**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 09023/2019**

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

**3 JUNE 2019**

In the matter between:

| | |
|---|---|
| **UMSOBOMVU COAL (PTY) LTD** | Applicant |
| and | |
| **TRANSASIA MINERALS (PTY) LTD** | First Respondent |
| **11 MILES INVESTMENTS (PTY) LTD** | Second Respondent |
| **MINISTER OF POLICE** | Third Respondent |
| **PHILLIP LEVINSOHN N.O** | Fourth Respondent |
| **PHEZUKOMKHONO COMMUNITY PROPERTY ASSOCIATION** | Intervening Party |

**J U D G M E N T**

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**MODIBA J:**

**INTRODUCTION**

[1] In a judgment handed down on 29 March 2019, I granted an order at Umsobomvu's instance, making an arbitration award an order of court and ordering the Minister of Police to assist Umsobomvu to access the Malonjeni mine, Hazeldean Farm ("the mine"), in the event that such assistance becomes necessary. The arbitration award granted Umsobomvu access to the mine. I also dismissed Transasia's application to review and set aside the arbitration award. Transasia has applied for leave to appeal that judgment and order.

[2] Transasia has applied for leave to appeal the 29 March 2019 judgment. The filing of the application for leave to appeal effectively suspended the judgment and order of 29 March 2019 in terms of section 18 (1) of the Superior Courts Act[1]. It is for that reason that concomitantly, Umsobomvu seeks an order in terms of section 18 (1) read with section 18 (3), to uplift the suspension of the 29 March 2019 order, pending this application and any subsequent leave process.

[3] Like he did in the application to make the arbitration award an order of court, the Minister of Police abides the decision of the court.

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[1] 10 of 2013.

[4] For convenience, I refer to the parties by the nomenclature used in the two previous applications.

[5] On the day I heard the two applications described above, a third party, Phezukomkhono Community Property Association ("Phezukomkhono"), entered the fray. It sought to intervene in Umsobomvu's section 18 (1) and (3) application, on an urgent basis. It also sought other relief, which I will deal with at the appropriate point.

[6] Phezukomkhono's attorneys served papers on the parties the night before the two applications were heard. Its attorney, who argued the intervention application, handed the papers to the bench from the bar. I stood the applications down to read the papers and to allow the parties to take instructions on the intervention application. When the court resumed, counsel for Transasia submitted that Transasia supports the intervention application. Counsel for Umsobomvu submitted that Umsobomvu opposed the application on a point of law and that she would argue on the basis of the papers as filed. The position taken by the parties made it possible to hear all three applications on the same day.

[7] The factual matrix is as summarized in paragraphs 1 and 2 above. It is detailed in the 29 March 2019 judgment. To repeat it here would render this judgment unnecessarily prolix.

[8] I deal with the three applications in the following order:

[8.1] intervention application;

[8.2] application for leave to appeal;

[8.3] section 18 (1) and (3) application.

**INTERVENTION APPLICATION**

*Introduction*

[9] Phezukomkhono brings the intervention application on an urgent basis. It is common cause that Phezukomkhono is the holder of the surface rights in respect of the land occupied by Transasia and over which Umsobomvu holds a mining right, referred to earlier and throughout this judgment, as the mine. It is on that basis that it contends that it has an interest in the dispute between Umsobomvu and Transasia, hence it seeks to intervene in the section 18 (1) and (3) application.

[10] If allowed to intervene in Umsobomvu's section 18 (1) an (3) application, Phezukomkhono seeks to have the judgment making the arbitration award an order of court rescinded, in order to assert its right in terms of section 54 of the Mining and Petroleum Resources Development Act ("MPRDA")[2]. It also seeks to interdict Umsobomvu from entering the immovable property where the mine is located, until Umsobomvu has complied with the dispute resolution procedure set out in section 54.

[11] Transisia supports the application. Umsobomvu opposes it. The basis for Umsobomvu's opposition is as follows:

[2] 28 of 2002.

[11.1] the notice of motion excludes a prayer in respect of Rule 6 (12);

[11.2] Phezukomkhono has failed to explain its apparent delay in bringing the application;

[11.3] Phezukomkhono has failed to make out a case for the relief sought, both in respect of the rescission of the judgment and order of the 29 March 2019, and the interdictory relief.

*Urgency*

[12] It is indeed so, that the notice of motion excludes a prayer in respect of Rule 6 (12). However, it is apparent from the founding affidavit that Phezukomkhono seeks to have the intervention application heard on an urgent basis.

[13] It is trite that urgency in urgent applications involves mainly the abridgment of times prescribed by the Uniform Rules of Court and the departure from established filing and sitting times of the court.[3] Rule 6 (12) provides that an applicant in an urgent application is obliged to explain clearly in the founding affidavit, the circumstances which render the application urgent. The applicant is also required to set out reasons why it claims that it cannot be afforded substantial relief at a hearing in due course.

[3] *Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers)* 1977 (4) SA 135 (W).

[14] Phezukomkhono fails to take the court into its confidence regarding when it acquired knowledge of the 29 March 2019 judgment. Umsobomvu's application to have the arbitration award made an order of court was issued and served on the respondent's on 11 March 2019, commencing the said application. The judgment was handed down on 29 March 2019. Umsobomvu issued and served the section 18 application on 2 April 2019. Phezukomkhono only filed the intervention application on 16 May 2019. Phezukomkhono leaves the court to speculate why it is only bringing the application on the eve of the hearing.

[15] On Phezukomkhono's version, one of its residents, Sibusiso Trice Zondo ("Zondo") and one of its Trustees, Veli John Buthelezi ("Buthelezi"), were aware of Umsobomvu's representative, Lungani Hector Dominica Kunene's ("Kunene") attempts to access the mine as early as 23 January 2019 and on 6 March 2019 as they were personally involved in these incidents. They both deposed to statements to the South African Police services in support of trespassing charges against Kunene, arising from these incidents. In these statements, Buthelezi and Zondo describe themselves as Transasia's employees. Lyudmyla Roytblat ('Roytblat"), the deponent to Transisia's answering affidavit in the application to make the arbitration award an order of court, where she describes these incidents, also refers to Buthelezi and Zondo as Transasia's employees.

[16] Buthelezi is the deponent to the founding affidavit in this application. Until this application was filed, Buthelezi and Zondo only featured in the applications

between Transasia and Umsobomvu as Transisia's employees and residents of the property where the mine is based.

[17] It is common cause that on 6 March 2019, Kunene and his party attempted to access the mine on the strength of the arbitration award. It is unclear from Kunene's founding affidavit in the application to make the arbitration award an order of court, whether he presented the award to the guards when he attempted to access the mine. In the papers before court, Buthelezi and Zondo on the one hand and Kunene on the other, accuse each other of acrimonious conduct during these two incidents. It is not necessary for the purpose of this application to resolve that factual dispute because it is common cause that Transasia denied Umsobomvu access to the mine, despite the arbitration award. As mentioned, Phezukomkhono has now entered the fray, also denying Umsobomvu access to the mine. It is only in this application that Buthelezi and Zondo feature as Phezukomkhono's representatives. It is worth emphasising that Buthelezi is not an ordinary member of Phezukomkhono. He is its trustee.

[18] The junior counsel who assisted Mr Mpofu SC to prepare heads of argument in the application to have the arbitration award made an order of court, Mr Ngcukaitobi, also prepared Phezukomkhono's heads of argument in this application. Under these circumstances Mr Ngcukaitobi was certainly aware of the arbitration award, at least before it was made an order of court. It is unclear when he was briefed on behalf of Phezukomkhono in this application. In its answering affidavit in the section 18 application, Transasia takes issue with Umsobomvu's failure to consult with Phezukomkhono regarding accessing

the mine. This affidavit is dated 8 April 2019. This information could only be in the personal knowledge of Phezukomkhono's representatives. It is improbable that Transisia could have derived this information anywhere else than from Phezukomkhono's representatives, who as mentioned above are also its employees.

[19] These circumstances and in particular, the relationships between Transasia and Phezukomkhono's representatives described above, as well as the apparent involvement of Mr Ngcukaitobi in these applications, suggests that it is improbable that Phezukomkhono only became aware of the arbitration award on the eve of this application[4]. Therefore, its failure to take the court into its confidence regarding how and when precisely it became aware of the arbitration award is frowned upon by this court.

[20] Be that as it may, a request to hear an application urgently is not merely denied because the applicant failed to bring it timeously. The ultimate test is whether, by refusing to hear the application urgently, the court would deny an applicant substantive redress in due course.

[21] Phezukomkhono passes the latter test without much effort. The urgency of this application rides behind the hearing of the section 18 (1) and (3) application which, as already stated, was set down on the day the application to intervene is filed. If the intervention application is not heard at this stage and Umsobomvu's section 18 application is granted, the horse bolts for

[4] I heard this application on 16 May 2019.

Phezukomkhono, unless Transasia successfully appeals the section 18 order. This is so because the arbitration award grants Umsobomvu access to the mine only for 48 hours. To extrapolate that far in order to determine whether, by refusing to hear the application urgently, the court would deny Phezukomkhono substantive redress in due course traverses conjecture.

[22] In the premises, I am satisfied that Phezukomkhono has made out a case to be heard urgently.

[23] Although in the notice of motion Phezukomkhono prays for an interdict pending the rescission application, in the founding affidavit, rescission of the 29 March judgment is sought alongside the interdict. When asked to clarify the correct position, Phezukomkhono's attorney submitted that the latter position is correct. The prayers for rescission and for an interdict attract different legal requirements.

[24] Counsel for Umsobomvu did not make specific submissions against Phezukomkhono's request to intervene in the section 18 (1) and (3) application. As the owner of the surface rights, Phezukomkhono does have the right to control access to the mine. As to whether it may exercise this right in the manner that trumps Umsobomvu's right of access to the mine as the holder of the mining right stands to be determined under the prayers Phezukomkhono seeks once admitted.

[25] Therefore the intervention application stands to be granted.

**THE APPLICATION RESCISSION**

*Introduction*

[26] Phezukomkhono brings the rescission application, in terms of Rule 42 (1) (a) or common law generally and on the ground of *justus error*.

[27] To succeed in terms of Rule 42 (1) (a), [5] Phezukomkhono ought to establish that the order making the arbitration award an order of court was erroneously sought and granted in it absence.

[28] To succeed under the common law generally, it must show good cause, which entails:

[28.1] a reasonable explanation for the default;

[28.2] the rescission application is brought in good faith;

[28.3] the existence of a *bona fide* defence, which *prima facie* has some prospects of success.

[5] This rule provides:

**42 Variation and rescission of orders**

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

*(a)* An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

[29] To succeed in terms of the common law on the ground of *justus* error, exceptional circumstances ought to be present.

[30] As correctly pointed out by Counsel for Transasia, Phezukomkhono's reliance on section 54 cuts across the three basis on which it seeks rescission. It is the basis of the contended error in terms of Rule 42 (1) (a). It is the basis on which Phezukomkhono contends that it has a *bona fide* defence, a requirement when rescission is brought under the common law generally. It is also the basis on which Phezukomkhono contends that it is entitled to rescission at common law on the ground of *justus* error.

[31] Section 54 is also one of the basis on which Transasia opposes Umsobomvu's section 18 (1) and (3) application. In its answering affidavit, filed that application, Transasia contends that the court order is not enforceable against it as the occupier and against Phezukomkhono as the surface rights holder, because Phezukomkhono was not joined to those proceedings. Further, Umsobomvu failed to follow the section 54 procedure. Therefore, the arbitrator was remiss to have granted the arbitration award in that, until the section 54 procedure had been followed, it lacked jurisdiction in this dispute. Similarly, the court acted contrary to public policy to have made an award made under these circumstances an order of court. It relies on the Constitutional Court judgment *Maledu*[6] as authority for these contentions. To the extent these contentions overlap with Phezukomkhono's, to avoid duplication, I deal with them in this section of the judgment.

[6] 2019 (2) SA 1 (CC).

[32] Phezukomkhono relies on section 54 on the following basis:

[32.1] as the owner of the surface rights, permission to access the mine must be obtained from it. Its rights as the owner are an essential consideration in matters pertaining to access to the mine.

[32.2] Umsobomvu ought to have notified the Department of Minerals and Energy's Regional Manager, who would have called on it to make representations regarding issues raised by Umsobomvu.

[33] Therefore, Phezukomkhono further contends, Umsobomvu did not only attempt to by-pass the speedy dispute resolution mechanism provided for in section 54, it sought to undermine its rights as the holder of the surface rights.

[34] Umsobomvu contends that Phezukomkhono's reliance on section 54 is misplaced, as it does not apply in the circumstances of this case. It also contends that *Maledu* does not assist Transasia's, as it is distinguishable.

[35] Section 54 of the MPRDA provides:

> ***"54 Compensation payable under certain circumstances***
>
> *(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-*
>
> *(a) refuses to allow such holder to enter the land;*
>
> *(b) places unreasonable demands in return for access to the land; or*
>
> *(c) cannot be found in order to apply for access.*

*(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)-*

*(a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;*
*(b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;*

*(d) set out the provisions of this Act which such owner or occupier is contravening; and*

*(e) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.*

*(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.*

*(4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act 42 of 1965), or by a competent court.*

*(5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section (c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.*

*(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.*

*(7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context."*

[36] Interpreting section 54 following the trite approach to interpreting statutory provisions,[7] I find that Phezukomkhono and Transasia ought to establish the following jurisdictional facts, for the dispute resolution mechanism provided for in this section, to be applicable:

[36.1] that Umsobomvu is the holder of a reconnaissance permission, prospecting right, mining right or mining permit;

[36.2] Umsobomvu is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because, Phezukomkhono as the owner or Transasia as the lawful occupier of the land in question-

(a) refuses to allow Umsobomvu to enter the land;

(b) places unreasonable demands in return for access to the land; or

(c) cannot be found in order to apply for access.

[37] The above jurisdictional facts are not present in this case.

[38] That Umsobomvu is the holder of a mining right is common cause. The purpose for which Umsobomvu seeks to access the land is entirely different from that envisaged in section 54. It was not Umsobomvu's case in the arbitration proceedings, that it is prevented from commencing or conducting

[7] See Maledu, paragraphs 43-49.

any reconnaissance, prospecting or mining operations. Umsobomvu's case is that it is prevented from accessing the mine for the purpose of compiling a Social Labour Plan ("SLP"). Phezukomkhono does not dispute this. It was not open to Transisia to dispute this in the application dealt with in the 29 March 2019 judgment, as the arbitration award is not appealable.

[39] Transasia's contention that section 5, 22, 54 and 55 are part of a framework and have to be applied as such does not assist Phezukomkhono, in the circumstances of this case. Sections 22 and 55 are not relevant given the facts of this case. Umsobomvu sought and was granted the arbitration award to access the mine in terms of section 5. Section 5(1) recognizes the limited real right of a holder of a mining right over the land to which the mining right relates. Section 5(3) sets out the content of this limited right. It provides:

> *(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may-*
>
> *(a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;*
>
> *(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;*
>
> *(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;*
>
> *(cA) subject to section 59B of the Diamonds Act, 1986 (Act 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;*
>
> *(d) subject to the National Water Act, 1998 (Act 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and*
>
> *(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.*

[40] Although there is a clear overlap between section 54 and section 5 (3), the purpose for which a mining right holder may access the land in terms of section 5(3) is wider than the purposes for accessing the land as set out in section 54. Section 5 (3) does not prescribe a dispute resolution procedure. Nor does it operate subject to section 54. Therefore, to the extent that a dispute concerning access does not relate to land uses enumerated in section 54, the dispute resolution mechanism in section 54 does not find application. If the legislation intended to make it applicable, it would have expressly provided so. On the contrary, by extending the purposes of access in section 5(3) beyond those in section 54, is probably indicative of the legislature's intention to exclude the application of section 54 from the reasons for access not provided for in that section. Here, as already stated, Umsobomvu does not seek access for any of the purposes set out in section 54.

[41] Further, a dispute is not referred to the Regional Manager simply because the legislature provides such a procedure. The Regional Manager ought to have statutory powers to deal with it. In the absence of such powers, it is improbable that the legislature intended such a referral. The powers of the Regional Manager in respect of disputes referred to him or her in terms of section 54 (1) are limited to those set out in section 54 (6). This is not the relief sought by Umsobomvu. If the Regional Manager had jurisdiction over this dispute as contended by Phezukomkhono, he holds no power to deny Umsobomvu access to the mine pending resolution of the dispute between Phezukomkhono and Umsobomvu by arbitration or the court. He only has the

powers to prevent a mining right holder from using the mining right as described in section 54 (1). As already stated, this is not the relief that Umsobomvu seeks.

[42] In *Maledu*, the court rejected the holder of a mining right's resort to common law remedies on the basis that the parties' rights:

> *'[109] …are derived from the MPRDA, which contains its own internal mechanism for resolving obstacles of the kind that they encountered when they sought to exercise their mining rights. It makes provision for avenues that can be deployed to resolve disputes between the mining right holder on the one hand, and the land owner or lawful occupier on the other, the most drastic of which is expropriation when all else fails. In by passing the express provision of section 54, the respondent's undermined the supervisory role and powers of the Regional Manager who is charged with the responsibility of administering and implementing the MPRDA as the Director General's delegate'*[8]
>
> *[110] In addition, and more fundamentally, the fact that section 54 provides for a remedy must mean that resort cannot be had to an alternative remedy available under the common law. This must be so because section 4(2) of the MPRDA expressly provides that in so far as the common law is inconsistent with [the MPRDA], the [MPRDA] prevails.*

[43] Herein lies the first distinguishing factor between the facts in *Maledu* and the facts here. In Maledu, the holder of the mining right availed itself of common law remedies. Here, Umsobomvu did not resort to the common law but asserted its rights of access to the mine, in terms of section 5 of the MPRDA.

[8] At para 109.

[44] The second distinguishing factor is that in *Maledu*, the dispute between the informal owner and the holder of the mining right involves the latter's use of the mining right in one of the ways contemplated in section 54 (1). As already stated, this is not the case here.

[45] Lastly in *Maledu*, when interpreting section 5 in the context of section 54, the Constitutional Court said:

> *'[56] It is apposite at this juncture to observe that a mining right confers on the holder of such right certain limited real rights in respect of the mineral and the land to which it relates. In particular, it entitles the mining right holder to 'enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment, and build, construct or lay down any surface, or underground . . . infrastructure which may be required for the purpose of', amongst others, mining, removal and disposal of any mineral to which such right relates as may be found during mining. These rights are, however, subject to the other provisions of the MPRDA.*
>
> *[57] It bears emphasising that the provisions of s 5(3) of the MPRDA echo two fundamental principles of the common law. First, that the owner of the land to which a mining right relates is obliged to allow the holder access to his or her land to do whatever is reasonably necessary for the effective exercise of the mining holder's rights.*
>
> *[58] Second, the mining right holder is in turn obliged to exercise his rights civiliter modo (in a reasonable manner) so as to cause the least possible inconvenience to the rights of the owner. Accordingly, the common law requires of both the landowner and the mining right holder to exercise their respective rights alongside each other to the extent that it is reasonably possible to do so. It therefore fosters a situation where the rights of the landowner and the mining right holder co-exist.*

[46] Here, it is not Phezukomkhono's case that, Umsobomvu seeks to exercise its right to access in a manner that trumps its rights as the owner. Phezukomkhono fails to demonstrate how accessing the mine for 48 hours for the purpose of compiling the SLP will result in Umsobomvu interfering with its right as a landowner. Umsobomvu is not a mining right applicant. It is the holder of such a right. It enjoys the right to access the mine in terms of section 5. This

is the right it asserted in its application for interim access. This is the right the arbitrator found it is entitled to exercise. Under these circumstances, Umsobomvu does not need Phezukomkhono's permission to access the mine for the purpose of compiling an SLP. Denying Umsobomvu access to the mine for the reason it intends to is contrary to the objects of the MPRDA and the letter of sections 5 and 54.

[47] To impose an obligation on the holder of a mining right, who has access in terms of section 5 (3) to consult with the owner and / or occupier in terms of section 54 and to refer such a dispute to the Regional Manager is contrary to the letter of these provisions and the purpose of the MPRDA as interpreted in *Maledu,* particularly in a context such as this one, where the purpose for which access is sought to be exercised differs from the enumerated purposes and the party denying access fails to demonstrate how the exercise of access right by the mining right holder trumps its rights.

[48] In the premises, Phezukomkhono has failed to establish that the order making the arbitration award an order of court in terms of Rule 42 (1) (a) was erroneously sought and granted in its absence. It has not established that it has an interest in the dispute between Transasia and Umsobomvu that warrants that it ought to have been joined in the application to make the arbitration award an order of court.

[49] Phezukomkhono has failed to establish that it is entitled to rescission at common law on the ground of *justus error*. The legal position it seeks to rely on,

is incorrect. Therefore by making the arbitration award an order of court, the court did not act contrary to public policy.

[50] Further, to the extent that it seeks rescission based on the common law generally, Phezukomkhono has also failed to establish that it has a *bona fide* defence that has prospects of success.

[51] Having found that Phezukomkhono lacks a *bona fide* defense, it is unnecessary to determine whether it has shown good cause for the default.

[52] Therefore the rescission application stands to be dismissed with costs.

**APPLICATION FOR AN INTERDCIT**

[53] It is trite that for an application for an interim interdict to be successful, Phezukomkhono ought to meet the following requirements:

[53.1] the existence of a *prima facie* right;

[53.2] a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

[53.3] the balance of convenience favours the granting of the interdict.[9]

[9] *Setlogelo v Setlogelo* (1914).

[54] In determining whether the applicant has satisfied these requirements, I am also guided by the nuanced approach to this exercise articulated by Holmes J in *Olympic Passenger Services (Pty) Ltd v Ramlagan.*[10] It is opposite that I quote the relevant extract from this judgment:

> *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between these two extremes falls the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak.*
>
> *The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon the proof of a well-grounded apprehension of irreparable harm, and there being no ordinary alternative remedy, the court may grant an interdict.*
>
> *It has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of all the prospects of success and the balance of convenience. The stronger the prospects of success, the less need for such a balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him.*
>
> *I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."*

[55] Phezukomkhono's rights as property owner, including the right to control access to the property, does not trump Umsobomvu's right as the holder of the mining right, to access the land. As already stated, in Maledu, the court recognizes that to the extent that the holders of different rights may have different the land use interests in respect of the land, their rights may compete, resulting in possible harm to the holder

[10] 1957 (2) SA 382 at 383C-G

of a competing right. It is for that reason that they ought to co-exist. For the reasons already stated, Phezukomkhono has failed to establish a *prima facie* right to deny Umsobomvu as the mining right holder, access to the mine for 48 hours for the purpose of compiling the SLP.

[56] Phezukomkhono has also failed to establish that it has a reasonable apprehension of harm. That Transasia engaged Phezukomkhono and acquired the right to use the land in exchange for certain social benefits and the development of infrastructure on the land does not detract from Umsobomvu's right as the mining right holder to access the land. It is unclear how exercising its right to access the land for 48 hours for the purpose of compiling the SLP would interfere with whatever agreement Phezukomkhono has with Transasia.

[57] Further, the pending criminal charges against Kunene do not bar Umsobomvu's right to access the mine, particularly under the strength of an arbitration award which has been made an order of court.

[58] For the same reason set out in paragraph 56 above, Phezukomkhono has also not established that the balance of convenience for the granting of the interdict favours it. The basis on which I find that Umsobomvu stands to suffer harm if not granted access to the mine in respect of the section 18 (1) and (3) application in paragraph 71 below, is applicable here.

[59] In the premises, the interdict application, also stands to be dismissed with costs.

**APPLICATION FOR LEAVE TO APPEAL**

[60] To succeed in this application, Transasia has to establish that it has reasonable prospects on appeal.[11] To the extent that Transasia seeks to rely on the arbitrator's lack of jurisdiction to hear a dispute between Umsobomvu and it regarding the former's access to the land until it had followed the procedure in section 54, there are no prospects that another court would find that under the circumstances of this case, section 54 is applicable. For the reasons already stated, the jurisdictional facts for that section to find application are absent in the circumstances of this case. *Maledu* is also distinguishable.

[61] I have considered the other grounds for appeal relied on by Transasia, as well as written and oral submissions by counsel for the parties. I stand by my reasons for judgment as set out in the judgment handed down on 29 March 2019.

[62] In the premises, I find that none of the grounds set out in section 17 of the Superior Courts Act exist, justifying the success of this application. It therefore stands to fail.

**SECTION 18 (1) AND (3) APPLICATION**

[63] In this application, Umsobomvu requires an order in terms of section 18 (1) and (3) of the Superior Court's Act, that permits the operation and execution of the order

[11] Notshokovu v S, unreported SCA case no 157/15 dated 7 September 2016 at para 6.

making the arbitration award an order of court, despite Transasia's application for leave to appeal. Further, it seeks such order to endure until any further leave process instituted by Transasia against the said court order. It also seeks costs of the application. Transasia opposes the application.

[64] To succeed in this application, Umsobomvu must establish that:

[64.1] exceptional circumstances exist;

[64.2] it stands to suffer irreparable harm if the order is not implemented pending any further appeal processes;

[64.3] Transasia will not suffer irreparable harm if the order is implemented pending any further appeal.[12]

[65] Umsobomvu contends that it meets the above test. It prays for an order as prayed for in the notice of motion. Transasia denies that Umsobomvu meets the above test. It calls a dismissal of the application with costs.

[66] As far as Phezukomkhono is concerned, with its rescission application and application for an interdict found to merit dismissal, it lacks meritorious opposition to this application.

[12] See *Ntlemeza v Suzman Foundation* 2017 (5) SA 402 (SCA) at paras 35-36 and the authorities cited there.

*Exceptional circumstances*

[67] Save to ascribe meaning to the words ‘exceptional circumstances’, the courts have expressed a reluctance to lay precise rules to determine what constitutes such circumstances. Court have held that these words mean: ‘to be out of the ordinary or something excepted in the sense that the general rule does not apply to it’. Further courts have held that to be exceptional, the circumstances must arise out of or be incidental to the particular case. The existence of such circumstances is also a matter of fact, which the court must decide accordingly. The circumstances must be such that to justify deviation from the norm.[13]

[68] Umsobomvu seeks to rely on the following factors to establish the existence of exceptional circumstances:

[68.1] Transasia is litigation prone to frustrate the determination of the main arbitration dispute and/ or the access dispute. As a result, despite its interim nature, the latter dispute has been pending for almost four months.

[68.2] Transisia instituted a High Court application in March 2018, declaring that the agreement of sale of Umsobomvu’s mining right to it was not validly cancelled, despite that the sale agreement contains an arbitration clause. Three days before the hearing, its attorneys withdrew as attorneys of record. The

[13] *Ntlemeza* at paras 37-39.

application was ultimately struck from the roll due to non-appearance by Transasia's attorneys.

[68.3] on 24 April 2018, Umsobomvu instituted the aforesaid arbitration proceedings and sought a stay of the abovementioned High Court application. The latter application was stayed, *inter alia*, on the basis that Transasia had taken a further step in the arbitration proceedings, including a pre-arbitration hearing where time frames for the arbitration were agreed upon.

[68.4] on 12 July 2018, Transasia launched an application to interdict the arbitration proceedings on the same basis as the stay application. Umsobomvu opposed it. Almost two months after launching the application, on 3 September 2018, Transasia issued further papers to convert the application into an urgent application. Umsobomvu opposed it. The application was dismissed on 13 September 2018. Transasia applied for leave to appeal, which was unsuccessful.

[68.5] Transasia continues to participate in the arbitration proceedings, where it has counterclaimed for damages in the amount of R1 billion. Meanwhile, their continued refusal of Umsobomvu's access to the mine may compromise the mining right, given that Umsobomvu seeks access to compile the SLP, which expires in November 2019. The access dispute has endured for four months. Umsobomvu is running out of time to compile the plan.

[68.6] Transasia applied for a review of the arbitration award. I dismissed the said application. As already determined, its application for leave stands to be dismissed.

[69] The conduct of Transasia and/ or its attorney had a dilatory effect in the present applications. It took several weeks to commit to a date of hearing, contending that its counsel is not available, well knowing that the lack of availability of counsel never serves as justification to delay the hearing of a matter. When pinned to a hearing through a judicial directive, Transasia and/ or its attorney, in a letter of complaint to the Acting Deputy Judge President, accused my Clerk of communicating exclusively with Umsobomvu's attorneys. Transasia and/ or its attorney indicated that they have commissioned an IT investigation to verify this. The outcome of this investigation is yet to be made unkown.

[70] Transasia and/ or its attorney also accused me of biased, unreasonable and oppressive conduct on the basis that I handed down 'a fundamentally wrong judgment' and that by giving the said directive, I created conditions that made it impossible for Transasia to exercise its right to appeal. Umsobomvu's attorney invited Transasia and/ or its attorney to bring an application for my recusal under oath to allow the allegations to be dealt with judiciously. They never did. In my response to the ADJP, I indicated that the complaint is based on ill-conceived and unfounded assumptions, accusations and conclusions. The ADJP found my conduct to be above reproach. I proceeded to hear the applications almost a week later than initially directed.

[71] I am satisfied that exceptional circumstances are present as contended by Umsobomvu. It risks to lose the mining right if it fails to comply with prescribed requirements. This is not seriously disputed by Transasia. Transasia has no right as the buyer of the mining right, to insist on complying with the SLP requirement on Umsobomvu's behalf. The criminal charges laid by Transasia against Kunene do not dilute the exceptional circumstances present here, that warrants allowing Umsobomvu permission to execute the order making the arbitration award an order of court pending any subsequent appeal process. A period of four months has already lapsed since it sought access. Granting this application is probably the only way Umsobomvu will get to access the mine without further delay, to compile the SLP by November 2019.

***Irreparable Harm***

[72] Transasia has not established that it stands to suffer irreparable harm if the application is granted. Its suspicion that Umsobomvu intends selling the mining right to a third party does not constitute irreparable harm. As already stated, its R1 billion damages claim is pending in the main arbitration dispute. It would repair any harm Transisia suffers as a result of Umsobomvu alleged cancellation of the sale agreement in breach of the said agreement.

[73] On the other hand, Umsobomvu has established that it stands to suffer irreparable harm if the application is not granted in the form of the risks it bears to lose the mining right if it does not file the SLP timeously. Further, its suspicion that Transasia may be mining illegally is not unreasonable, given the extent to which

Transasia is prepared to litigate and conduct in such litigation, which has so far, as demonstrated above, had a frustrating and dilatory effect on proceedings.

[74] As already stated, Transasia's appeal has no prospects of success, hence its application for leave to appeal stands to be dismissed.

[75] In the premises, Umsobomvu's section 18 (1) and (3) application stands to succeed.

[76] Therefore the following order is made:

**ORDER**

**A. APPLICATION TO INTERVENE**

1. The Intervening Party, Phezukomkhono Communal Property Association's ("Phezukomkhono") non-compliance with the Uniform Rules of Court in respect of service and time limits, is condoned. This application is heard on an urgent basis, in terms of Rule 6 (12).

2. Phezukomkhono's application to intervene in an application brought by Umsobomvu Coal (Pty) Ltd ("Umsobomvu"), in terms of section 18 (1) and (3) of the Superior Courts Act 10 of 2013, succeeds.

3. The application for the rescission of the judgment of Judge Modiba, handed down on 29 March 2019 under case number 09023/2019 (“the judgment”), is dismissed.

4. The application by Phezukomkhono to interdict Umsobomvu Coal from entering Portion 3 and Portion 12 of Farm Hazeldean, is dismissed.

5. Phezukomkhono shall pay Umsobomvu’s costs of this application.

**B. APPLICATION FOR LEAVE TO APPEAL**

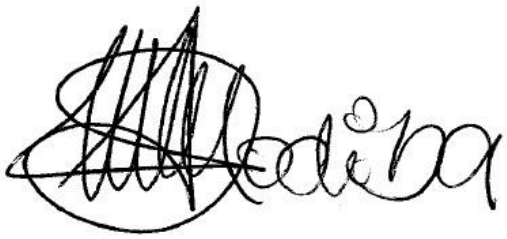
6. The application by the First and Second Respondents, Transasia 1 (Pty) Ltd and 11 Miles Investments (Pty) Ltd (jointly, “Transasia”), for leave to appeal the judgment Judge Modiba handed down on 29 March 2019 is dismissed with costs.

**C. APPLICATION IN TERMS OF SECTION 18 (1) (3)**

7. Umsobomvu’s non-compliance with the Uniform Rules of Court, in respect of service and time limits, is condoned. This application is heard on an urgent basis, in terms of Rule 6 (12).

8. The 29 March 2019 judgment by Judge Modiba is not suspended pending the finalization of applications for leave to appeal, petitions, applications for reconsideration by the President of the Supreme Court of Appeal and/ or appeals instituted by Transasia.

9. Transasia shall pay Umsobomvu's costs of this application.



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**MADAM JUSTICE L T MODIBA**
**JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**APPEARENCES:**

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| Counsel for Umsobomvu Coal (Pty) Ltd: | Advocate A Milovanovic-Bitter |
| Attorney for Umsobomvu Coal (Pty) Ltd: | Edward Nathan Sonnenbergs |
| Counsel for Transisia Minerals (Pty) Ltd and 11 Miles Investments (Pty) Ltd: | Advocate D Mpofu SC |
| Attorney for Transisia Minerals (Pty) Ltd and 11 Miles Investments (Pty) Ltd: | Mabuza Inc |
| Counsel for Phezukomkhono Community Property Association: | Mr Kumatama (Attorney with the right of appearance) |
| Attorney for Phezukomkhono Community Property Association: | Mathebula & Jona Inc |

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|---|---|
| Date heard: | 16 May 2019 |
| Date of judgment: | 3 June 2019 |