REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/46533

REPORTABLE

In the matter between:-

HVH GOLD (PTY) LIMITED **Applicant**

and

FRIEDSHEFT 1063 (PTY) LIMITED **1st Respondent**

ATLEHANG ENGINEERING CC **2nd Respondent**

JUDGMENT

MOKGOATLHENG J

(1) This application came by way of urgency wherein the applicant sought an order:

(a) evicting the respondents from its immovable property; and

(b) directing the respondents to deliver its movable assets.

(2) After hearing argument, I found that the matter was urgent. Upon considering counsels submissions I granted the order sought and ruled that the reasons for such order would be furnished on request. These then are the reasons predicating my orders.

THE FACTUAL MATRIX

(3) The applicant is the registered owner of certain immovable property occupied by the respondents, being Portion 32 of the Farm Varkensfontein 169, Registration Division IR, Province of Gauteng, situated at 2 Springs Road Nigel, and is also the owner the movable assets referred to in the schedule to the written sale agreement marked "*J*".

(4) On the 24 August 2009, the applicant and the first respondent concluded a written sale agreement in terms whereof, the applicant sold to the first respondent who purchased;

(i) the above described immovable property ;

(ii) the above described movable assets; and

(iii) the "*Rights*" to the enterprise as defined in *clause 1.1.49* of the sale agreement.

(5) The sale agreement was subject to the fulfilment of certain precedent material terms identified in *clause 3* thereof, which are:

"(a) the first respondent undertook to procure the cancellation of the "Rehabilitation Guarantee" (i.e. as defined in clause 1.1.48 of the sale agreement with reference to Annexure "M" thereto) not later than 30 September 2009 or within such extended period as the applicant may in writing agree upon;

(b) the purchase consideration payable by the first respondent to the applicant for the enterprise was R10 000.000.00 to be paid as follows:

(i) R7 936.000.00 being the aggregate of the "Friedshelf Claims" (as defined in clause 1.1.27 of the sale agreement) and the assumption of liability thereof by the applicant and the application on the "Closing Date" of a set off as provided in clause 10 of the sale agreement; and

(c) R2 064.000.00 as follows:

(i) R1 032.000.00 on 30 September 2009; and

(ii) R1 032.000.00 on 30 October 2009;

(6) *Should any of the aforesaid payments not be effected on the due date thereof, in such event, the breach of the provisions as set forth in clause 20.2 of the sale agreement would be and become operative.*

(7) *Should the first respondent breach any of the provisions of the sale agreement applicable to it, and should the first respondent fail, refuse and/or neglect to effect payment of any amount due and owing by it to the applicant in respect of the purchase consideration, and fail to*

remedy such breach within fourteen days after the receipt of written notice requiring it to do so, then and in such event, the applicant would without prejudice, invoke clause 20.2.1 and be entitled to, inter alia, cancel the sale agreement.

(8) Before signature of the agreement of sale on the 24 August 2009, occupation and possession of the enterprise had been given to and was taken by the first respondent, with effect from the Effective Date being, 1 May 2009 from which date it was agreed that the second respondent would occupy that portion of the immovable property more fully identified in Annexure "X" of the sale agreement.

(9) *On the 30 August 2009, the first respondent, breached the sale agreement in that it:*

(a) did not procure the cancellation of the "Rehabilitation Guarantee" as defined in the sale agreement by 30 September 2009; and

(b) did not make payment to the applicant of the amount of R1 032.000.00 on 30 September 2009.

(10) *As a consequence of the first respondent's breach of the sale agreement, on 1 October 2009 the applicant's attorneys addressed a letter to the first respondent, calling upon it to remedy its breach of the sale agreement within fourteen days of the date of the receipt of the letter, failing which, the applicant would be entitled to invoke either clause 20.2.1.1 or 20.2.1.2 of the sale agreement.*

(11) *The first respondent acknowledged not having paid the applicant the amount of R1 032.000.00 by not later than 30 September 2009 as obliged in terms of the sale agreement, consequently, due to first respondent's failure to remedy its breach of the sale agreement as requested, on 16 October 2009 the applicant's attorneys addressed a letter to the first respondent cancelling the sale agreement."*

(12) Consequent to cancellation of the sale agreement, the first respondent was called upon to forthwith hand over to the applicant's representatives control of all movable assets situate on the immovable property, failing which the applicant would institute proceedings.

(13) The first respondent failed to comply with the said demand and asserts that the respondents remain in unlawful occupation of the immovable property and are in unlawful possession of the movable assets despite the cancellation of the sale agreement.

URGENCY

(14) Regarding urgency, Mr Subel on applicant's behalf argued that it is predicated on the following grounds:

(a) in terms of the sale agreement, ownership in the assets comprising the enterprise remained vested in the applicant pending the discharge by the purchaser of its obligations under the sale agreement, irrespective of whether, occupation and possession of the enterprise had been given to and was taken by the first respondent prior to the conclusion of the sale agreement;

(b) all risks and benefits accruing from the enterprise, and all costs associated therewith (save as provided to the contrary in *clause 18.1)* were deemed to have passed from the applicant to the first

respondent with effect from the "*Effective Date,*" the 1 May 2009;

(c) on 20 October 2009 the first and second respondents brought an urgent *ex parte* spoliation application before the Nigel Magistrate's Court under case number 957/09 and obtained a court order, as a consequence whereof JCT Protection Services CC and its security officers were ordered to vacate the immovable property with the result that:

(i) the immovable property and the movable assets have been left unprotected at the risk of being vandalised and stolen;

(ii) waybills have been removed and are no longer being completed with the result that there is no proper record of the movement of items from the immovable property; and

(iii) there are suspicions that movable assets are being removed from off the immovable property;

(d) the respondents are currently apparently operating illegally on the immovable property without a refining licence, consequently, the applicant as the owner of the immovable property, could possibly face criminal sanction;

(e) the respondents are not complying with the requirements of the Certificate of Registration 184 issued to the applicant in terms of the ***National Nuclear Regulator Act 47 of 1999,*** and such failure exposes the applicant to possible criminal sanction;

(f) in terms of to *clause 5.1 of the Sub-Contracting Agreement, Annexure "Q"* to the sale agreement, the first respondent is obliged to obtain all the necessary permits and appoint all the necessary competent persons in terms of the ***Mine Health and Safety Act 29 of 1996 and the Mineral and Petroleum Resources Development Act 28 of 2002***. Currently no such appointments have been made by the first respondent, consequently, the applicant faces the risk of prosecution in the event of any fatality occurring;

(g) the respondents are concluding agreements with third parties and are incurring liabilities in the applicant's name, purporting to do so on applicant's behalf;

(h) the respondents are using the telephones on the immovable property and have not paid Telkom, the amount of R20 128.78 which is due and payable; and

(i) the respondents have failed to pay the Ekurhuleni Municipality accounts in respect of water, electricity, rates and taxes.

(15) Mr Subel argued that the circumstances that currently prevail on the immovable property have engendered reasonable fear to the applicant that it will suffer irreparable harm, were the respondents to continue to be in possession of the movable assets and be in occupation of the immovable property.

(16) Counsel submitted that the respondents conduct demonstrates a complete disregard of the applicant's rights to ownership and to the first respondent's contractual obligations, consequently, there is little doubt that the respondents would have no hesitation in spiriting away the movable assets.

(17) The applicant contends that the respondents are in a parlous financial position as is evidenced by their inability to service debts. Such impercunity has rendered it impossible for them to comply with the first

respondent's obligations under the sale agreement. Consequently, it unlikely that the applicant would be able to recover damages in the normal cause. Having regard to the prevailing circumstances, the risk the applicant is exposed to by the respondent's conduct is incalculable.

(18) The applicant further contends that there is accordingly no satisfactory alternative remedy available to it except to seek the relief claimed in this application, as a matter of urgency.

(19) The applicant argues that since the respondents allege that no mining operations are conducted on the immovable property, having regard to the respondents inability to lawfully conduct operations on the immovable property there can be no prejudice or loss suffered by the respondents in the event of the urgent relief being granted.

THE RESPONDENTS SUBMISSIONS

(20) Mr Da Silva on the respondents behalf argued that this matter is not urgent, as the application constituted an abuse of the court process in that the respondents have occupied the immovable property in question

and have been in possession of the moveable assets from the 15 January 2009 with the knowledge and consent of the applicant.

(21) Further Mr Da Silva contended that in terms of the sale agreement entered into between the parties on 24 August 2009, the effective date is defined therein as 1 May 2009. This he submitted, constituted a reaffirmation of the fact that the respondents have occupied the property and have been in possession of the moveable assets for a considerable period of time, consequently, the grounds for the applicant's purported or perceived apprehension predicating the basis for urgency have existed since the 1 May 2009, and this negatives urgency as contended for by the applicant.

(22) In the alternative, counsel argued that the respondents are not involved in any illegal activity on the immovable property, as currently no mining activities are conducted thereon by the respondents which could amount to a contravention of any statutory prohibition, consequently, the perceived possibility of harm is accordingly non-existent.

(23) The respondents deny that they have entered into any contracts with third parties on behalf of the applicant, and argue that the applicants fears that the immovable property and movable assets are at risk

because JCT Protection Services CC no longer performs security functions on the immovable property are unfounded and without merit, because a security company SA Security has been employed by the respondents to perform the very same security functions as the former did.

(24) The respondents allege that even though the respondents are not presently engaged in mining activities on the immovable property, waybills are utilised to control the arrival and departure of goods associated with the respondents business.

(25) The respondents contend that the applicant's concerns that it has cause to fear that it will suffer irreparable harm if the they are to remain in occupation of immovable property and be in possession of movable assets, conveniently ignores the fact that they stand to forfeit an amount of almost R8 million already paid in favour of the applicant as pre-determined damages should it be found that the agreement was lawfully cancelled.

THE APPLICABLE LEGAL PRINCIPLES

(26) The approach of the courts to vindicatory or quasi-vindicatory claims was stated by Stegmann J in ***Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA (W)*** quoting Millin J in ***Stern and Ruskin NO v Appleson 1951 (3) (W), 813B-C*** as follows:

"In the case of vindicatory or quasi-vindicatory claims, this (i.e. well-grounded apprehension of irreparable loss) is presumed until the contrary is shown."

(27) In ***Fey NO v Van der Westhuizen and Others*** Meer J quoted with approval the following from an article of J Cane:

"In cases in which the applicant has a vindicatory or quasi-vindicatory claim, he would not be required to prove a well grounded apprehension of irreparable harm, for there is a rebuttable presumption of irreparable injury if the interdict is not granted."

(28) Similarly, in ***Hawkins' Trustees v Corio Saw and Planting Mills Ltd and Others Tindell*** J stated:

"The principle seems to be that if the thing itself which forms the subject-matter of the disposition is in the hands of the creditor, on a prima facie case being made out by the trustee that he is entitled to

reclaim it for the estate, the Court will attach the thing until the trustee's case can be finally decided, even if mala fides or collusion is not established and the thing itself is money, and even if the probability of irreparable loss has not been established."

THE EVALUATION OF URGENCY

(29) Our Courts recognise urgency in vindicatory or quasi-vindicatory actions where the preservation of the merx is at stake. The high water mark of the respondents denial that this application is not urgent is encapsulated the assertion that:

"13. The respondents are not involved in any illegal activity on the property. There are currently no mining activities conducted on the premises by the respondents which could amount to a contravention of any statutory prohibition. This apparent 'possibility' of harm is accordingly non-existent." I agree Mr Subel that:

"Apart from this negative assertion, the respondents do not disclose precisely what lawful activities are being conducted on the immovable property and under what licence same are being conducted."

(30) Having regard to the fact that the applicant was granted a mining license by the Department of Minerals and Energy in terms of ***section***

9(1) read with section 9(3)(e) of the Minerals Act 1991 which had to be converted by the first respondent by lodging a "*DME Application*" from an old order used mining right into a new order mining right in terms of the ***Mineral and Petroleum Resources Development Act 28 of 2002,*** the first respondents failure to prosecute such "*DME Application*" has serious consequential financial prejudice to the applicant.

(31) I agree with the applicant's contention that "*Whilst there may not be operations for the extraction of minerals being carried on at the immovable property, the fact remains that the immovable property is a mining site and as such, it is subject to legislation which, inter alia, requires a refining licence. The respondents do not dispute not having such a licence. The applicant is accordingly exposed to criminal sanction. This assertion is not denied by the respondents*."

(32) The fact that the first and second respondents took occupation of the immovable property and the movable assets on or before the effective date of the sale agreement, does not detract from the urgency of the applicant's application. The urgency of the application could not have arisen prior to the cancellation of the sale agreement on the 1 October 2009 as correctly contended by the applicant.

(33) The cancellation of the sale agreement triggered the applicants concerns about the security and safety of the assets forming the subject-matter of

the enterprise, because such cancellation, precipitated the applicant's contractual entitlement to repossess the enterprise. The applicant accordingly had a right to instruct JCT Protection Services CC to ensure that no assets were removed from the immovable property, and request the respondents' personnel to vacate the immovable property.

(34) The respondents do not dispute that on 19 October 2009 and 20 October 2009, Schalk Blaauw an employee of Mintails, attended at the immovable property in order to inspect the immovable property and to determine which assets were still thereon, or that during the inspection on 19 October 2009 and 20 October 2009, Blaauw specifically observed that various assets were missing from the immovable property.

(35) The fact that movable assets have been removed from the immovable property is a breach of the first respondent's obligations in terms of *clause 16.1.2* of the sale agreement, which decrees that pending payment of the purchase consideration, the first respondent is not entitled to sell, alienate, encumber or otherwise deal with the assets without the prior written consent of the applicant. No such consent was either sought or given as asserted by the applicant.

(36) The first respondent does not deny that it is:

(a) in breach, *inter alia*, of *clauses 5.1.4 and 5.1.5* of the sale agreement, in that it failed to prosecute (at its cost), as it was obliged to do, the "*DME Application*" (as defined in *clause 1.1.18* of the sale agreement) which is an application for the conversion of an old order used mining right into a new order mining right in terms of the ***Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA")***. The first respondent failure to take to prosecute the "*DME Application*" is a further exacerbation of urgency as stands to possibly lose the preference afforded to it in terms of the ***Mineral and Petroleum Resources Development Act 28 of 2002*** to seek a conversion from old order mining rights to new order mining rights with consequent financial prejudice and loss.

(37) The respondents are apparently in a parlous financial position as is evidenced by their inability to service their debts, consequently it unlikely that the applicant would be able to recover damages in due course, and it appears that unless urgent relief is granted, the applicant would not be accorded substantial redress at a hearing in the ordinary course.

(38) Urgency is predicated upon the basis that the applicant has to take steps to protect its ownership in the immovable property and movable assets. The respondents answering affidavit does not reveal any legal basis upon which they should continue to be in occupation of the immovable property or to refuse to make restitution of the movable assets to the applicant in view of the lawful cancellation of the sale agreement.

(39) The respondents have acted in complete disregard of the sale and sub-contracting agreements concluded between the applicant and first respondent, consequently such conduct creates a reasonable apprehension that the immovable property and movable assets are at serious risk.

(40) The balance of convenience strongly favours the preservation of the immovable property and movable assets, and justifies the relief claimed, because urgency has been occasioned by the respondents unlawful conduct and the disregard of the applicant's rights to ownership, the applicant has shown that this application is urgent.

THE APPLICANT'S ENTITLEMENT TO EVICTION

(41) The applicant contends that on 16 October 2009 it lawfully cancelled the sale agreement, and requested the first respondent to forthwith deliver to its representatives the movable assets situate on the immovable property and to immediately vacate same.

(42) The applicant contends further that notwithstanding the cancellation of the sale agreement and concomitantly the sub-contracting agreement, the respondents have refused to vacate the immovable property or to restore the movable assets to it, consequently, applicant argues that it is entitled to evict the respondents since they are in unlawful occupation of the immovable property.

THE RESPONDENTS DEFENCE

(43) The respondents argue that "*the applicant's entitlement to cancel the agreement allegedly premised upon the first respondent's failure to procure the cancellation of the so-called "Rehabilitation Guarantee" by not later than 30 September 2009 (clause 5.1.10 of the agreement) and its failure to effect payment of the sum of R1 032 000.00 on 30 September 2009 (clause 9.1.2.1 of the agreement), is unsustainable for the following reasons:*

(a) in terms of the provisions of clause 11.3 of the agreement the applicant was obliged to furnish the first respondent "as soon as reasonably possible after the signature date,

with copies of the EMP (Environmental Management Programme pertaining to the enterprise (the business enterprise of HVH comprising the assets), the rights and permits or certificates required in terms of the legislation";

(b) in terms of the contents of the rehabilitation guarantee the amount guaranteed in terms thereof (R210 000.00) was "Concerning the responsibility in terms of the Mineral Petroleum Resources Development Act which is incumbent on (the applicant) to execute the environment management programme approved in terms of the provisions of the said Act for the (said property)."

(c) the first respondent alleges that it has tendered payment of the purchase consideration referred to in clause 9.1.2 of the main agreement. Further no payment has become due and payable to the applicant, and set off (as provided for in the agreement) has as yet not being effected; and

(d) the applicant has to date not provided respondents with the requisite copies of the EMP until which time it is not obliged to attend to the cancellation of the "Rehabilitation Guarantee."

RIGHT OF RETENTION

(44) "*Further respondents contend that they have a joint right of retention over the property and assets as a result of expenses totalling almost R4 million incurred in maintaining, improving and repairing the property*

and assets pending reimbursement by the applicant therefor, consequently, it is impermissible for the applicant to seek their eviction from the immovable property or to take possession of the movable assets pending the extinguishing of the respondents' right of retention over the property.

SUB-CONTRACTING AGREEMENT

(45) *The respondents contend that notwithstanding the cancellation of the sale agreement, they are entitled to remain in occupation of the ` immovable property in terms of the Sub-Contracting Agreement.*

(46) *In any event, the applicant is in any event not entitled to evict them from the immovable property or claim possession of the movable assets pending the termination of the 'sub-contracting agreement' concluded between the applicant and the first respondent on 24 August 2009, because the second respondent acquired occupation of the immovable property and possession of the movable assets together with the first respondent on 15 January 2009;*

(b) the sub-contract is an agreement independent from the 'main' sale agreement with its own terms and conditions notwithstanding the fact that it was entered into as a condition of the main agreement;

(c) the applicant's contentions that the sub-contracting agreement "was dependent upon the continued existence of the (main) sale agreement which, has been validly

cancelled" is unfounded. The sub-contracting agreement continues to remain in force despite the alleged cancellation of the main agreement;

(d) in terms of the provisions of clause 6 of the sub-contracting agreement the applicant "made available the property and the rights to (the first respondent)" ostensibly from the effective date of 1 May 2009 for a determinate period of time as provided for in clause 4 thereof. None of the occurrences envisaged in clause 4 have arisen in terms of which the sub-contracting agreement can be said to have terminated; and

(e) the sub-contracting agreement continues to remain extant notwithstanding the alleged termination of the main agreement, consequently, the respondents are entitled to occupy the immovable property and to possess the movable assets pending the termination thereof. Further the respondents rights remain unaffected pending the outcome of a dispute in regard to the interpretation and termination of the sub-contracting agreement."

DISPUTE RESOLUTION BY ARBITRATION

(47) "*The respondent contends that in terms of the sale agreement any dispute between the parties in regard to the parties' respective obligations under, or a breach of, or the termination of, or any matter arising out of the termination of the agreement, that dispute shall be decided by arbitration, in terms of clauses 12.1.1, 12.1.5 and 21 of the sub-contracting agreement further, the provisions of the sale agreement also decree that disputes relating to the interpretation, and termination of the agreement are to be resolved or decided by arbitration, consequently, the respondents are entitled to occupy the property and to possess the assets pending the arbitration of the dispute in regard to the interpretation and termination of the sub-contracting agreement.*

(48) *The respondent allege that in terms of the provisions of clause 11.3 of the agreement the applicant was obliged to furnish the first respondent* "*as soon as reasonably possible after the signature date, with copies of the EMP (Environmental Management Programme pertaining to the enterprise (the business enterprise of HVH comprising the assets), the rights and permits or certificates required in terms of the legislation".*

(49) *The respondents further contention is that in terms of the contents of the "Rehabilitation Guarantee" the amount guaranteed in terms thereof (R210 000.00) was "Concerning the responsibility in terms of the Mineral Petroleum Resources Development Act which is incumbent on (the applicant) to execute the environment management programme approved in terms of the provisions of the said Act for the (said property)*". *Consequently, no payment has become due and payable to*

the applicant and set off (as provided for in the agreement) has not yet been effected in any event, the first respondent has tendered payment of the purchase consideration as referred to clause 9.1.2 of the main agreement.

(50) *The first respondent contends that consequently, the applicant has to date not provided it with the requisite copies of the EMP, until such time as same is furnished time it is not obliged to attend to the cancellation of the rehabilitation guarantee."*

A CONSIDERATION OF THE EVIDENCE

(51) I agree with Mr Subel's submission that the respondents answering affidavit fails to disclose any valid defence to the relief claimed and does not raise any genuine, *bona fide* dispute of fact precluding the grant of final relief having regard to the unsustainability of the respondents contentions addressed in seriatim below. Mr Da Silva conceded that the sale agreement was lawfully cancelled. The only defence Mr Da Silva argued, pertains to the fact that an eviction order could not be granted due to the continued existence of the

subcontracting agreement. Mr Da Silva also conceded that the respondents answering affidavit lacked detail and specificity in relation to the applicant's contentions.

(52) Lest I be accused of plagiarism, I have to own up that for purposes of clarity and elucidation I have adopted the parties eloquently drafted affidavits and the applicant's counsel's heads of argument in the adjudication of this matter because I concur fully with same as regards the enunciation of the salient exposition of the contractual dispute and the legal submissions therein as same coincide with mine regarding the interpretation of the contract and the application of the legal principles to the facts.

(53) The respondents purported dispute in regard to the lawfulness of the cancellation of the sale agreement is without any merit, if regard is had to the provisions of the sale agreement as to the manner in which the purchase price is discharged, and in particular the assumption of liability and set off provisions thereof, the first respondent in fact does not actually forfeit any monies as it alleges.

(54) The respondents contention that the applicant:

"(a) it would be entitled to retain the almost R8 million already paid by the respondent, as part of the contract price pre-determined as damages; and

(b) the full outstanding amount of R2 064 000.00 has already been paid into an attorneys trust account and tendered to the applicant in terms of the sale agreement, which tender the applicant has declined to accept has no merit, does not derogate from applicant's right to cancel the sale agreement on breach by the first respondent."

(55) The amount of R2 064 000.00 has been tendered by someone other than the first respondent. In any event, the applicant did not accept this tender. On 29 October 2009 the applicant's attorneys advised attorneys Woodhead Bigby & Irving who were acting on behalf of Bevline Mechanical Projects (Pty) Ltd that the sale agreement had been cancelled on 16 October 2009 consequent upon the first respondent's failure to discharge its obligations to the applicant in terms thereof.

(56) The contention that the parties have not complied with their obligation of meeting at a pre-determined time and venue in order to attend to the matters set out in *clause 15* of the agreement has no merit. So too is the allegation that the circumstances surrounding the giving of notice by

the applicant to the first respondent on 1 October 2009 concerning its alleged breach of the agreement and notice of cancellation on 16 October 2009 were accordingly premature and ineffective because the applicant has not provided the first respondent with all outstanding accounts relating to the business of the applicant as provided for in terms of *clause 11.8* of the main agreement.

(57) C*lause 15* of the agreement provides: "*On the closing date (at latest 30 September 2009) the parties and/or their duty authorised representatives shall meet at a pre-determined time and venue and at which:- 15.1 the applicant shall, subject to the overriding provisions of the agreement, be deemed to have delivered to the first respondent all the moveable assets and physical possession and de facto control of the enterprise; 15.2 the set off referred to in clause 10 supra shall be implemented and the balance of the purchase consideration shall be discharged as provided in clause 9.1.2 supra."*

(58) The fact of the matter is that, the applicant has not accepted the payments made into the trust account of WB&I and it is not obliged to do so because the sale agreement has been validly cancelled.

(59) The submission by the applicant that the fact that someone other than the first respondent has tendered payment of the amount of R2 064 000.00 (i.e. the total of the amounts payable by the first respondent in terms of *clause 9.1.2* of the sale agreement) is evidence of the first respondent's parlous financial position and the fact that the first respondent is unable to pay its debts and cannot discharge its obligations to the applicant in terms of the sale agreement is unassailable.

THE CANCELLATION OF THE REHABILITATION GUARANTEE

(60) I agree with Mr Subel's submission that it cannot be contended, and indeed no such contention is made in the respondents' answering affidavit, that:

> *"(a) the first respondent required copies of the EMP in order to procure the cancellation of the "Rehabilitation Guarantee". All that would be required to procure the cancellation of the "Rehabilitation Guarantee" would be the establishment of a satisfactory substitute guarantee, i.e. on the same terms (mutatis mutandis) as the* "*Rehabilitation Guarantee*";
>
> *(b) the first respondent's obligation, in terms of clause 5.1.10 of the sale agreement, to procure the cancellation of the "Rehabilitation Guarantee" has nothing to do with and is completely independent of the applicant's obligation, in*

terms of clause 11.3 of the sale agreement, to furnish the first respondent with copies of the EMP;

(c) *the contrary contention made by Pillay in paragraph 46 of the respondents' answering affidavit has no merit. It is clear, upon a reading of clause 9.1, 9.2, 15.1 and 15.2 of the sale agreement, that the first respondent's obligation to make payment to the applicant of the amounts of R1 032 000.00 on 30 September 2009 and 30 October 2009 has nothing to do with and is completely independent of the meeting envisaged in clause 15.1 and 15.2 of the sale agreement taking place;*

(d) *the contrary contention made by Pillay in paragraph 51 of the respondents' answering affidavit has no merit. There is no correspondence addressed by or on behalf of the first respondent to the applicant. complaining that the applicant did not provide the first respondent with copies of the EMP or, most importantly, that in the absence of being provided with copies of the EMP the first respondent could not procure the cancellation of the "Rehabilitation Guarantee" or contending that the first respondent's obligation to make payment to the applicant of the amounts of R1 032 000.00 on 30 September 2009 and 30 October 2009 arose only once the meeting envisaged in clause 15 of the sale agreement had occurred; and*

(e) *no complaint is raised by McCrae that the applicant did not provide the first respondent with copies of the EMP and that the first respondent could thus not procure the*

cancellation of the "Rehabilitation Guarantee", neither is it contended that the first respondent's obligation to make payment to the applicant of the amounts of R1 032 000.00 on 30 September 2009 and 30 October 2009 arose only once the meeting envisaged in clause 15 of the sale agreement had occurred.

(61) *There is no merit in this contention in that:*

(a) the Sub-Contracting Agreement was dependent upon the continued existence of the sale agreement which has been validly cancelled. The Sub-Contracting Agreement is part of the main sale agreement. The Sub-Contracting Agreement makes numerous references to the main agreement and records the transaction under the main agreement as being:

"2.2 subject to the Main agreement becoming unconditional and pending the later of the grant of the DME Application or the grant by the DME of New Order Mining Rights in respect of the Property to Friedshelf (i.e. a reference to the first respondent) or the arrival of the Transfer Date, the Parties have agreed to enter into the Agreement upon the terms and conditions hereinafter set forth."

(62) *Clause 3 of the Sub-Contracting Agreement further records that the appointment of the first respondent to mine and exploit the Enterprise is for and on behalf of the applicant. Clause 4 of the Sub-Contracting Agreement further makes it clear that the appointment under the Sub-Contracting Agreement is pending the transfer under the sale agreement or final implementation or other event identified in clause 4.*

(63) *Clause 11 of the Sub-Contracting Agreement provides for cancellation thereof in the event inter alia of:*

> *"11.1.3 If the other Party is unable or is deemed to be unable to pay its debts in accordance with the provisions of section 345 of the Companies Act, 1973, or otherwise defaults generally in the payment of its liabilities.*

(64) *There is no dispute concerning the first respondent's default in its payment of its liabilities to the applicant nor any genuine dispute in respect of third parties. Accordingly, the applicant was entitled to and did cancel the Sub-Contracting Agreement."*

DISPUTE RESOLUTION BY ARBITRATION

(65) "*The respondents further seek to avoid this application by raising the arbitration provisions of the sale and sub-contracting agreements*

namely Clause 21 and Clause 12 respectively. This contention is similarly without merit:

(a) in the first instance the second respondent is not party to the two agreements and accordingly is not party to the arbitration agreement;

(b) neither prior to nor in the answering affidavit in this application the respondents have not raised any real dispute justifying adjudication by arbitration; ***See Withinshaw Properties (Pty) Ltd v Dura Construction Co (SA) (Pty) Ltd 1989 (4) SA 1073, 1079; Delfante v Delta Electrical Industries Ltd 1992 (2) SA 221 (C), 227;***

(c) in casu there is no dispute raised within the meaning of clause 21, nor is there any dispute that would qualify as "palpable and genuine." Merely by contending that there is a dispute does not trigger the arbitration provisions; and

(d) furthermore, in terms of ***section 21(1)(f) of the Arbitration Act*** *the Court has the power to grant interim interdicts or similar relief. Prayer 5 of the notice of motion constitutes such relief.*

(66) *Clause 21 of the sale agreement subjects only "disputes" falling within one of the categories in clause 21.1 to arbitration. A "dispute" must therefore arise as a pre-requisite to arbitration.* ***See Delfante v Delta Electrical Industries Ltd supra*** *where it was stated:*

*"it cannot be that on every occasion the 'interpretation' of any one of the many provisions in the amending agreement is in some loose sense moot that there is to be a referral to arbitration. There must be an issue, palpable and genuine. (See further, in this regard**, Russell (op cit at 171); Mustill and Boyd Commercial Arbitration 2 ed (1089) at 12,123.)"***

THE RIGHT OF RETENTION

(67) *I agree with Mr Subel's submission that "no basis is made out for a right of retention because:*

(a) no proof of payment of any alleged "expenses" has been provided by the respondents nor particular thereof;

(b) the respondents make no allegation in regard to any increase in value of the property or assets occasioned by such alleged expenses having been incurred;

(c) no details are provided in regard to the alleged "maintaining, improving and repairing of the property and the assets";

(68) *I concur that as a matter of legal principle that: "to raise a lien the respondents would be required to establish and prove:*

(a) that they are in lawful possession of the property and assets. This is not established;

(b) that their expenses were necessary for the salvation or useful for the improvement of the property and assets. This similarly not established;

(c) their actual expenses and the extent of the enrichment of the applicant. Both have to be established because the lien covers only the lesser of the two amounts;

(d) that the applicant's enrichment is iniusta (unjustified);

(e) that there were no contractual arrangements between the parties in respect of the expenses; and

(f) the respondents have not established any of these requirements. In fact, it is not even apparent from the answering affidavit whether the improvements relate to the movable assets or the immovable property. Mr Da Silva correctly conceded the unassailability of the applicant's legal contention.

THE ENVIRONMENTAL MANAGEMENT PROGRAMME COPIES

(69) "*The respondents further seek to place reliance on clause 11.3 of the sale agreement. The respondents contend that the applicant has failed to provide the first respondent with copies of the EMP and, therefore that the first respondent was not obliged to procure the cancellation of the "Rehabilitation Guarantee". This ground of opposition is similarly baseless.*

(70) There is no correspondence addressed by or on behalf of the first respondent complaining that it had not been furnished with a copy of the Environmental Management Programme or, most importantly that in the absence thereof the first respondent could not procure the cancellation of the "Rehabilitation Guarantee." Nor is there any correspondence contending that the first respondent's obligation to make payment to the applicant of the amount of R1 032.000.00 on 30 September and 30 October 2009 would only arise once the meeting envisaged in clause 15 of the sale agreement had occurred.

(71) *The obligation to procure cancellation of the "Rehabilitation Guarantee" is not dependent upon clause 11.3. This was required to have been procured by not later than 30 September 2009 (clause 5.1.10 of the sale agreement). In any event, the respondents lose sight of the fact that the first respondent's failure to make payment of the amount of R1 032.000.00 on 30 September 2009 (clause 9.1.2.1) in itself justified cancellation."*

(72) *The "Sub-Contracting Agreement" annexure "Q" to the sale agreement entitles the applicant to cancel the agreement in the event inter alia of the first respondent failing to make any payment owed by it on due date and remaining in default ninety days after receiving written notice to remedy such default or in the event of the first respondent being unable or deemed to be unable to pay its debts in accordance with the provisions of* ***section 345 of the Companies Act, 1973,*** *or otherwise defaulting generally in the payment of its liabilities.*

THE CLAUSE 15 MEETING

(73) "*The respondents place reliance on clause 15 of the sale agreement which provides for a meeting on the closing date (at latest 30 September 2009). This provision has no effect on the first respondent's performance and such performance was not reciprocal on or dependent upon such meeting."*

(74) *I agree with applicant's contention that: "upon a reading of clause 9.1, 9.2, 15.1 and 15.2 of the sale agreement, the first respondent's obligation to make payment to the applicant on 30 September 2009 and 30 October 2009 had nothing to do with and is completely independent of such meeting. The Closing Date is defined as the date of the implementation of the provisions of clause which would correspond with the date of the fulfilment or waiver, as the case may, of the last of the conditions precedent in clause 3 or least five business days thereafter."*

(75) "That date is independent of the due date for performance of the obligations which the first respondent breached i.e. 30 September 2009. Furthermore, in this instance the first respondent was already in physical possession of the movable assets and the Enterprise prior to any Closing Date."

(76) In the premises the following order is made:

(a) the respondents are ordered to vacate Portion 32 of the farm Varkensfontein 169 Registration Division

I.R. Province of Gauteng by not later than ten (10) days from date of this order;

(b) the respondents are to deliver to the applicant the movable assets enumerated in Annexure "*J*" to the sale agreement; and

(c) the respondents are ordered to pay the applicant's legal costs, including the legal costs incurred consequent upon the employment of two counsels.

Dated at Johannesburg on the 4th June 2010.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 19TH OCTOBER 2009

DATE OF JUDGMENT: JUNE 2010

ON BEHALF OF THE APPLICANT: MR SUBEL SC

WITH MR L HOLLANDER

INSTRUCTED BY: FEINSTEINS & ASS INC

TELEPHONE NUMBER:(011) 712-0700

ON BEHALF OF THE RESPONDENT: MR DA SILVA

INSTRUCTED BY: DE BEER ATTORNEYS c/o SALEY LAHER & ASS

TELEPHONE NUMBER:(011) 728-6666/7290