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

Case No: 1252/2023

Argued: 01 November 2023

Date delivered: 01 December 2023

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE, KIMBERLEY)

In the matter between:-

ASSMANG (PTY) LTD

APPLICANT

and

OCHRE SHIMMER TRADE AND INVEST 78 (PTY) LTD FIRST RESPONDENT

THE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE: NORTHERN CAPE SECOND RESPONDENT

REGIONAL MANAGER: THIRD RESPONDENT
DEPARTMENT OF MINERAL
RESOURCES AND ENERGY: NORTHERN CAPE REGION

TRANSNET SOC LIMITED FOURTH
RESPONDENT

JUDGMENT:
FIRST RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION:-

[1] For ease of reference I will refer to the parties as they are cited in the main application. This is an opposed application for leave to appeal against the following order that I granted on 14 July 2023, pursuant to an urgent application and after the exchange of affidavits:-

1.1 The first respondent, and anyone occupying the immovable property through the first respondent, was ordered to:-

1.1.1 Restore possession of the farm Doornfontein Nr. 446, situated in the district of Postmasburg ("Doornfontein"), free and unencumbered of infrastructure (including, but not limited to fencing and structures) and equipment, vehicles and employees and/or agents, within 3 days of the date of the order; and

1.1.2 Vacate Doornfontein, and remove all infrastructure (including, but not limited to fencing and structures) and equipment and vehicles from Doornfontein, within 3 days of the order.

GROUNDS OF APPEAL:-

[2] In response to the written reasons for my judgment, handed down on 27 July 2023, the first respondent filed an application for leave to appeal.

[3] The first respondent has listed a number of grounds in its application for leave to appeal. Properly summarised, they are in essence that I erred:-

3.1 By not upholding the first respondent's points in *limine* pertaining to administrative action and acquiescence;

3.2 In granting an order that is unlawful and contrary to the provisions of Mineral and Petroleum Resources Development Act, Act 28 of 2002 ("the MPRDA");

3.3 In finding that the applicant had met the requirements for a spoliation order; and

3.4 In making a cost order in respect of two counsel.

[4] In amplification, the first respondent avers that I erred in finding that:-

4.1 The applicant had been in undisturbed and peaceful possession of Doornfontein by virtue of the following:-

4.1.1 The first respondent was in possession of Doornfontein since 2010 when it was granted a prospecting right;

4.1.2 The first respondent mined on Doornfontein and produced stockpiles, which remain the assets of the first respondent;

4.1.3 Section 43(1) of the MPRDA places a duty on the first respondent to rehabilitate the surface area where prospecting activities took place; and

4.1.4 Section 5(3) of the MPRDA granted the first respondent possession of Doornfontein when the mining right was issued.

4.2 The first respondent's possession of Doornfontein was unlawful for the following reasons:-

4.2.1 Section 5(3) of the MPRDA grants the first respondent the right to access and exercise its mining right in the area to which the right relates;

4.2.2 Section 43(1) of the MPRDA provides that the prospecting and mining right holder has an ongoing duty to rehabilitate the surface area where the holder would have mined until a certificate of closure is issued;

4.2.3 Clause 7.3 of the mining right authorises the mining right holder to “trespass” for as long as the said trespassing is towards the exercise of the mining right;

4.2.4 The parties agreed on 20 September 2022 that the first respondent would have access to Doornfontein; and

4.2.5 On 17 April 2023, during a meeting held between the applicant, the first respondent and the Department of Mineral Rights and Energy (“the DMRE”), an agreement/resolution was reached that the first respondent is granted access to Doornfontein and that such access was not dependant on the conclusion of a surface lease agreement.

LEGAL PRINCIPLES APPLICABLE IN APPLICATIONS FOR LEAVE TO APPEAL:-

[5] Section 17(1) of the Superior Courts Act 10 of 2013 (“the Act”) provides 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.”

[6] In ***The Mont Chevaux Trust v Goosen***, [1] Bertelsmann J found that the introduction of the provisions of section 17(1) of the Act raised the threshold for granting leave to appeal against a judgment of a High Court. Bertelsmann J reasoned that the former test whether leave to appeal should be granted, was a reasonable prospect that another court might come to a different conclusion, whilst the use of the word would in the Act indicated a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[7] In ***S v Smith*** [2] Plaskett AJA reaffirmed that:-

> *"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

ANALYSIS:-

[8] The first respondent's grounds of appeal mirror its grounds for the opposition of the application. Save for two additional submissions, the arguments by Mr ML Mashele, on behalf of the first respondent, are a

[1] 2014 JDR 2325 (LCC) at paragraphs 5 and 6.
[2] 2012 (1) SACR 567 (SCA) at paragraph 7.

repetition of what was contended during the hearing of the main application, which have been comprehensively addressed in the written reasons for my order. I can do no better than refer thereto.

[9] Mr Mashele submitted that I incorrectly applied section 54 of the MPRDA. According to his argument, the first respondent had invoked the provisions of section 54 of the MPRDA, which resulted in the agreement reached at the meeting of 17 April 2023 and the dispute about the access to Doornfontein was therefore settled and not dependant on the conclusion of a service lease agreement. Mr Mashele stated that a mere invocation of section 54 is sufficient in the circumstances.

[9] I remain unpersuaded that the parties agreed that the first respondent may access Doornfontein by virtue of the minutes of the meeting held on 17 April 2023, or that another court would come to a different conclusion in this regard. Paragraphs [31] and [32] of my written reasons bear repetition:-

"[31] The minutes, however, concluded that *"Access will be granted for establishing on site dates 24 April 2023, subject to outcome of the meeting with Assmang team, which meeting must take place prior to 24 April 2023."* The concluding remarks in the minutes do not support the first respondent's argument that consent was granted to it by the applicant on 17 April 2023.

[32] The first respondent's arguments are also not borne out by the three letters addressed by the first respondent to the applicant pursuant to the meeting of 17 April 2023. On 18 April 2023, the

first respondent *inter alia* requested access to the immovable property for the purpose of site establishment; on 24 April 2023, the first respondent requested *"That Assmang reconsider the decision to deny Ochre Shimmers access to the Property for the purposes of site establishment and to access our half processed stockpile of 150 000,00 tons."* and on 25 May 2023, the respondent confirmed that it "*is still in negotiations with Assmang Proprietary Limited for a Lease to access the farm and to commence with mining."*

[10] The Constitutional Court in ***Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another (Mdumiseni Dlamini and another as amici curiae) ("Maledu")***,[3] unequivocally held that:-

10.1 Section 54 of the MPRDA must be exhausted to ensure that the MPRDA's purpose of balancing the rights of the mining right holders on the one hand and those of the surface rights holders on the other is fulfilled *(my emphasis)*; [4] and

10.2 Pending the finalisation of the section 54 process, a mining rights holder should not be entitled to mine as to do so will undermine the purpose of section 54 and the MPRDA.[5]

[11] Mr Mashele also contended that I incorrectly applied ***Maledu*** in two respects, namely that:-

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[3]2019 (1) BCLR 53 (CC).
[4]Supra at paragraph [90].
[5]Supra at paragraph [92].

11.1 In terms of paragraph [57], the applicant is “obliged” to grant the first respondent access to Doornfontein; and

11.2 With reference to paragraph [58], that I failed to appreciate the applicant’s failure to make allegations that the applicant’s conduct was reasonable, and that the first respondent’s conduct was unreasonable.

[12] In support of his argument, Mr Mashele relied on the judgment of the Supreme Court of Appeal in the matter of ***Joubert and others v Maranda Mining Company (Pty) Ltd (“Maranda”)***. [6] In ***Maranda***, in terms of a high court order, the appellants were interdicted against refusing the respondent access to a piece of land in respect of which the respondent had acquired the mineral rights. Subsequent to the acquisition of the mineral rights, the respondent obtained a mining permit. Despite numerous attempts by the respondent to gain access to the land so as to exercise its rights in terms of its mining permit, such access was refused by the appellants. Eventually, the respondent obtained an order of court, confirming that it had a clear right to access. The Supreme Court of Appeal held that in terms of section 27(7)(*a*) of the MPRDA, the holder of a mining permit has a right to enter the land in respect of which the mining rights have been granted for purposes of exploiting its rights and that the right to enter the land solidifies once the mining permit holder has complied with the provisions regarding notification and consultation with the owner of the land, or occupier and/or other parties affected by the permit. It was common cause that the respondent had complied with all the requirements in that regard.

[6] [2009] 4 All SA 127 (SCA).

[13] ***Maranda*** is, however, distinguishable from this application as at the time it was handed down, section 5(4)(c) of the MPRDA was still in force. Section 5(4)(c) prohibited the commencement of mining activities by a permit holder unless it notified and consulted with the owner or occupier of the land in question.

[14] I find the argument pertaining to the conduct of the parties, disingenuous. It was held in ***Nino Bonino v De Lange***:-[7]

> *"It is a fundamental principle that no person is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear*"

[15] According to the applicant's letter to the first respondent, dated 28 June 2023, the applicant proposed a further meeting to assist in resolving the issue pertaining to the sketch plan. It also requested further information from the first respondent to enable the applicant to meaningfully consider the request for consent for the use of the railway line. Information was also requested pertaining to the water use and an updated environmental impact assessment once the diagram was settled. The first respondent did not reply to this letter, but instead took possession of Doornfontein. In my view, the letter demonstrates the reasonableness of the applicant's conduct whereas the first respondent's actions were manifestly unreasonable.

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[7] 1906 TS 120 at page 122.

[16] The discretion conferred upon the court of allowing the costs of two counsel must be exercised judicially and upon adequate grounds. The enquiry is whether the expenses incurred in the employment of more than one counsel were *"necessary or proper for the attainment of justice or for defending the rights of the parties and were not incurred through over-caution, negligence or mistake."*[8]

[17] The matter *in casu* was not a straightforward spoliation application as it also involved the MPRDA. Moreover, the urgency and the importance of the matter in issue justified the appointment of two counsel. The first respondent did not make submissions to the contrary when the main application or this application for leave to appeal was argued.

CONCLUSION:-

[18] Having considered the grounds set out in the notice of application for leave to appeal and counsels' argument, and keeping in mind the applicable legal principles, I am not persuaded that the first respondent has shown that the appeal would have reasonable prospects of success. Neither has it been established that there is some compelling reason why the appeal should be heard or that there are conflicting judgments on the matter that was under consideration. The application for leave to appeal should therefore fail. There is no reason why costs should not follow the result.

Wherefore the following order is made:-

[8]Motaung v Mothiba N.O [1975)(1)] at page 631 A to D.

(1) The application for leave to appeal is dismissed with costs, including the costs of two counsel.

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STANTON, A

JUDGE

On behalf of the applicant:
Adv. T Bruinders SC with M Smit
o.i.o Cliffe Dekker Hofmeyer Attorneys (Van de Wall Inc.)
On behalf of the first respondent:
Adv. ML Mashele o.i.o Vakalisa Inc. Attorneys (Duncan & Rothman Attorneys)