



24 June 2024

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 2799/2024

In the matter between:-

TERRAPAN MASJINERIE CC

Applicant

and

TURNOVER TRADING 251 (PTY) LTD

1st Respondent

GEORGE GRAHAM

2nd Respondent

*This judgment is handed down by means of electronic communication (e-mail) to the legal representatives of the parties. The date and time of handing down is deemed to be **24 June 2024 at 12h00.***

JUDGMENT

FMM REID J

Introduction

[1] In this urgent application the applicant (Terrapan) seeks an interim interdict to prevent the 2nd respondent (Graham) from

conducting any mining activities and to interdict the 1st respondent (Turnover Holdings) to appoint and/or allow any other third party to exercise any mining rights granted to Turnover Holdings on the properties identified below.

- [2] The properties are: the remaining extent of Portions 6, 7, 10 and Portions 8, 17 and 19 of the farm Sterkfontein 155 IP Portions 1, 2 and the remaining extent of the farm Omega 478 IP, Portion 3 and the remaining extent of the farm Holgat 63 IP, Portions 4, 5, 6 and the remaining extent of portion 2 of the farm Wildfontein 201 IP, the remaining of Portions 5 and 31 of the farm Leeuwfontein 64 IP and a certain portion of the remaining extent of the farm Rheeboekfontein 533 IP (“the properties”).
- [3] Mining rights were granted to Turnover Trading on 3 August 2023 and notarised on 12 December 2023 in respect of the properties.
- [4] Terrapan prays that the interim interdict is to be operative pending the final adjudication of an action to be instituted by itself, for the relief set out in Part B of the application. In Part

B, Terrapan prays for (a) a declaratory order that Terrapan is appointed as the sole and exclusive contractor to conduct mining activities on the properties, (b) that Turnover Trading allows Terrapan to conduct such mining activities on the properties and (c) that Turnover Trading is ordered to cooperate and allow Terrapan to do so.

Material background

[5] Turnover Trading held a prospecting right to conduct prospecting activities for diamonds under reference NW30/5/1/1/2/12058PR on the properties. This prospecting right was renewed on 29 July 2018 for a period of 3 years, which period lapsed on 19 July 2021.

[6] Turnover Trading had to apply for a mining right prior to the lapse of the prospecting right on 19 July 2021. Due to a lack of funds, no access to funds and the lack of expertise required for the mining right application, this application was not done.

[7] During February 2024, Terrapan provided the financial assistance to enable Turnover Trading to obtain mining rights

on the properties in terms of a verbal agreement as set out below.

[8] Turnover Trading was consequently granted mining rights to mine diamonds (alluvial) on the properties under reference number NW30/1/2/2/10186MP which rights commenced on 3 August 2023, and is applicable for a period of 10 years until 2 August 2033.

[9] During March 2021 at Wolmaransstad, and at a later occasion during 2023, the representatives of Terrapan and Turnover entered into a verbal agreement, *inter alia* in the following terms:

- 9.1. That Turnover Trading shall apply for a mining right on the properties;
- 9.2. That Terrapan would cover the costs and expenses in relation to the application for the mining right;
- 9.3. That Terrapan shall as remuneration receive 15% of the proceeds of the gross proceedings of the mining activities; and
- 9.4. The remainder of the previous agreement (termed by the

deponent as “the existing agreement”) shall otherwise continue to apply.

[10] It is disputed whether the parties agreed that Terrapan would be appointed as the sole and exclusive contractor to conduct mining activities on the properties. This is a material term of the contract.

[11] Terrapan states as follows in the founding affidavit:

“4.19 (Terrapan) heard a rumour amongst the diamond fraternity that another contractor shall be conducting mining operations on the properties. As this would be in direct conflict with the verbal agreement between (Terrapan) and (Turnover Trading), a meeting was called with (Turnover Trading) on 7 May 2024 at the offices of Japie van Zyl Attorneys.

...

4.22. (Terrapan) would have until the end of May 2024 to set up all necessary equipment on the property and to commence with the mining activities. I pause to mention, that (Terrapan) had to vacate the properties when the prospecting right renewal lapsed and could not return to the mining properties, until such time as the applicant's activities on another farm, Farm Blaauboschkuil, where ceased and finalised. The cost of moving such operation is in excess of R500,000.00. (Terrapan) shall also then be able to apply for a water use license.

- 4.23 *During a site visit to the mining properties by myself (Terrapan) and Nieuwenhuis on 19 May 2024 to make the necessary arrangement for the transfer of mining equipment to the property, we observed that a ramp had already been built and two washing pans installed, which did not belong to (Terrapan). The purpose of such ramp and washing pans is clearly to conduct mining activities.*
- 4.24. *I (Terrapan) believed that this equipment belongs to (Graham) and that he has apparently been appointed by the first respondent as contractor and/or otherwise allowed to conduct mining activities on the mining properties.*
- 4.25 *I (Terrapan) have previously been in business with (Graham) and I (Terrapan) am therefore able to identify the same as his property. The only reasonable inference is therefore that he is the mining contractor involved..."*

[12] The above illustrates that Terrapan has become aware thereof that Graham has been conducting mining activities on the properties, on 19 May 2024.

[13] Terrapan and Turnover Trading then commenced with correspondence through its respective attorneys. Terrapan's attorneys wrote a letter on 22 May 2024 and after no response was received, another letter dated 3 June 2024 was sent to Turnover Trading. Similarly, no response was forthcoming.

[14] In the answering affidavit, the following response is given by

Turnover Trading:

- “13. Indeed, (Terrapan) paid some of the expenses resulting from the application for a mining right of which (Turnover Trading) did reimburse / paid back some of the monies as part of the terms of the loan agreement.*
- 14. The mining right was then granted on 3 August 2023 and executed on 12 December 2023. After the mining right was granted, (Turnover Trading) made it clear that it wants to resume mining activities in January 2024 since it has been some time without generating revenue.*
- 15. After a mining right was granted, (Turnover Trading) called (Terrapan) to make him aware and he told me that he knows. And due to the fact that it has been sometime without mining or working, we (informed) (Terrapan) that we wished to resume with mining activities somewhere in January 2023. Between January 2024 and February 2024, (Turnover Trading) phoned (Terrapan) to find out what is their position and why are they delaying starting with the mining activities and the response (Turnover Trading) received from (Terrapan) was that they will avail themselves to set up equipment but without any clarity as to when will they do that.*
- 16. Around March 2024, during a meeting, (Terrapan) was sceptical about moving his equipment to the properties for mining activities*

to resume because of the notion or the results of the inspection of the availability of gravel within the properties. (Terrapan) showed concerns that the scope of work is limited because after the properties had been inspected, it showed that there is only two to six months of work.

17. *Due to scepticism of (Terrapan) and uncertainty of whether they will come and start mining, I contacted (Graham) who gave us a different opinion about the properties after prospecting the properties. Then that is when (Turnover Trading) and (Graham) decided to work together.*
18. *To expedite the process of resuming with mining, (Graham) had to satisfy the obligations set out in the SLP (Social and Labour Plan) that after six months (Turnover Trading) must start implementing it. Furthermore, (Turnover Trading)- also made commitment with the surrounding (sic - community) to provide them with certain services alluded to in the SLP. As a result, (Turnover Trading) was forced to start mining in order to comply with the obligations of the SLP. ...*
19. *As things stand, (Turnover Trading) has never denied (Terrapan) an opportunity to come and work, and we will stand by this position that they can still come and work. What I contend is the allegation that there is an agreement between (Terrapan) and (Turnover Trading) that (Terrapan) is a sole and exclusive contractor to conduct mining activities over the properties which (Turnover Trading) possesses a mining right over.*

20. *The Court must further note that all the properties combined, consists of over 9,000 hectares of land of which (Terrapan) does not even have capacity to mine it."*

[15] In the founding affidavit, Terrapan sets out its grounds for urgency as follows:

"5.1 Despite attempts by (Terrapan), through communication by its attorneys of record, as set out above, (Turnover Trading) and (Graham) have to date refused to engage with the applicant in a bona fide manner.

5.2 I submit that if this matter is not heard on an urgent basis, (Terrapan) will not be afforded substantial redress in due course. It is apparent that such mining is being conducted and shall continue if not interdicted. In terms of the agreement concluded by (Terrapan) with (Turnover Trading), (Terrapan) is entitled to so extract diamonds and receive the benefit thereof.

5.3 If (Graham) is not interdicted from conducting mining activities on the mining properties, (Terrapan) will suffer substantial harm, in that it will not be able to exercise its rights to mining on the properties. More importantly, the applicant shall suffer irreparable harm and shall continue to do so whilst such mining is conducted. By its very nature diamonds so obtained may be removed and disposed of without the applicant being able to establish and determine the extent of the proceeds of such mining activities. During the prospecting period (Terrapan) generated a gross turnover of between R30 million and R40

million per annum. This clearly renders the application urgent, so as to prevent these diamonds being mined in direct conflict with said agreement.

- 5.4 *Should (Terrapan) not be able to mine, (Terrapan) will be forced to reduce its work force, which will have an economic impact on the communities surrounding the mining activities and the workers of (Terrapan).*
- 5.5 *(Terrapan) is further, in terms of the guarantee submitted when the mining right was applied for, responsible for any and all rehabilitation on the property, should (Turnover Trading) and/or (Graham) not rehabilitate the property in terms of the environmental management programme.*
- 5.6 *(Terrapan) will, once mining activities have commenced, have no way of knowing, the quantities of diamonds extracted by the second respondent and will therefore not be able to recover damages and have no other redress."*

[16] To this, Turnover Trading responds as follows in the answering affidavit:

- "71 *The allegations contained in these paragraphs are denied. I have already dealt with urgency somewhere above.*
- 72 *It is wrong that the presence of (Graham) in the mining properties hinders (Terrapan) to conduct mining activities from the said properties. It has already provided above that there is no way that one contractor will have capacity to mine over*

9,000 hectares of land.

- 73 *Furthermore, the gross turnover that (Terrapan) allege that it generated is highly inflated. (Graham) confirmed that while working together with (Terrapan), it has never received the alleged income.*
- 74 *(Terrapan) further alleges that, should they not be able to mine, (they) will be forced to reduce its work force. This is a pure misrepresentation; (Terrapan) has not been working on site since 19 July 2021.*
- 75 *It is not true that (Terrapan) in terms of the guarantee it submitted for the mining right application makes (Terrapan) responsible for any and all rehabilitation on the property. (Turnover Trading) stands in for the rehabilitation in that the mining right and properties are in its name.*
- 76 *Therefore, there is no urgency in this application. The allegation of diamonds that will be mined is pure economic, a relief that does not warrant urgency."*

[17] It is common cause that Turnover Trading is the holder of the mining right in terms of clause 2 of the Mining Right granted in terms of section 23(1) of the **Mineeral and Petroleum Resources Development Act** 28 of 2002 under protocol number 674/2023 with reference number 30/1/2/2/10186MR.

[18] It is uncertain whether a water use license has been obtained by either Graham or Turnover Trading.

[19] It is also common cause that the agreement between Terrapan and Turnover Trading included that Terrapan will pay on behalf of Turnover Trading in order to obtain the mining right. Terrapan paid an amount of R106,000 to Japie van Zyl Attorneys during February 2024 and an amount of R420,629.23 for costs and expenses in relation to the mining right application.

[20] Terrapan also provided the rehabilitation guarantee to the Department of Mineral Resources and Energy to the amount of R433,932.

[21] There is a material factual dispute whether the verbal agreement between Terrapan and Turnover Trading included the term that Terrapan will be appointed as the sole and exclusive contractor to conduct all mining activities on the properties.

[22] There is a further factual dispute whether the funding of the

prospecting and mining right applications was a loan, and whether Turnover Trading refunded Terrapan in full.

Urgency: Chronology

[23] The time-line of the events are as follows:

- 23.1. Turnover Trading held prospecting right to the properties, which lapsed on 19 July 2021.
- 23.2. Terrapan financially assisted Turnover Trading to receive mining rights from 3 August 2023 for a period of 10 years to 2 August 2033.
- 23.3. On 7 May 2024, Terrapan and Turnover Trading held meetings during which verbal agreements were concluded. It is disputed that Terrapan holds the sole and exclusive rights to mining activities on the properties, and that Turnover Trading has settled the loan amount to obtain the prospecting / mining right.
- 23.4. On 19 May 2024 Terrapan inspected the mining properties and discovered that Graham is mining on the

site. This was confirmed on 21 May 2024 when Graham was witnessed as being present on the site.

23.5. On 22 May 2024 correspondence was directed from Terrapan's attorneys to that of Turnover Trading.

23.6. Absent a response, a follow-up correspondence was directed from Terrapan's attorneys to that of Turnover Trading on 3 June 2024.

23.7. This urgent application was served and filed on 12 June 2024 and the matter was set down on the urgent roll for 14 June 2024.

[24] Urgency must relate to the specific relief sought. The urgent relief sought pertains mainly to the claim of Terrapan that Terrapan has the sole right of mining on the properties, as per the verbal agreement between Terrapan and Turnover Trading.

Analysis

[25] It is trite that an applicant in an urgent application must set

out in the founding affidavit the explicit circumstances relied on to render the matter urgent and the reason why the applicant claims it cannot be afforded substantial redress at a hearing in due course. **See: Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniure 1977 (4) SA 135 (W) at 136H.**

[26] The right on which the applicant relies for urgency, is that Graham is being allowed by Turnover Trading to mine on the properties, in contradiction with the verbal agreement that Terrapan has the sole and exclusive right to mining. This is factually disputed.

[27] In addition, Turnover Trading states that Terrapan has never been prevented to mine on the properties and has never been prevented access to the property. This directly influences the urgency of the application on the basis that Terrapan may access the property and may conduct mining activities.

[28] In my view, the period since the beginning of May 2024 when Terrapan became aware thereof that Graham was mining on

the properties, and mid-June when the application was brought, was in inordinate long period to exert the sole mining rights claimed by Terrapan. The 2 letters of correspondence provide cold comfort and is not the actions of an applicant that seeks to protect a sole right urgently. In my view, the legal representatives could have done more than write 2 letters. There could (and should) have been telephonic conversations and more attempts to resolve the matter.

[29] Furthermore, I am not convinced that Terrapan would not be able to receive substantial redress in the normal course of the litigation process. Should Terrapan be in a position to prove that it has sole and exclusive mining rights, substantial redress may be received in the normal course of the litigation process with a claim of damages.

[30] As such, I find that the matter is not urgent on the basis that substantial redress may be received in the normal course of litigation.

Costs

[31] The normal rule in costs is that the successful party is entitled to be reimbursed for the costs it incurred in the matter.


[32] No reason has been advanced, and I find no reason, why the normal rule should not be applicable.

[33] As such, the applicant is ordered to pay the cost of the first and second respondent.

Order

In the premise, I grant the following order:

- i) The matter is struck from the roll for want of urgency.
- ii) The applicant is to pay the respondents costs.



FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE OF ARGUMENT: 14 JUNE 2024

DATE OF JUDGMENT: 24 JUNE 2024

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