in the notice of motion, the order sought by the applicant is as follows:

'1. It is declared that there is no valid lease agreement between the Applicant and the First Respondent.
2. The First and Second Respondents, and anyone else occupying the Applicant's property, namely Erf 1, Matatiele Commonage, also known as Postershoek Quarry, through them are hereby directed to vacate the property within one (1) calendar month of this order being granted.
3. The First Respondent is hereby ordered to take steps to rehabilitate the Applicant's property upon vacating the property at its own cost.
4. The First and Second Respondent are ordered to pay the costs of this application.
5. Further and/or alternative relief.'

**The parties**

[3] The applicant is the Matatiele Local Municipality, a category B municipality duly constituted in terms of the Local Government: Municipal Structures Act[1] (Municipal Structures Act), with its principal place of business situated at 102 Main Street, Matatiele, Eastern Cape.

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[1] Local Government: Municipal Structures Act 117 of 1998.

[4] The first respondent is Zincede Ngokwakho Housing (Pty) Ltd (Registration number: 2019/140609/07), a private company registered in terms of the Companies Act[2] whose registered address is 24 Main Street, Matatiele, Eastern Cape. It was previously registered as Zincede Ngokwakho Housing CC (Registration number 1995/49681/23).

[5] The second respondent is Stonewell Quarry (Pty) Ltd (Registration number: 2017/502047/07), trading as Dorning Crushers whose registered address is 146 Jabu Ndlovu Street, Pietermaritzburg, Kwa-Zulu Natal.

[6] The third respondent is the Minister of the Department of Mineral Resources and Energy whose address for purposes of this application is 3rd Floor, Durban House, 333 Anton Lembede Street, Durban. No relief is sought against the third respondent.

**Summary of facts**

[7] The property that is the subject of this application can be described as Erf 1, Matatiele Commonage, also known as Postershoek Quarry (the property).

[8] On 10 August 2016, the applicant and the first respondent concluded a written lease agreement in terms of which the applicant leased the property to the first respondent. The material terms of the agreement included that the lease would continue until 21 May 2022. Any option for the extension of the lease agreement would be subject to ratification by the municipal council and as set out in clause 15 of the agreement.

[9] When the lease agreement was concluded, the first respondent was the holder of a converted mining right which was issued by the third respondent. The mining right authorized the first respondent to conduct mining activities in respect of the gravel on the property. The mining right was granted for a period of ten years commencing from 22 May 2012 until 22 May 2022, unless cancelled or suspended.

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[2] Companies Act 71 of 2008.

[10] On 4 February 2019, the first respondent ceded its mining right to the second respondent. On 4 December 2020, the third respondent gave consent to the cession of the mining right to the second respondent. According to the applicant the cession of the mining right had the effect of terminating the lease agreement that was concluded between itself and the first respondent.

[11] On 15 November 2021, the second respondent notified the applicant of its intention to exercise the option contained in clause 15 of the lease agreement, being an intention to extend the 'leased area' equivalent to any period of extension of its mining right on the same terms and conditions as set out in the original agreement.

[12] On 17 February 2022, the applicant informed the second respondent of the council's resolution not to extend the period of the lease agreement. The applicant also commenced with procedures for the agreed alienation of the property. On 17 March 2022, the third respondent informed the second respondent that the application for the renewal of the mining right was still under consideration. The second respondent was granted permission to utilize the mining right that was soon to expire, pending the outcome of the application.

**Issues**

[13] The issues that require determination include:

(a) whether a valid lease agreement existed between the applicant and the first respondent beyond 22 May 2022;

(b) whether the second respondent was entitled to remain in occupation or use of the property after the expiry of the lease agreement;

(c) whether the written lease agreement between the applicant and the first respondent made provision for cession to another party;

(d) whether the second respondent is entitled to remain in occupation of the property after the expiry of the lease agreement between the applicant and the first respondent; and

(e) as the second respondent is a holder of a mining right over the property, whether the applicant has any rights over the property.

**Applicable legal principles**

[14] The legal framework that promotes equitable access to the nation's mineral and petroleum resources and which provides for the security of tenure in respect of mining, amongst others is the Mineral and Petroleum Resources Development Act[3] (MPRDA). Section 5A of the MPRDA finds particular application and provides that:

'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-

*(a)* an environmental authorisation;

*(b)* a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

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

[15] The property in issue is owned by an entity that is a category B municipality duly constituted in terms of the Municipal Structures Act. Therefore, reg 34(1) of the Municipal Asset Transfer Regulations (the Regulations)[4] finds application on how the applicant managed or used and exercised control over the property. Regulation 34 provides that:

'**34 Granting of rights to use, control or manage municipal capital assets**

(1) A municipality may grant a right to use, control or manage a capital asset after:

*(a)* the accounting officer has in terms of regulation 35 conducted a public participation process regarding the proposed granting of the right; and

*(b)* the municipal council has approved in principle that the right may be granted.

(2) Sub regulation 1*(a)* must be complied with only if -

*(a)* the capital asset in respect of which the proposed right is to be granted has a value in excess of R10 million; and

*(b)* a long term right is proposed to be granted in respect of the capital asset.

(3) Only the municipal council may authorise the public participation process referred to in sub regulation (1)*(a)*.'

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[3] Mineral and Petroleum Resources Development Act 28 of 2002.

[4] Municipal Asset Transfer Regulations, GN R878, *GG* 31346, 22 August 2008.

**Evaluation and findings**

[16] It is common cause that the applicant is the owner of the property. During the subsistence of the lease between the applicant and the first respondent, the second respondent became the holder of the mining right on the property through the cession of the mining right that was held by the first respondent.

[17] The parties agreed that the lease agreement expired on 22 May 2022 and that the applicant resolved not to renew same. The applicant also revealed its plan about the future of the property, and that plan did not involve any of the respondents.

[18] At the time of the issue of this application and during argument it was common cause that the application of the second respondent for renewal of the mining right was pending. Therefore, the second respondent remained the holder of the mining right pending the decision of the third respondent.

[19] The salient questions that arose from these facts is whether the second respondent could lawfully remain on the property after the expiry of the lease agreement or whether it mattered that the applicant had different plans for the property.

[20] It seems that there are competing interests over the use or control of the property. The applicant believed that, as the owner, it had right to determine how the property was utilized. On the other hand, second respondent contended that the mining right ceded to it by the first respondent entitled it to continue with its mining activities on the property, even after the expiry of the lease agreement.

**Arguments**

[21] On behalf of the respondents, it was argued that because the second respondent was the holder of mining right in respect of the property, irrespective of whether or not the lease agreement was still in force, it could not be evicted. During oral arguments it was submitted that, the continued presence of the first respondent on the property was not occasioned by the operation of a lease agreement or any rights that the first respondent may have held through the mining right, but that it was at the instance the second respondent.

[22] It was also emphasised that it mattered not that the applicant intended to sell or alienate the property. The second respondent was the holder of the mining right and was entitled to continue to occupy the property for purposes of mining activities.

[23] The contention of the respondents was that the applicant's reliance on reg 34(1) was misplaced. This was on the basis that: [5]

'22. ...no such consent was required, even if it was required, it cannot have any effect on the mining right.

23. The mining right is created in terms of the Act, is granted in terms of the Act and grants the right of access to the land in question for mining purposes. In terms of the Act, a mining right is a mandatory prerequisite for carrying out mining.'

[24] According to the applicant, it was bound to comply with reg 34(1), in relation to the property. In its stead, the municipal council had followed the prescribed process in its dealing with the property.

[25] The applicant's argument was that it had entered into the lease agreement with the first respondent, which did not exercise the option in clause 15 of their written agreement. According to the applicant, the second respondent was not a party to the said agreement and the ceded mining right did not extend to the ceding of the lease agreement that was in operation between itself and the first respondent.

[26] The applicant argued that the lease agreement operated separately from the mining right. Further, there was no transfer of the rights that flowed from the lease agreement with the first respondent to the second respondent. The applicant further argued that the lease agreement created specific terms upon which the agreement could be amended or altered.

**Evaluation and application**

***Reliance on reg 34***

[27] As a category B entity established in terms of s 2 of the Municipal Structures Act, the conduct or affairs of the applicant are subject to the Local Government:

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[5] First and second respondents' comprehensive heads of argument.

Municipal Finance Management Act[6] (MFMA), as provided for in s 3(1)*(a)*. By extension, it is also subject to the regulations published by the Minister of Finance in terms of s 168 of the MFMA.

[28] Regulation 2(1*)*, inter alia, makes provisions for the applicability of the Regulations to the granting of rights to use, control or manage municipal capital assets particularly under Chapter 4, reg 34. Therefore, the applicant which was an entity that was concerned with the granting of rights of use, control or management of a capital asset, and not a mining right, is not exempt from complying with the requirements set out in reg 34(1). Contrary to the respondents' arguments that reliance on the said regulation was misplaced, in my view, reg 34(1) does find application.

***The lease agreement***

[29] When the mining right was ceded between the first and second respondents, it does not appear that there was any mention on whether such cession had any bearing or effect on the lease agreement that was in operation between the applicant and the first respondent.

[30] It is worth noting that the parties did anticipate that the first respondent might wish to pursue an extension of the lease period. This is clear from clauses 2 and 15 which sets out the process that would be followed should the first respondent wish to extend the lease period. These clauses provided as follows:

'**2. <u>THE LEASE</u>**

The Lease (*sic*) shall hire the leased area from the Lessor from the date of signature of this Agreement by the last party signing the document, which date will be deemed to be the date of commencement of the Lease, for the currency of the aforesaid converted Mining Right, plus any extension hereof by the exercising of the option set out below.'

'**15. OPTION**

'15.1 The Lessee shall have the option to lease the leased area for a further period, equivalent to any periods of extension of its mining rights, on the same terms and conditions as set out in this agreement and subject to such reasonable market related rental as may be agreed between the parties.

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[6] Local Government: Municipal Finance Management Act 56 of 2003.

15.2. This option is subject to the condition that the Lessee shall in writing notify the Lessor of its intention to exercise the option not less than six months prior to the expiration of the initial period (22nd day of May 2022).

15.3. Should the parties not be able to reach agreement concerning the reasonable market related rental for the optional period by the commencement of the optional period the matter shall be referred to an Arbitrator in terms of the Arbitration Laws of South Africa.

15.4. The option set out herein is subject to the ratification by any subsequent Municipal Council, if required, and the provisions of the Municipal Finance Management Act, if applicable.'

[31] Although there was an alignment of the operation of the lease agreement to that of the mining right, clauses 15 and 2 are silent on the prospects of the cession of the mining right. The lease equally did not seem to anticipate the cession of the mining right to a third party, hence no provisions are made for in that regard. However, it does appear that the parties did anticipate that there might be an intention or need to amend, alter or vary the terms of the lease agreement. Hence in clause 14, provision is made for the process to be followed and the consequences of any failure to follow that process, namely, that they will have no binding effect. In terms of clause 14:

'**14. <u>WHOLE AGREEMENT AND NO VARIATIONS</u>**

14.1 This Agreement constitutes the entire Agreement between the parties and no amendments, alterations or variations of this Agreement shall be binding on the parties unless reduced to writing and signed by both parties or their duly authorised representatives;

...'

[32] This is the background upon which the applicant opposed the respondents' argument that, when the mining right was ceded to the second respondent, by implication, so too was the lease agreement.

[33] In the circumstances, and in regard to the interpretation of the specified clauses of the lease agreement, it would be prudent to apply the principles set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[7] where the court gave a clear technique on interpretation.

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[34] Notably, the lease agreement expressly prohibited any amendments, alteration or variations of the agreement unless reduced to writing and signed by both parties or their duly authorised representatives. Upon an application of *Endumeni* to clauses 2,14 and 15 of the lease agreement and with regard to the background in which the agreement was concluded, it was peremptory for the first respondent to seek the written consent of the applicant in order to replace itself with the second respondent as the first and second respondents are distinct entities. The applicant was not a party to the cession of the mining right and the respondents have laid no basis upon which it could be found that the terms of that cession would have a binding effect on the applicant, or by extension vary the lease agreement that was in operation between the applicant and the first respondent.

[35] Although there was no lease agreement concluded between the applicant and the second respondent, it communicated its intention to exercise the option in clause 15 of the lease agreement between the applicant and the first respondent. The applicant declined to renew the lease agreement and informed the second respondent of its future plans for the property. The expiry of the lease agreement between the applicant and the first respondent and absence of a lease agreement between the applicant and the second respondent renders the respondents without any rights or legal title over the property.

***The ceded mining rights***

[36] According to the respondents the mining right entitled them to remain in occupation of the property even against the applicant's will. The respondents relied on *Minister of Minerals and Energy v Agri South Africa*[8] for its contention that as the holder of the mining right, it is therefore entitled to remain in occupation of the property for purposes of its mining activities. The relevant portion of the judgment relied upon reads as follows:[9]

'It is plain from these provisions that anyone who wishes to prospect for or mine minerals in South Africa may only do so in terms of rights acquired and held under the MPRDA. The rights of holders of mineral rights reflected in s 5(1) of the 1991 Act have, as such, disappeared. Whilst those who held such rights under the 1991 Act, and persons authorised by them, were

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[8] *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA).
[9] Ibid para 10.

formerly the only persons who could, subject to the 1991 Act, prospect and mine, and accordingly enjoyed exclusivity, that is no longer the case. They are free to compete with others for rights under the MPRDA, but their status as holders of mineral rights, recognised in the past, is of no relevance to whether they will be afforded such rights in the current dispensation. In addition, the owners of land, from which the mineral rights have not been separated, can no longer prevent others from coming onto their land for the purpose of mining. All they have is a right under s 5(4)*(c)* of the MPRDA to be notified and consulted before others, acting in terms of rights afforded to them by the Minister under the MPRDA, come onto their land to prospect or mine. There are no longer any rights that can be put up for sale, used as security or bequeathed to one's heirs. That broadly constitutes the deprivation of which Agri SA complains.' (Footnote omitted.)

[37] The essence of the respondents' contention was that as the holder of the mining right, it mattered not that the owner of the property did not consent to the second respondent's continued occupation and mining activities on the property. The respondents claim that the cession of the mining right from the first respondent transferred all the rights previously acquired by the first respondent.[10]

[38] On the other hand, on 15 November 2021, the second respondent notified the applicant of its intention to exercise the option in clause 15 of the lease agreement that was in operation between the applicant and the first respondent. As it seems, this was an acknowledgement that the respondents required the consent and co-operation of the applicant, as the owner of the property, in order to extend the operation of the lease agreement.

[39] With respect, this acknowledgement of the applicant's title to the property defeated the respondents' contention that the mining right entitled the respondents to remain on the property even without the consent or co-operation or plans of the applicant. If the mining right gave them such a title, as they claim, then it would not have been necessary for the second respondent to seek the applicant's co-operation and consent for the renewal of the lease.

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[10] First and second respondents' answering affidavit paras 9-10.

[40] It is against this background that one finds the respondents' assertion that the mining right entitled them to occupy the property against the applicant's will to be inconsistent with their conduct towards the applicant. On this alone, it should not be open to the respondents to rely on *Agri SA* only after it had failed to bargain with the applicant or convince it to extend the lease agreement. The implication of this conduct was that the applicant as the owner of the property had the final say on the lease agreement and an indication that the respondents believed that continued occupation of the property was subject to the consent and co-operation of the applicant. On this aspect, reliance on *Agri SA* does not advance their cause, more so that it still placed the responsibility on the holder of the mining right to *still notify and consult before the enforcement of the mining right.*

[41] Reference was also made to the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another,*[11] which stated:

'[56] it is apposite at this juncture to observe that a mining right confers on the holder of such right certain limited real rights in respect of the mineral and the land to which it relates. In particular, it entitles the mining right holder to "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, or underground ... infrastructure which may be required for the purpose of", amongst others, mining, removal and disposal of any mineral to which such rights relates as may be found during the mining. *These rights are however, subject to the other provisions of MPRDA.*

[57] It bears emphasising that the provisions of s 5(3) of the MPRDA echo two fundamental principles of the common law. First, that the owner of the land to which a mining right relates is obliged to allow the holder access to his or her land to do whatever is reasonably necessary for the effective exercise of the mining holder's rights.

[58] Second, the mining right holder is in turn obliged to exercise his rights civiliter modo (in a reasonable manner) so as to cause the least possible inconvenience to the rights of the owner. Accordingly, the common law requires of both the landowner and the mining right holder to exercise their respective rights alongside each other to the extent that it is reasonably possible to do so. It therefore fosters a situation where the rights of the landowner and the mining right holder co-exist...

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[11] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC).

[59] These common-law principles were articulated by Malan J in *Hudson* thus:

> "...whether or not the holder of the mineral rights acts bona fide and reasonably in the course of exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface owner..."' (Footnotes omitted.) (Emphasis added.)

[42] *Maccsand (Pty) Ltd v City of Cape Town and Others*,[12] to the extent that it dealt with the relationship between the holder of a mining right and the owner of the land on which the holder sought to exploit the resources, finds application to the case at hand. *Maccsand*, placed responsibility on the holder of the mining right to still subject itself to legislative requirements of the owner of the property. It is instructive in that:[13]

'The court in the *Maccsand CC d*ecision made it clear that mining rights or mining permits granted by the Minister in terms of MPRDA do not obviate the obligation to require authorisations in terms of other legislation that deals with functional domains other than minerals, mining and prospecting.'

[43] From the extracts quoted above, and on their application to the issues between the parties, the respondents were always conscious of their responsibilities towards the applicant, as the owner of the property. Such responsibilities were also outlined in both *Maledu* and *Maccsand* with the end result being contrary to the respondents' attitude that the mining right trumped everything.

***Rehabilitation of the property***

[44] In terms of clause 7(3) of the lease agreement the parties agreed that on termination of the converted mining right, the first respondent would be responsible to rehabilitate the property at its own cost. The first respondent has not expressed any opposition to this clause, and it should be carried out as agreed.

**Conclusion**

[45] It is undeniable that the applicant and the second respondent have no contractual obligations towards each other. There has been no sound legal basis

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[12] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).
[13] NJJ Olivier, C Williams and PJ Badenhorst '*Maccsand (Pty) v City of Cape Town* 2012 (4) SA 181 (CC)' 2012 (15) 5 PER at 559.

shown for the belief that the cession of the mining right had any bearing on the contractual relationship that existed between the applicant and the first respondent.

[46] The lease agreement that expired between the applicant and the first respondent was the only basis upon which the first respondent could remain in occupation of the applicant's property. Beyond the said lease agreement, the applicant did not bind itself in any further contractual relationship of the said property. As demonstrated above, the mining right could not be extended to bind the applicant to give the respondents right of occupation or control and use of the property. Therefore, there is no legal basis upon which the respondents could remain in occupation of the property.

[47] As pointed out in *Maledu*,[14] the respondents claim of its mining right should be done in a "manner least onerous or injurious to the owner". Undoubtedly, the respondents' continued occupation of the property cannot be justified on the basis of *Maledu*.

[48] Therefore, the applicant and respondents are not exempt from the procedures provided for in the Regulations on the granting of rights of use, control or manage municipal capital assets particularly under Chapter 4, reg 34 as passed by the Minister of Finance in terms of s 168 of the MFMA.

**Costs**

[49] In these proceedings including the pre-trial conduct of this matter, there were no factors to warrant a departure from the general rule that costs should follow the result.

**Order**

[50] The following order is therefore made:

1. It is declared that there is no valid lease agreement between the applicant and the first respondent.

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[14] *Maledu* above fn 11.

2. The first and second respondents, and anyone else occupying the applicant's property, namely Erf 1, Matatiele Commonage, also known as Postershoek Quarry, through them are hereby directed to vacate the property within one (1) calendar month of this order.
3. The first respondent is hereby ordered to take steps to rehabilitate the applicant's property upon vacating the property at its own costs.
4. The first and second respondents are ordered to pay the costs of this application.

**SIPUNZI AJ**

## CASE INFORMATION

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| Date of Hearing | : | 16 October 2023 |
| Date of Judgment | : | 23 November 2023 |

## APPEARANCES

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