IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

CASE NO: A295/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

17/12/2019

In the matter between:

BILA CIVIL CONTRACTORS (PTY) LTD — Appellant

and

SAMANCOR CHROME LTD — Respondent

JUDGMENT

Lukhaimane AJ (Baqwa and Sardiwalla JJ concurring):

[1] This is an appeal to the Full Court by Bila Civil Contractors (Pty) Ltd, hereinafter referred to as appellant against a decision handed down on 30 September 2019

directing that parts of a judgment and order delivered on 1 July 2019 be implemented pending the outcome of the petition for leave to appeal to the Supreme Court of Appeal (SCA).

[2] The Respondent is Samancor Chrome Limited, hereinafter referred to as the respondent, a public company and co-owner of the remaining extent of Portion 2 of the Farm Elandskraal 469 SQ North West Province (RE Portion 2) and the owner of Portion 154 of farm Elandskraal 469 SQ North West Province (Portion 154) ("the properties).

Background

[3] The respondent has the sole and exclusive right to mine and recover chrome in on and under the properties in terms of its converted mining rights.

[4] on 23 November 1994 a mining authorisation in form of a mining license was issued to the respondent in terms of Section 9 of the Mineral Act 50 of 1991 *("the Mineral Act")* under licence number ML21/1994 to authorise the mining of chrome over, inter alia, certain portions of the farm Buffelsfontein 465 JQ, Elandsdrift 467 JQ and Elandskraal 469 JQ.

[5] The initial RE Portion 2 mining license did not include RE Portion 2 Elandskraal within the ambit of the initial portion 2 mining license. It was always intended to be

included. The Initial RE Portion 2 mining license was amended on 13 December 1995 to include RE Portion 2 within the ambit of the initial RE Portion 2 mining license.

[6] On 8 April 2010 Samancor was granted a converted mining right with Department of Mineral Resources ("the DMR") reference number: NW30/5/1/2/2/482R, which was notarially executed.

[7] The old order mining right, comprising of the amended RE Portion 2 mining license still exists pursuant to the provisions of item 7(7) of the transitional arrangements in the Mineral and Petroleum Resources Development Act 28 of 2002 *("the MPRDA")*.

[8] As a result of an administrative error RE Portion 2 Elandskraal was erroneously not included in the RE Portion 2 converted mining right.

[9] The erroneous ommission of RE Portion 2 Elandskraal was the subject matter of the relief sought before Neukircher J. Neukircher J found, in determining whether the respondent had a right to seek interdictory relief against the appellant in respect of the mining operations conducted by it on RE Portion 2 Elandskraal found:

"68. ...the applicant [Samancor] has established a clear right – it has both ownership and the converted miming rights in respect of the properties"

[10] The appellant has a prospecting right which was granted to it, for a period of five years commencing on 30 May 2018 until 29 May 2023. This prospecting rights was granted to the appellant approximately eight years after the respondent's converted mining right was registered.

[11] The appellant does not have a mining right over the two properties.

[12] The order of Neukircher J granted an order under case number 40526/2019 amongst others directing the following at paragraph 89:

"[89] Thus the order I make is the following:

89.1. In respect of remaining extent of Portion 2 of the farm Elandskraal 469 SQ North West Province;

89.1.1 The first respondent its employees and contractors are interdicted and restrained from conducting, facilitating or being involved in any manner whatsoever in mining operations on this property;

89.1.2 The first respondent its employees and contractors are interdicted and retrained from the removal of any material containing chrome or other minerals from this property outside of that allowed by its prospecting right".

[13] Aggrieved with this decision, appellant lodged an application for leave to appeal which Neukircher J dismissed with costs on 12 August 2019 and the appellant thereafter undertook to file a petition for leave to appeal with the SCA.

[14] In the meantime, the respondent approached the court for an urgent interdict requesting that paragraphs 89.1.1 and 89.1.2 of Neukircher J's order be implemented pending appellant's approach to the SCA. This is so because our well established common law rule of practice in our courts has generally been that the execution of a judgment would be automatically suspended upon the noting of an appeal resulting in such judgment not being carried out and having no effect except with the leave of the court which granted the judgment.[1]

The order of Van der Westhuizen J

[15] On the 30 September 2019, Van der Westhuizen J granted an order in favour of the respondents, which reads as follows:

"I grant the following order,

(c) it is declared that paragraphs 89.1.1 and 89.1.2 of the order of Neukircher J dated 1 July 2019 is operational and enforceable pending any application or petition for leave to appeal and where leave is granted pending the finalisation of the appeal in accordance with Section 18(1) of the Superior Courts Act, 2013".

[1] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 544 H-545A

[16] It is the appellant's contention that the order by van der Westhuizen J should not only have taken into account the provisions of Section 18 of the Act but that the court should also have satisfied itself of the prospects of success on appeal, which the court failed to do.

[17] It is the respondent's contention that all that Van der Westhuizen J had to consider were the statutory provisions as set out in Section 18 of the Act. Should this court be of the opinion that the prospects of success on appeal also ought to have been taken into consideration the onus was on the appellant to lay out such prospects. All that the respondents had to do was respond to the appellant's grounds for prospects of success on appeal and in the absence of such grounds the respondents had nothing to respond to.

[18] It is correct that van der Westhuizen J in his judgment does not deal with the prospects of success by either party on appeal.

The provisions of Section 18 of the Superior Court Act 10 of 2013

[19] For reasons that will become clearer later on in this judgment it is not necessary for this court to traverse the merits of either party's satisfaction of the provisions of Section 18 of the Act. Section 18(1) of the Act provides a two- fold enquiry. It is

required of an applicant seeking relief under Section 18(1) and 18(3) of the Act to show:

10.1 That exceptional circumstances exist,

10.2 That proof exists on a balance of probabilities that Samancor, the applicant, will suffer irreparable harm if the order is not put into operation and the other party Bila will not suffer irreparable harm if the order is put into operation.

[20] Prior to the commencement of Section 18 the common law prevailed. In *Southern Cape Corporation v Engineering Management Services (Pty) Ltd*[2] Corbett JA stated:

"Whatever the true position may have been in the Dutch Courts, and more particularly the court of Holland (as to which see Ruby's Cash Store (Pty) Ltd v Estate Mark and Another 1961 (2) SA 118 (T) at pp. 120-3), it is today the accepted common law rule of practice in courts that generally the execution of a judgment is automatically suspended upon the notification of an appeal, with the result that pending the appeal, the judgment cannot be carried out and no effect can be given thereto except with the leave of the

[2] 1977 (3) SA 534 (A) at 544 H-545A

court which granted the judgment. To obtain such leave, the party in whose favour the judgment was given must make special application.

[21] Rule 49(11) of the Uniform Rules of the Court, which was repealed with effect from 22 May 2015, merely restated the common law:

"When an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended pending the decision of such appeal or application unless the court which gave such an order on the application of a party, otherwise directs".

[22] In *UFS v Afriforum and Another*[3] PB Fourie AJA states:

"A question that arises in the context of an application under Section 18 is whether the prospects of success in the pending appeal should play a role in the analysis. In Incubeta Holdings, Sutherland J was of the opinion that the prospects of success in the appeal played no role at all. In Liviero Wilge Joint Venture & Another v Eskom Holdings OC Ltd [2014] ZAGPJHC 150 at para 30) Satchwell J (Moshidi J concurring) was of the same view. However,

[3] [2016] ZA SCA 165 17 Nov 2016 at para 14 and 15

in Justice Alliance[4] Binns-Ward J (Fortuin and Boqwana JJ concurring) that the prospects of appeal remain a relevant factor and therefore the less sanguine a court seized of an application in terms of S18(3) is about the prospects of the judgment at first instance being upheld on appeal the less inclined it will be to grant the exceptional remedy for the appeal of execution of that judgment pending. The same quite obviously applies in respect of dealing with an appeal against an order granted in terms of S18(3).

I am in agreement with the approach of Binns-Ward J. In fact, Justice Alliance serves as a prime example why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief. Binns-Ward J concluded that the prospects of success on appeal were so poor that they ought to have precluded a finding of a sufficient degree of exceptionality to justify an order in terms of S18 of the Act".

[23] It is applicant's contention that in granting his order, Van der Westhuizen J did not consider the prospects of success on appeal and therefore on this ground alone, the appeal must succeed. This court accepts that apart from the provisions of S18, which we shall term the statutory provisions, the common law requirement to consider the prospects of success on appeal remains. Therefore, a court granting an order in terms of S18 should as a matter of course, also satisfy itself as to the prospects of success on appeal.

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[4] The Minister of Social Development Western Cape & others V Justice Alliance of South Africa & Another 2016 ZA WCHC 34

[24] In *Swart and Another v Cash Crusaders*[5],Fabricius J (with Wanless AJ and Strijdom AJ) concurring, concludes as follows:

> *"9. A further submission going to the heart of the matter, and the interpretation of the provisions S18(3) was the following: the respondent did not in its S18(1) application deal with the position of the Second appellant at all. The second appellant employed the First appellant and also opposed the Respondent's main application. Both the Second Appellant and First Appellant brought an application for leave to appeal against the judgment of Kollapen J. Thus the respondent in seeking relief in terms of S18(1) was required to make out a case of absence of irreparable harm in regard to both the First appellant and the Second appellant. The respondent says nothing in its application concerning the absence of irreparable harm to the Second Appellant and this was therefore a fatal omission to the Respondent's application and on this basis alone it ought to have been dismissed with costs by Kollapen J.*
>
> *10. I am constrained to agree with the criticism of both Appellants of the reasoning and conclusion of the court a quo that I have set out. It is clear from the affidavits before Kollapen J and his judgment that the consequent effect after the period of the restraint of the First Appellant were not dealt with at all and to this extent, the scope of the enquiry in terms of s18(3) was indeed limited. It is also abundantly clear that the position of the Second*

[5] 2018(6) SA 287 GP at para 9-10

Appellant was not dealt with at all. I agree therefore that the respondent in seeking relief in terms of s18(1) was required to make out a case of absence of irreparable harm, in regard to both the First Appellant ad the Second Appellant. This was not done accordingly; I agree that the Respondent's application ought to have been dismissed with costs by Kollapen J."

[25] The respondent's reference to the prospects of appeal in their papers before van der Westhuizen J was as follows:

"100. It is submitted that the first respondent's intended petition and/or application for leave to appeal has no prospects of success and will ultimately be lodged by the first respondent in an attempt to allow it to continue its unlawful mining operations to the applicant's prejudice. Accordingly, this intended petition should not delay the operation and execution of the order granted by Neukircher J on 1 July 2019, which seeks to stop the illegal mining of the first respondent and to prevent the health and safety risks associated with it[6]."

[26] When requested by this court to point out where van der Westhuizen J deals with the prospects of appeal in his judgment, the respondent pointed to paragraph 25 of the judgment which states as follows:

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[6] Record: Volume 1: page 42 para 100

"[25] In respect of the application in terms of section 18(1) of the Superior Court Act, the first respondent has been less than candid with the court. It has chosen to raise technical point and deliberately decided to ignore the pertinent facts raised in the founding affidavit, where it is in the position to gainsay such allegations, if holding all relevant detail of its conduct complained of."

[27] Upon a reading of the paragraph quoted above and trying to construe what, paragraph 25 was dealing with, it is difficult to read any part of this excerpt and see how van der Westhuizen J could have been dealing with the prospects of success on appeal. Therefore, in my view, van der Westhuizen did not deal with the prospects of success on appeal in his judgment.

[28] The respondent further submits that the onus was on the appellant, before Van der Westhuizen J, to prove that the prospects of success with the intended appeal to the SCA were such that the respondent's application in terms of s18(1) should fail. This also cannot be correct that in the absence of the appellant raising this issue, the respondent had nothing to respond to. In *UFS v Afriforum* it was held that in satisfying that heavy onus, the applicant must establish that he or she has strong prospects of success on appeal before the extraordinary and exceptional relief contained in s18 can be granted. The respondent was the onus bearing party, such onus not being dependent or reliant in any way on the appellant's own submissions as to its own prospects of success on appeal.

[29] The court then considered if on its own, since the full record of the proceedings before Neukircher J and the judgment of van der Westhuizen J were available, it may consider the respondent's prospects of success on appeal. The appellant's submission in this regard was, which I accept, that this court would have no basis for dealing with either the presence or absence of the prospects of success when neither the respondent nor the judgment which is being appealed against had addressed the issue of prospects of success.

[30] The respondent argued that the prospects of success ceased to be a requirement with the enactment of s18. This was after the court considered that the extent of the respondent dealing with the prospects of appeal in its papers was as indicated in paragraph 26 above. Upon considering the views expressed by Binns-Ward J, quoted with approval by Fourie AJA in the Afriforum matter *(Supra)*, the submission by the respondent cannot be correct. The correct position is that prospects of success remain a valid consideration in deciding whether or not to bring a judgment into operation in terms of section 18. This is despite the fact that the issue of prospects of success is not specifically mentioned in section 18 itself.

[31] The appellant on the other hand correctly submits that the respondent's application should have been summarily dismissed *"on the sole ground that the respondent,*

being the onus-bearing party, made no reference to the prospects of success on appeal in its founding papers".[7]

[32] As far as its own prospects of success on appeal are concerned, it is appellant's contention that given the well-established Constitutional Court authority on the prohibition of so-called overlapping mining rights, the chances of Neukircher J's judgment being confirmed on appeal are nearly non-existent. Whilst noting the appellant's submission it is not necessary to deal with it in this judgment in light of the discussion above regarding prospects of success.

[33] In the circumstances, I am constrained to agree with the submissions by the appellant in their criticism of the findings of the court a quo. It was imperative for the respondent, in making out its case to raise the issue of prospects of success pertinently and for the court a quo to deal with that issue in definitive terms in its judgement. Absent such a finding, the appeal must succeed.

The order

[34] Having regard to the above, I propose that the following order ensues:

[7] Appellant's Heads of argument: Page 11: par 40

34.1 The appeal is upheld with costs;

34.2 The order of the court a quo is set aside, and replaced with the following order:

"The application is dismissed with costs."

M A LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

S A M BAQWA

JUDGE OF THE HIGH COURT

I agree

C M SARDIWALLA

J UDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicants	: ADV. P Daniels
Instructed by	: Mabuza Attorneys, Johannesburg
Counsel for Respondent	: ADV. D Mpofu
Instructed by	: Malan Schoeman INC, Johannesburg
Date of Heard	: 14 November 2019
Date of Judgment	: