Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case number: 2673/2017
Heads of argument filed: 08 September 2022
Complete court file to judge: 01 November 2022
Date delivered: 20 January 2022

In the matter between:-

KLIPDAM DIAMOND MINING COMPANY (PTY) LTD FIRST APPLICANT
(REGISTRATION NUMBER: 1994/001754/07)

DIRK JACOBUS FOURIE SECOND APPLICANT
(IDENTITY NUMBER: [...])

and

NATHAN ALEC DATNOW T/A SHAWSHANK MINING RESPONDENT

IN RE:-

NATHAN ALEC DATNOW T/A SHAWSHANK MINING PLAINTIFF

and

KLIPDAM DIAMOND MINING COMPANY (PTY) LTD FIRST DEFENDANT

DIRK JACOBUS FOURIE SECOND DEFENDANT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

STANTON, AJ

INTRODUCTION:-

[1] For ease of reference, I shall refer to the parties as in the main action.

[2] During the trial, I was called to adjudicate upon the following separated issues, as agreed to by the parties, namely:-

2.1 The validity and contents of the oral agreement/s as pleaded by the plaintiff in paragraphs 4, 5 and/or 9 of the amended particulars of claim, read with paragraphs 4, 5 and 9 of the amended plea, in general, and specifically, pertaining to section 11 of the Mineral and Petroleum Resources Development Act, Act 28 of 2002 ("the MPRDA") and/or clause 9 of the mining right;

2.2 In the event that I found that the oral agreement/s is/are invalid, that the plaintiff's claim should be dismissed, and the counterclaim should succeed with costs;

2.3 In the event that the terms of the oral agreement/s is/are to be found to be legally permissible to be implemented, I was requested to:-

2.3.1 make a declaratory order to this effect;

2.3.2 declare what the terms and conditions of the agreement/s are; and

2.3.3 order that the defendants must pay the costs relating to the decision on the separated issues, and postpone all remaining issues.

[3] The issue for adjudication was thus whether the oral contractor agreement/s is/are valid in law.

[4] On 20 April 2021, I granted the following orders, namely:-

4.1 The 2015 oral agreement between the plaintiff and the first defendant is declared valid;

4.2 The terms and conditions of the 2015 oral agreement are:-

4.2.1 The plaintiff obtained the right to mine on the Farm Klipdam-North Site 5, an area of approximately 250 hectares, as more fully set out on the map, attached to the particulars of claim as annexure A;

4.2.2 The 2015 oral agreement commenced on 17 June 2015 and shall continue to operate until Site 5 is optimally mined and/or it is lawfully cancelled by either one of the parties;

4.2.3 The plaintiff shall pay to the first defendant the following:-

4.2.3.1 17.5% of the selling price of the diamonds mined which are sold for less than R 1,000,000.00 (One Million Rand); and

4.2.3.2 22% of the selling price of the diamonds mined, which are sold for more than R 1,000,000.00 (One Million Rand);

4.2.4 The first defendant shall remain liable for rehabilitation in view of the fact that the plaintiff agreed to pay a higher percentage of royalty per stone;

4.2.5 The plaintiff shall, as reasonably practical, comply with the lawful instructions of the first defendant and its lawfully appointed agents in respect of the provisions of the Mine Health and Safety Act, Act 29 of 1996 ("the Mine Health and Safety Act") and its regulations and other applicable legislation;

4.2.6 The plaintiff shall remain the owner of structural improvements and/or structures erected as part of his plant;

4.2.7 In the event of a breach of the 2015 oral agreement, the defaulting party would be notified of its default by the other party and shall be allowed a reasonable time in which to remedy same. A reasonable time will depend upon the circumstances;

4.2.8 The plaintiff shall rehabilitate only in areas where the mining operations were conducted by the plaintiff;

4.2.9 The plaintiff shall co-operate with the engineer appointed by the first defendant and remunerate the engineer for his services in respect of Farm Klipdam-North Site 5, an area of approximately 250 hectares;

4.2.10 The first defendant shall:-

4.2.10.1 Provide the plaintiff with undisturbed and unimpeded access to Farm Klipdam-North Site 5, an area of approximately 250 hectares, as more fully set out on the map, attached to the particulars of claim as annexure A Klipdam-North;

4.2.10.2 Provide the plaintiff with undisturbed and unimpeded access to Farm Klipdam-North to conduct mining activities from 06:00 am to 18:00 pm on Mondays to Saturdays and from 07:00 am to 13:30 pm on Sundays;

4.2.10.3 Provide the plaintiff with access to water, including but not limited to the existing excavated sand reservoir situated between Site 1 and Klipdam-North;

4.2.10.4 Allow and supply the plaintiff with access and usage of Eskom electricity supply, as and when required by the plaintiff for purposes of the mining operations;

4.2.10.5 Guide the plaintiff in regards to conducting the mining operations in accordance with *inter alia* the first defendant's mining work programme and environmental management programme; and

4.2.10.6 Apply for all the necessary approvals, certificates and consents required in terms of the MPRDA and the Mine Health and Safety Act, Act 29 of 1996;

4.2.11 The hearing of all remaining issues is postponed *sine die*; and

4.2.12 The first defendant shall pay the costs in relation to the separated issues.

[5] The defendant now applies for leave to appeal to the Supreme Court of Appeal against the whole of my judgment.

GROUNDS FOR APPEAL:-

[6] The defendants' grounds of appeal can be distilled as follows, namely that I erred:-

6.1 In basing the judgment on evidence to the effect that the plaintiff would be or was appointed as contractor of the first or second defendant, as such evidence is inconsistent with the plaintiff's pleaded case;

6.2 In finding the plaintiff's evidence credible;

6.3 In relying on the reference to the plaintiff in the proposed written agreement as "*contractor*", as the label which contracting parties place on their agreement is not necessarily decisive as to the true effect thereof;

6.4 In finding that the version of the plaintiff remained consistent and without contradiction;

6.5 In finding that the plaintiff's evidence is supported by certain objective facts;

6.6 In not finding that the plaintiff purportedly obtained the right to conduct the activities, which in terms of section 5(2) of the MPRDA may only be conducted by the owner of the mining right, which activities are also specified in paragraph 2 of the mining right;

6.7 In not finding that the oral agreement between the parties was invalid as it purported to transfer or let the mining right to the plaintiff without the written consent of the Minister, *alternatively* on the basis that, if properly interpreted, the agreement between the parties constituted a lease of rights to minerals in land, which was not attested by a notary public as is required by section 3 of the General Law Amendment Act, Act 50 of 1956;

6.8 In finding that the present case was distinguishable from the judgment in ***Elandskloof Trust v Emjeff (Pty) Ltd*** ("the Elandskloof matter")[1];

6.9 In finding that it was a term of the oral agreement that, in the event of a breach thereof, the defaulting party would be notified of its default by the other party and be allowed a reasonable time in which to remedy same, as there was no cogent evidence to justify this finding, as such evidence was elicited by leading questions; and

6.10 In failing to grant an order in terms of the first defendant's counterclaim.

THE TEST FOR LEAVE TO APPEAL:-

[1] 1988 (2) SA 15 (T).

[7] The defendants base their application for leave to appeal on section 17(1)(a)(i) of the Superior Courts Act, Act 10 of 2013 ("the Act"), which reads 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..."

[8] The interpretation of the rules and the law has evolved in case law since 2013. The view now held by the courts is that the threshold for the granting of leave to appeal was raised with the induction of the 2013 legislation. The former assessment that authorisation for appeal should be granted if *"there is a reasonable prospect that another Court might come to a different conclusion",* is no longer applicable.

[9] The discretion was therefore, in the words of the legislation, amended to a mandatory obligatory requirement that leave may not be granted if there is not a reasonable prospect that the appeal will succeed.

[10] It must be a reasonable prospect of success; not that another court may hold another view.

[11] The Supreme Court of Appeal, in the matter of ***Four Wheel Drive Accessory Distributors CC v Rattan NO*** [2] confirmed that:-

"There is a further principle that the Court a quo seems to have overlooked – leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'. In the light of its findings that the plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this Court succeeding that there was a compelling reason to hear

[2] 2019 (3) SA 451 (SCA) at paragraph 34.

an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit."

[12] Recently, the Supreme Court of Appeal in ***Ramakatsa and others v African National Congress and another,***[3] confirmed that:-

"Turning the focus to the relevant provisions of the Superior Courts Act (the 'SC Act'), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at High Court level debating whether the use of the word 'would' as oppose to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of 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."

LEGAL ARGUMENTS:-

[13] According to the defendants, leave to appeal should be granted because the plaintiff's evidence was inconsistent with the plaintiff's pleaded case in the following respects:-

[3] [2021] JOL 49993 (SCA) at paragraph [10].

13.1. In paragraph 5.1 of the particulars of claim, the plaintiff pleaded that he obtained the right to mine on the mining area. He did not plead that he obtained this right as a contractor;

13.2 In paragraph 5.3 of the particulars of claim, the plaintiff pleaded that in terms of the oral agreement, it was the plaintiff who incurred the obligation to pay the first defendant for the right to mine, which is inconsistent with the plaintiff being a contractor of the first defendant, as a contractor is paid by its employer and not *vice versa;*

13.3 The plaintiff pleaded in paragraph 5.6 of the particulars of claim that in terms of the agreement he is the owner of any excavated material, concentrate and diamonds produced as a result of his mining operation. A contractor who mines for the mining owner receives remuneration for the services he provides and does not become owner of the diamonds he excavates; and

13.4 In paragraph 5.4 of the particulars of claim, the plaintiff pleaded that the payment made by the plaintiff to the first defendant is a royalty per stone, which demonstrates that, in terms of the agreement, the plaintiff did indeed become owner of the diamonds which he excavated.

[14] On this score, I am guided by the following remarks of Innes CJ in the matter of ***Robinson* v *Randfontein Estates Gold Mining Co Ltd*** [4]:-

"The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the

[4] 1921 AD 168 at page 198.

Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

[15] The Court in the matter of ***Mastlite (Pty) Ltd v Stavracopoulos***[5] confirmed that this principle has been followed and applied in numerous cases, notably in ***Shill* v *Milner*** [6] and ***Marine & Trade Insurance Co Ltd* v *Van der Schyff*** [7], and that what must be emphasised is that the contemplated departure from the pleadings must not be such as to cause prejudice and the new issue or matter should have been fully canvassed by both parties to the extent that it virtually amounts to a tacit agreement between them to enlarge the scope of the pleadings. The Court confirmed that both parties must willingly participate in the effort to canvass the new issue, otherwise the possibility of prejudice must almost inevitably arise which would be fatal to any attempt to depart substantially from the pleadings.

[16] In my view, the contradictions between the pleadings and the plaintiff's evidence was not seriously contested by the defendants during the trial. In addition, the defendants extensively cross-examined the plaintiff with regard to the discrepancies. The defendants were accordingly not prejudiced; and I find no merit in this ground of appeal.

[17] The remainder of the grounds of appeal can be dealt with cumulatively.

[5] 1978 (3) TPD 296 at page 299.

[6] 1937 AD 101.

[7] 1972 (1) SA 26 (A).

[18] According to the defendants, I erred in finding the plaintiff's evidence credible for the following reasons:-

18.1 On 23 November 2015, the plaintiff's attorney recorded that it was his instruction that in terms of the oral agreement the plaintiff "*obtained the sole mining rights*'' for the mining area and that "*in return for the mining rights*'' the plaintiff would make certain payments to the First Defendant;

18.2 On 8 January 2016, the plaintiff deposed to the founding affidavit in his spoliation application and confirmed that the material terms of the oral agreement included that "*in return for the aforesaid mining right*" *he* would make certain payments to the first defendant;

18.3 The plaintiff deviated from the aforegoing for the first time during his oral evidence given in August 2021 by stating *inter alia* that in terms of the oral agreement, he did not become the owner of the diamonds which he excavated, without providing any cogent explanation for his inconsistent versions under oath;

18.4 The plaintiff's evidence that he had taken diamonds excavated by him to the trading house to be sold and received an advance from the trading house prior to the sale thereof, is inconsistent with his version that he never became owner of the diamonds; and

18.5 No explanation was placed before the Court by the plaintiff as to why his pleaded case repeatedly stated that he had become the owner of the diamonds mined by him.

[19] According to the defendants, I erred in finding that the plaintiff's evidence remained consistent, for the following reasons:-

19.1 The plaintiff contradicted his pleadings, his attorney's communications and his earlier evidence under oath as referred to above, without offering any explanation for the contradictions; and

19.2 His evidence during cross-examination regarding the question whether he had owed the defendants money, was contradictory and evasive.

[20] The objective facts I considered in reaching my conclusion, demonstrate that the effect of the oral agreement was not to transfer the first defendant's mining right to the plaintiff, nor do they show that this was the parties true or continuing intention. These facts are:-

20.1 The first defendant is the owner of the immovable property that forms the subject matter of the mining right;

20.2 The first defendant's mining right covers the entire immovable property of the first defendant, measuring 1466,0095 hectares in extent;

20.3 It is common cause that in terms of the oral agreement, the plaintiff acquired the entitlement to mine on the portion of the property identified as Site 5, same which measures a mere 250 hectares of the immovable property;

20.4 There are at least four other mining sites identified on the immovable property;

20.5 The first defendant employed a mine manager, Mr Ben Nel, a mining engineer, Mr D van Heerden and a medical practitioner, Dr Grobbelaar;

20.6 The unsigned written agreement, intended as a recordal of the parties' oral agreement, defines the plaintiff as the "Contractor" and the first defendant as the "Holder"; and

20.7 No oral testimony was provided by the first or second defendants. On the first defendant's version, in his affidavits filed in the eviction and spoliation applications, he confirms that he is the owner of a mining right in respect of the mining area that comprises the whole property. He furthermore denies that the plaintiff was granted the right to mine exclusively on the immovable property.

[21] The allegation that the plaintiff changed its version relating to the ownership of the diamonds is simply incorrect. The plaintiff, by way of its attorneys, attempted to introduce a clause into the proposed written agreement to the effect that the plaintiff would become the owner of diamonds excavated by him. This proposal was, however, rejected by the defendants and that was the end of the matter.

[22] The plaintiff's uncontested evidence was that he was never under the impression that he would be taking over the mining right, but merely that he had the right to mine; that the mining right holder would remain the owner of the diamonds; that the defendants had the right to choose whether to retain or sell the diamonds, mined by the plaintiff; and that he would become the owner of a percentage of the selling price of the diamonds. No other inference can be drawn from the evidence that the plaintiff did not become the owner of the diamonds.

[23] Whilst acknowledging that the plaintiff's evidence was not faultless, his version remained consistent and without contradiction, throughout chief-examination and cross-examination. I also considered his response in respect of the ownership of the diamonds and his explanation in respect of the payment procedure as adequate. When confronted with the fact that neither the original nor amended particulars of claim contained any reference to the involvement of Christopher Stokes Tender House and the split in the payment by Christopher Stokes Tender House, he agreed that no such reference was included, but insisted that the second defendant retained control of the diamonds and that such a payment method is standard in the industry. It is evident that the parties intended to conclude an agreement whereby the first defendant appointed the plaintiff as a mining contractor. It is further unlikely that the parties intended for the plaintiff to act as a mining contractor without any remuneration. In ***S v Monyane and others 2008 (1) SACR 543 (SCA)*** at paragraph [15] the learned Ponnan JA stated;

"*This court's powers to interfere on appeal with the findings of fact of a trial court are limited. ... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e – f).*"

The defendants' arguments pertaining to these grounds of appeal, are to my mind unconvincing and accordingly an appeal would not have a reasonable prospect of success.

[24] I deem it necessary to separately deal with the defendants' argument that I had erred in finding that the agreement entered into between the parties did not amount to a lease of minerals; and that I found this matter distinguishable from the *Elandskloof matter.*

[25] The main question that the court had to decide on in *Elandskloof Trust v Emjeff (Pty) Ltd* was whether or not the owner of the mining right retained ownership of the diamonds mined.

[26] In view of my determination that the plaintiff did not become the owner of the diamonds mined under the agreement, the two cases thus became distinguishable.

[27] The first defendant's allegations of illegality were contingent on it being able to show that the agreement has the effect of either transferring the mining right or proving its allegation that same amounts to a lease for minerals.

[28] It is a settled principle that a party who wishes to raise statutory illegality as a defence has the *onus* to prove the existence of the circumstances giving rise to such illegality.[8]

[29] The defendants failed to provide any evidence that contradicted the sworn testimony provided by the plaintiff, not even in their own statements made under oath in the affidavits filed in the preceding legal proceedings. The first defendant accordingly failed to show that the effect of the agreement was to transfer the mining right. I accordingly do not agree that another court would find that the defendants have proved the agreement to be illegal and therefore invalid.

[30] Based on the objective facts, I am not persuaded that another court would come to a different conclusion and find that the oral agreement was concluded to transfer the first defendant's mining right to the plaintiff or that the oral agreement was a mining lease.

CONCLUSION:-

[8] Yannakou v Apollo Club [1974] All SA 129 (A); P Trimborn Agency CC v Grace Trucking CC 2006 (1) SA 427 (N) 430-431.

[31] It follows that in the circumstances there is no reasonable prospect that another court would find for the defendants and in these circumstances, I must dismiss the application for leave to appeal, with costs.

The following order is made:

1) The application for leave to appeal is dismissed, with costs.

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A STANTON

ACTING JUDGE

For the plaintiff: Advocate R Nel
o.i.o. Duncan & Rothman Attorneys

For the defendants: Advocate JP Vorster SC
o.i.o. Van de Wall Incorporated