IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2024/080004

Date of hearing: 30 July 2024

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

16/8/24 [redacted]
DATE SIGNATURE

In the matter of:

HOSHOZA RESOURCES VRYHEID (PTY) LTD	**Applicant**
and	
JULOVISTA (PTY) LTD	**First Respondent**
TRIPALEX (PTY) LTD	**Second Respondent**
S VERREYNNE	**Third Respondent**
M DE BRUYN	**Fourth Respondent**

JUDGMENT

SWANEPOEL J:

INTRODUCTION

[1] In this application the applicant ("Hoshoza") seeks an urgent order interdicting the first respondent ("Julovista") from conducting any mining activities under and in terms of the mining right issued to applicant with DMRE number KZN 10081 (223) MR ("the mining right"), save for activities related to Julovista's rehabilitation obligations in terms of an agreement between the parties dated 23 August 2022.

[2] The applicant seeks an interdict against the second respondent ("Tripalex") that it must take all reasonable steps to prevent Julovista or anyone acting on its behalf, from conducting mining activities contemplated by the mining right, on Portions 1, 4, 8, 9 and 0 of the Farm Zoetmelksrivier. The applicant also seeks unrestricted access to the aforesaid land. Nothing more is needed to be said in respect of the relief sought against Tripalex, save that no case whatsoever was made out against it and that the application against Tripalex should be dismissed.

[3] The applicant is the holder of the mining right over what is known as the Kariboo Mining Area. Portions 1, 4, 8, 9 and 0 of the Farm Zoetmelksrivier comprise the "Tripalex properties". On 23 August 2022 Hoshoza and Julovista entered into a written agreement in terms of which Julovista obtained the right to continue with the processing and reclamation of certain discard and slurry dumps on the Soetmelks section of the Kariboo Colliery, against payment to Hoshoza of R 30 per tonne of coal mined.

[4] The third and fourth respondents were joined in the proceedings as directors of Julovista and Tripalex, inasmuch as they may have an interest in the matter (although it later emerged that the third respondent is the sole director of both companies). No relief is sought against them.

[5] The only controversial clause in the agreement is Clause 2, which reads:

"2. Duration

2.1 This agreement shall endure from the Signature Date and shall terminate on 30 June 2024, unless an extended period is agreed to in writing between the Parties."

BRIEF HISTORY OF THE MATTER

[6] The relationship between Hoshoza and Julovista has become acrimonious, and has devolved into a tussle between them for the control of the mining right. Hoshoza alleges that the agreement terminated on 30 June 2024, thereby terminating Julovista's right to mine under the mining right, whilst Julovista alleges that the agreement stands to be rectified, to reflect a termination date of 4 December 2033, the same date on which the mining right lapses.

[7] On 5 September 2023 Hoshoza's attorney wrote to Julovista's attorney. In the letter he addressed certain issues relating to Julovista's alleged purchase of Hoshoza shares. The letter then records the following:

> "Take note that the agreement relating to the beneficiation of the dumps expires on 30 June 2024 without further notice."

[8] In response Julovista's attorney wrote that *"We regard this statement to be a veiled threat."* Significantly, the letter did not deny the factual statement that the agreement was due to terminate on 30 June 2024. On 1 November 2023 Julovista issued summons against Hoshoza seeking two alternative orders. The first was an order declaring clause 4.1.3.6.1 of the agreement invalid and unenforceable, and in the alternative, rectification of clause 4.1.3.6.1. The exact dispute related to

this clause is irrelevant to this application. However, what is significant is that when this action was launched, after Julovista had been warned that the agreement was due to terminate on 30 June 2024, there was no mention by Julovista that the agreement incorrectly recorded the termination date. In fact, Julovista itself pleaded that the agreement was due to terminate on 30 June 2024.

[9] Hoshoza duly defended the action, and it delivered an exception to the particulars of claim. On 30 April 2024 Julovista delivered an amendment to its particulars of claim. The particulars of claim contained the following new Claim 3:

> "14.1 The plaintiff avers that
>
> 14.1.1 clause 2 of the agreement does not correctly and accurately reflect the true and continuing intention of the parties, as the parties always intended that the agreement would endure until the expiration of the defendant's mining right on 4 December 2033;
>
> 14.1.2 the incorrect recordal of the true and continuing intention of the parties was brought about as a result of an error common to the parties, alternatively a mutual error;
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> 14.1.3 The agreement thus falls to be rectified by substituting clause 2.1 of the agreement with the following:
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> *'2.1 This agreement shall endure from the signature date and shall terminate on 4 December 2033 unless otherwise agreed to between the parties in writing."*

[10] Julovista delivered amended pages prematurely on 14 May 2024. Hoshoza opposed the amendment and delivered notice of an irregular step. I have been advised that the proposed amendment was withdrawn shortly before this application was argued.

[11] On 28 June 2024 Hoshoza wrote to Julovista reminding it that the agreement was due to terminate on 30 June 2024. Julovista was also reminded of its rehabilitation obligations, and it was called upon not to conduct further mining activities. On 1 July 2024 Julovista's attorneys replied to the letter. Julovista's stance was that clause 2 was the subject of litigation, and any attempt to 'disturb the current status quo' would be met with an application.

[12] Hoshoza also disseminated a circular to the community in which it reiterated that the contract was coming to an end. The circular was met with a response from the fourth respondent in which he stated that Julovista was "going nowhere".

[13] Hoshoza contends that the belated attempt at the rectification of the agreement is a ploy to extend the term of the contract longer than the parties had intended. Julovista says that there is a factual dispute on the papers regarding the termination date that cannot be determined on the papers. For that reason, says Julovista, the application should be dismissed.

PRELIMINARY ISSUES

[14] Before I deal with the aforementioned issue, there are some preliminary issues to consider. Firstly, Julovista says that Hoshova has made unfounded allegations in the founding affidavit, allegations that do not find support in the facts of the matter. It is so that Hoshova has made allegations relating to Julovista's alleged unlawful conduct. However, those allegations are not the sum total of the case against Julovista. The core facts are in fact not in dispute, in other words, the parties are agreed that there is a written agreement between them that reflects the termination date as being 30 June 2024. The simple question to be determined is whether there is a real factual dispute regarding the date of termination.

[15] Julovista's further contention is that the application is an abuse of Court processes. It says so because of the lengthy annexures that were attached to the founding affidavit. Hoshoza attached the entire Mining Work Programme, the Water License, and the Environmental Impact Assessment Report to the founding affidavit. None of these documents had any discernable relevance to the issues to be decided in the application, and they spanned a substantial number of pages. Hoshoza also did not, with some exceptions, state clearly which part of the documents were being relied upon, as is required of a party in motion proceedings.[1] Julovista urged me to dismiss the application for these reasons alone. Although the decision to attach these documents was an error, I do not believe that it justifies dismissing the entire application. However, the respondents should not have to bear the costs of perusal of these documents, and I shall make an appropriate order hereunder.

[16] Julovista further contends that the application is not urgent. Hoshoza says that Julovista's continued mining activities in. circumstances where its entitlement to mine has ended is an ongoing wrong that cannot be rectified if the application were to be heard in the normal course. Julovista argues that even if its mining activities are later found to have been unlawful, and that the agreement in fact terminated on 30 June 2024, Hoshoza would not have suffered prejudice because it would have received the contractual payment due to it in terms of the agreement. Hoshoza could also institute a damages claim if it so wished, argues Julovista.

[17] The difficulty that I have with these arguments is that, if Julovista's entitlement to mine has ended, and it continues to mine, it prevents Hoshoza from exploiting the mine for its own purposes, as it is entitled to do. As Julovista continues to mine, it continues to reduce the ore body available for mining. If Julovista is allowed to continue mining whilst its entitlement to do so has ended, it is cold comfort to say that Hoshoza

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1 See: Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T)

should seek damages that may or may not be paid at some stage in future. In my view, an ongoing wrong should in principle be dealt with as speedily as possible.

[18] Julovista says that Hoshoza should have known on 30 April 2024, when the proposed amendment was delivered, that Julovista did not intend to vacate the mine on 30 June 2024. It must be noted that the first time that Julovista expressed its intention to remain on the mine was in its attorney's letter of 1 July 2024, when it intimated that it would resist a change to the status quo. I daresay that if Hoshoza had brought the application in May, for instance, it would have been met with the defence that the application was premature.

[19] In my view the application is clearly urgent.

CLEAR RIGHT

[20] Julovista has argued that Hoshova has not demonstrated a clear right to the relief sought. It contends that Hoshova has not shown that it owns the mining right because it did not attach the original mining right to the papers. Instead, Hoshova attached a mining right renewal document that shows that the mining right was extended to 4 December 2033.

[21] Julovista itself says that its right to mine derives from the agreement. The agreement records that Hoshosa is the holder of the mining right, and that it has given the right to mine in terms of that mining license to Julovista. Julovista cannot blow hot and cold. If the mining right does not exist, then neither party is entitled to mine. In fact, Julovista says expressly that it is Hoshova's contractor in respect of the mining right.

[22] In any event, at Julovista's instance the Department of Mineral Resources and Energy inspected the mine specifically to determine whether there was illegal mining being conducted. The department

reported that the mining activities were being conducted on the strength of valid documentation. There is no merit to this argument.

FACTUAL DISPUTE

[23] The final issue is whether there is a real factual dispute between the parties relating to the termination date of the agreement.

[24] Julovista said in its answering affidavit that there is an action pending between the parties, and that the relief sought in the action included a claim for rectification to reflect the date of termination as 4 December 2033. The mere existence of this fact, says Julovista, means that there is a factual dispute that cannot be resolved on the papers.

[25] Julovista says that when the parties entered into the agreement, their intention was not only to allow Julovista to generate profit, but also for it to earn sufficient money to enable it to purchase the shareholding in Hoshova. It is impossible, it says, to generate sufficient money in two years to purchase the mining right, and so the intention was always that the agreement would endure for a longer period. Julovista says, furthermore, that the input costs associated with the commencement of such a project are such that it takes at least five years to recover those costs.

[26] Julovista says that "*several questions would need to be answered by the parties in order to establish that this was the intention of the parties at the conclusion of the agreement, and this is not possible on affidavit.*"

[27] The question is whether there is a true dispute of fact relating to the date upon which the agreement terminates on these papers. In *Wightman t/a JW Construction v Headfour (Pty) Ltd*[2] the Court considered when there can be said to be a true dispute of fact:

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[2] 2008 (3) SA 371 (SCA)

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously an unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied." (my emphasis)

[28] Is it sufficient for Julovista to say that it has sought rectification of the agreement (belatedly) in other proceedings, when the basis for the rectification is not pleaded either in those proceedings, nor in this application? I think not. I note Julovista's allegation that a short-term agreement of this kind does not make business sense. That may well be true. However, when did Julovista realize this fact? Was it discussed between the parties when the agreement was negotiated? How did the allegedly incorrect date make its way into the agreement? Why did Mr. Du Bruyn sign the agreement with an incorrect termination date?

[29] None of these questions are answered in the answering affidavit. Julovista has unique knowledge of the circumstances under which the negotiations were held, and what was discussed. It has chosen not to disclose those facts to this Court. In the absence of a factual basis for the contention that the termination date is incorrect and does not reflect the will of the parties, I cannot find that there is a live dispute raised in the papers.

[30] I am satisfied that Hoshova has established a clear right to the relief sought. Should the order not be granted, the ore body would continue to be reduced, which would cause Hoshoza irreparable harm. Finally, the balance of convenience favours the granting of the order. It is also, in my view, important to hold parties to the terms of the agreements that they have concluded.

[31] In the premises I make the following order:

[31.1] The application is dismissed as against the second respondent.

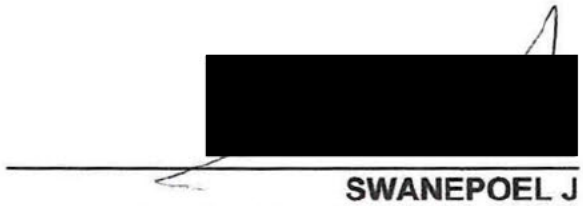
[31.2] The applicant shall pay the costs of the second respondent, including the cost of two counsel, on Scale B.

[31.3] The first respondent is interdicted and restrained from conducting any form of mining activity under and in terms of the mining right issued and granted to the applicant under DMRE reference number KZN 10081 (233) MR ("the Kariboo mining right") save for the mining activities related to the performance of the first respondent's rehabilitation obligations under and in terms of the written agreement concluded by and between the applicant and the first respondent on 23 August 2022.

[31.4] The applicant shall pay the first respondent's cost of perusal of Annexures FA 5, FA 6, FA 8, FA 8 A, and FA 21 on Scale B.

[31.5] The first respondent shall pay the applicant's costs, including the costs of two counsel where so

employed, excluding the costs of the Annexures listed in paragraph 31.4 above, on Scale B.



SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION ,PRETORIA

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Instructed by:	**Venter de Villiers Attorneys**
Date heard:	**30 July 2024**
Date of reasons:	**16 August 2024**