

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A601/14

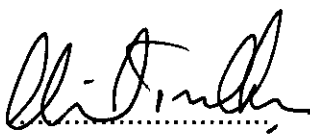
In the matter between:

14/12/2016

CARPE DIEM EXPLORATIONS (PTY) LIMITED

Appellant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	13/12/16..... DATE	 SIGNATURE

KASIMIRA TRADING 82 (PTY) LIMITED

First Respondent

MINISTER OF MINERAL RESOURCES

Second Respondent

DEPUTY DIRECTOR-GENERAL

DEPARTMENT OF MINERAL RESOURCES

Third Respondent

REGIONAL MANAGER

DEPARTMENT OF MINERAL RESOURCES

Fourth Respondent

JUDGMENT

Tuchten J:

- 1 The dispute between the appellant (Carpe) and the first respondent (Kasimira) relates to the rights to prospect for diamonds on the farm Wolfberg 187 (Wolfberg) in the Nama Khoi municipality (formerly the district of Springbok) in the Northern Cape. Kasimira became the

owner of Wolfberg on 2 April 2012. Carpe was (or is, depending on the outcome of this case) the holder of what is called in the Minerals and Petroleum Resources Development Act, 28 of 2002 (the MPRDA) an old order prospecting right.

- 2 Kasimira applied for relief in two stages. In Part A of the notice of motion, Kasimira sought orders *pendente lite* interdicting Carpe from continuing to prospect on and for its eviction from Wolfberg. In part B, Kasimira asked for relief arising from a decision taken by a functionary in the Department of Mineral Resources (DMR) to convert Carpe's old order prospecting right into a new order prospecting right.¹ Kasimira lodged an internal appeal against that decision. Its internal appeal was lodged a few days late and Kasimira also applied to the Minister for condonation in this regard. But the second respondent (the Minister) whose duty it was to decide the appeal, took no decision on the appeal. Kasimira also asked in Part B of its notice of motion that the failure of the Minister to take a decision on the appeal be reviewed and set aside and to exempt, in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), Kasimira from any further obligation to participate in the internal appeal processes provided for in the MPRDA. In addition, Kasimira sought a declaration

¹ It is unnecessary for present purposes to identify the decision maker within the DMR. In what follows, I shall refer to decisions or conduct of functionaries within the DMR simply as having been made or performed by the DMR.

that Carpe had no prospecting right over Wolfberg and a final order ejecting Carpe and its equipment from Wolfberg.

- 3 The first, second and third respondents (collectively the government respondents) gave notice to abide. The application was thus resisted only by Carpe.
- 4 The interim interdict sought in Part A of the notice of motion was granted on 7 February. Part B came before Ismail J and on 15 May 2014, it was ordered that the interim interdict be confirmed and that the impugned decision of the DMR be set aside. In addition the court below declared that Carpe had no valid prospecting rights to Wolfberg.
- 5 On 17 July 2014, Ismail J granted leave to appeal to the full court of this Division against the orders made by the learned judge.
- 6 There are five grounds of appeal. Firstly, Carpe claims that the review component of the relief sought by Kasimira was instituted out of time and that there is no application for an extension of time under s 9 of PAJA; secondly that Kasimira ought to have exhausted an internal remedy available to it under s 96 of the MPRDA before approaching the court on review; thirdly that Kasimira was not excused from

exhausting the internal remedy simply because the Minister did not oppose the application in this court and preferred that the court deal with the matter; fourthly that the entire application constituted by Part B of the notice of motion was *res judicata* on the ground that the issues raised by the application had been pronounced upon in litigation in the Kimberley High Court in November 2012; and fifthly, that the court below erred in finding that Carpe had no valid prospecting right over Wolfberg.

- 7 The matter is complicated at a procedural level because Carpe's attorney allowed the appeal to lapse. Kasimira seeks an order, pursuant to a formal application commenced by notice of motion dated 12 January 2016, that the appeal has indeed lapsed. The grounds on which it was said that the appeal had lapsed were that Carpe was some five months late in applying for a date for the appeal,² some five months late in filing the appeal record,³ had failed to file a power of attorney at all and had failed to provide security under rule 49(13), which reads:

- (a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the

² Rule 49(6)(a)

³ Rule 49(7)(a)

appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.

- (b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.

8 Carpe responded by bringing an application on notice of motion dated 15 March 2016 for orders condoning the late filing of the record and the power of attorney⁴ and either releasing Carpe from the obligation to furnish security for Kasimira's costs of appeal or ordering Carpe to find such security in an amount to be determined by the court.

9 It is trite that it is the duty of an appellant which learns that it needs to seek condonation for failures to comply with the Rules to do so as soon as possible after it has realised it is in default.⁵ But the appellant cannot claim that it has done so in this case because its attorney was told in a letter dated 16 April 2015 that the appeal had lapsed. The response, in a letter dated 17 April 2015, was that the attorney for

⁴ Which was ultimately filed over a year late.

⁵ As to the principles which govern applications for condonation generally, see Harms, *Civil Practice in the Superior Courts* (looseleaf ed), vol 1 para C12.3.

Carpe was experiencing problems with the preparation of the appeal record and would apply for condonation "where applicable".

10 By letter dated 9 October 2015, the attorney for Kasimira pointed to the failure of Carpe to furnish the security required under the Rules. She demanded security both under the Rules and because Carpe was insolvent. The response to this letter by the attorney for Carpe was dated 22 October 2015. The letter made clear that the activities of Carpe on Wolfberg went far beyond prospecting and indeed extended to mining for diamonds on Wolfberg. Carpe has no right to mine on Wolfberg. The clear implication of the letter was that Carpe had no assets other than that represented by its alleged prospecting right and the letter suggested that the impecuniosity of Carpe arose from its inability to prospect. It will be recalled that Carpe had been interdicted from prospecting. But still no application for condonation was forthcoming until Carpe, or more accurately its attorney, was forced to confront the exigencies arising from Kasimira's application to declare that the appeal had lapsed.

11 Carpe experienced difficulty preparing the record on appeal. The reason why the power of attorney was filed late and no application was made promptly for condonation of the failures to comply with the Rules is quite simply that Carpe's attorney, Mr WAC Bouwer,

neglected to acquaint himself with or comply with the simple provisions of the Rules relating to the procedural obligations of an appellant's attorney and the equally simple provisions of the law laid down by the courts over many decades regarding the duty of such an attorney who neglects to comply with those rules.⁶ Such an attorney must ensure that an application is brought at the earliest reasonable opportunity for condonation and must explain the delays. The basic reason for this jurisprudence is to minimise the inconvenience and prejudice caused to the other litigants on appeal, to the court and to the administration of justice generally.

- 12 The failure to find security and to obtain a ruling on the failure to find security before the appeal was due to be heard is of a character different to the other procedural non-compliances which I have mentioned. It is the right of a respondent on appeal to go into an appeal secured, at least to the extent provided by the Rules, against the inability of the appellant to pay costs if the appeal is unsuccessful. This right of Kasimira has been rendered valueless by the deliberate act of Carpe and its attorney. As far back as 9 October 2015, ie more than a year ago, Kasimira told Carpe in its attorney's letter of that date that it insisted on the provision of security.

⁶ An attorney instructed by an appellant to prosecute an appeal who wishes to establish the ambit of his duties as such need not do much more than read the provisions of Rule 49 and a few paragraphs in a standard work on civil procedure.

- 13 As far as I can make out, the sole basis on which Carpe seeks condonation for its failure to find security is that it has been prevented from mining for diamonds on Wolfberg. The affidavits in Carpe's application for condonation make it perfectly plain that Carpe's only source of revenue is its diamond mining activity on Wolfberg. But Carpe may not mine there for diamonds. Carpe was never entitled to mine there for diamonds. I think that the only fair inference is that Carpe throughout has used such prospecting rights as it had and the illusion of prospecting rights that it has managed to create from time to time, to conduct illegal mining activities on Wolfberg.
- 14 Carpe has found money (an "enormous amount")⁷ to fund its application for leave to appeal. Why no money was found to provide security is left unexplained. The failure to provide an explanation as to why security should be dispensed with and the failure to have the issue of security resolved by application to court before Kasimira incurred expense in opposing the appeal are in my view sufficient by themselves to justify the dismissal of the application to dispense with security. No suggestion has been made in the papers as to what security in amount or form prescribed by the Rules ought to be ordered in terms of Carpe's alternative prayer in this regard.

15 As additional factors bearing upon the discretion of the court to relax the prescriptions of the Rules as to security, I give weight to the purpose of Carpe in persisting with the appeal. It is doing so in the hope that success on appeal will enable it to continue with its unlawful diamond mining activities. In addition, I have regard to the neglect of its attorney's duty to acquaint himself with the Rules regarding appeals and to bring applications for condonation promptly.

16 We were referred in argument to *Strouthos v Shear*,⁸ in which it was held in this Division that where leave to appeal has been granted by the SCA, only that court has the power to release an appellant from its duty to provide security under rule 49(1) and that this court, hearing the appeal by direction of the SCA has no jurisdiction in that regard. I shall assume however that we do have the requisite jurisdiction. But on the grounds I have mentioned. I consider that the application for condonation ought to fail without any reference to the merits of the appeal.⁹

⁸ 2003 4 SA 131 T

⁹ Compare *Blumenthal and Another v Thomson NO and Another* 1994 2 SA 118 1211, where the principle is expressed that in cases of flagrant breaches of the Rules, especially where no adequate explanation is forthcoming, condonation may be refused irrespective of the merits of the appeal and even though the blame lay solely with the appellant's attorney.

17 Had the shortcomings relating to the record and the power of attorney stood alone, I should have considered Carpe's prospects of success in the appeal before coming to a decision on condonation. I propose now to deal with Carpe's prospects of success.

18 The foundation of Carpe's claim to prospecting rights over Wolfberg is its old order prospecting right. Carpe's old order prospecting right on which it relies for the purposes of this case arose from a permit granted to it under s 6(1) of the Minerals Act, 50 of 1991 (the old Minerals Act). This permit was expressed to expire on 1 October 2005.

19 The position of old order prospecting rights is regulated by item 6 of Schedule II to the MPRDA. Item 6(1) reads:

Subject to subitems (2) and (8), any old order prospecting right in force immediately before this Act took effect continues in force for a period of two years from the date on which this Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.¹⁰

20 Subitem (2) of item 6 requires the holder of an old order prospecting right to lodge it for conversion into a right under the MPRDA by a specified time. Carpe indeed lodged its old order prospecting right for conversion. Pursuant to such lodgement, the DMR purported to confer a new order right. The letter dated 25 August 2011, upon which Carpe relies as the instrument purporting to confer upon Carpe the new order right, does indeed purport to grant a prospecting right in terms of item 6(3) of Sch II, which deals with the conversion of old order prospecting rights into new order prospecting rights. But the instrument is silent as to the period of the converted right. Section 16(6) of the MPRDA provides that a prospecting right is valid "for the period specified in the right, which period may not exceed five years". But the "right" for the purposes of s 16(6) on which Carpe relies is the letter dated 25 August 2011 and that "right" is silent as to period. It seems to me that the letter of 25 August 2011 is ineffectual because it does not specify any period. On the papers both sides however accepted that the DMR purported to extend Carpe's right to prospect on Wolfberg for a further year. Whether or not that extension was lawfully conferred does not change my ultimate conclusions on the merits of the appeal.

21 So, at best for Carpe, what happened was that an old order right which was to expire on 1 October 2005 was purportedly converted into a new order right which was to expire on 1 October 2006. One can stop there. The purpose of item 6 was to enable old order rights to continue to exist, subject to certain procedural compliances, for at most the lifetimes of those old order rights. An old order right holder cannot acquire greater rights under the conversion process than it could under the old order. The DMR did not have the power to convert an old order prospecting right into a new order right of duration longer than the original old order right.

22 But Carpe contends that its old order right has continued to exist even today. This, on the face of it, startling claim is based on the provisions of subitems 5, 7 and 8 of item 6, which read as follows:

- (5) The holder must lodge the right converted under subitem (3) within 90 days from the date on which he or she received notice of conversion at the Mining Titles Office for registration and simultaneously at the Deeds Office or at the Mining Titles Office for deregistration of the old order prospecting right, as the case may be.
- (6) ...
- (7) Upon the conversion of the old order prospecting right and the registration of the prospecting right into which it was converted, the old order prospecting right ceases to exist.

- (8) If the holder fails to lodge the old order prospecting right for conversion before the expiry of the period referred to in subitem (1), the old order prospecting right ceases to exist.

23 It will be seen that subitem (7) requires simultaneous new order registration and old order deregistration as one of the two conjunctive requirements for an old order prospecting right ceasing to exist. Carpe lodged its purported new order prospecting right for registration and deregistration but for some reason, registration and deregistration did not take place until, we were told from the bar, comparatively recently when a new order prospecting right not dealt with in the present papers was conferred on it. Thus, submits Carpe, its old order right did not cease to exist and it was entitled even when the application was adjudicated in the court below in 2014, seven or eight years after the date upon which its old order prospecting right was expressed to expire by effluxion of time, to prospect for diamonds on Wolfberg.

24 I do not agree. An old order prospecting right continued to exist, all other things being equal, "subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued." Carpe's old order prospecting right expired on 1 October 2005 precisely because that was the period of validity for which it was granted or issued.

- 25 The DMR had no power, in my opinion, to convert an old order prospecting right due on its own terms to expire in 2005 to a new order right due to expire at a later date. For that an application for a new order prospecting right under s 16 was essential. The court below rightly set aside the decision of the DMR in this regard.
- 26 Carpe has thus in my judgment no prospects of success on the merits. For this conclusion no review jurisdiction need be exercised. The conclusion finds effect through the exercise by the court of its jurisdiction to make declaratory orders and grant consequential relief. Three issues remain for consideration. The first is that the review was brought out of time.
- 27 Kasimira became the owner of Wolfberg on 2 April 2012. Its representative, Mr Hendricks, learnt by word of mouth that Carpe asserted rights to prospect for diamonds on Wolfberg. Enquiries led to a meeting at an hotel in Springbok on 10 February 2011 between Hendricks and the representative of Carpe, Mr Cloete. During this meeting Cloete asserted Carpe's prospecting right over Wolfberg but based it on a letter dated 14 October 2005 written by the DMR to record the acceptance of an application to convert Carpe's old order prospecting right.

- 28 It is this document which Carpe claims made Kasimira aware of the existence of Carpe's old order prospecting right. Kasimira however rightly did not regard this single document as proving that Carpe held rights. But even if it did, the letter did not record the administrative decision ultimately impugned by Kasimira on review, ie the decision of the DMR to *convert* the old order prospecting right into a new order prospecting right.
- 29 Kasimira only acquired the knowledge that such a decision had been made when Kasimira took proceedings against Carpe in the Kimberley High Court under case no. 1659/2012 (the Kimberley application). In its terms, Kasimira's notice of motion in the Kimberley application sought to interdict Carpe from carrying on mining or prospecting activities on Wolfberg for as long as Carpe failed or refused to provide Kasimira with certified copies of certain specified documents which Kasimira suggested were fundamental to any claim Carpe might have to rights in this regard. *Pendente lite*, Kasimira sought in the Kimberley application to have Carpe vacate Wolfberg.
- 30 In its answering affidavit in the Kimberley application, Carpe provided a number of documents. The Kimberley High Court gave judgment on 9 November 2012 dismissing Kasimira's claim. Carpe prays this

judgment in aid for the proposition that the judgment in the Kimberley application rendered the relief presently sought *res judicata*.

31 It is so that many of the issues arising in the present case were argued in the Kimberley application and that the learned judge who heard the Kimberley application made certain pronouncements which touch upon issues raised before this court. But the requirements for the application of the doctrine of *res judicata* are that a judgment must have been given in previous litigation between the same parties in relation to the same cause of action in proceedings in which the same thing is claimed.¹¹ Neither the cause of action or what was claimed in the court below in the present case was the same as in the Kimberley case. The defence of *res judicata* has no merit.

32 Kasimira sought to take the decision of the DMR on internal appeal to the Minister. It noted the internal appeal some three days out of time. But the Minister simply did not decide the appeal and finally Kasimira approached this court. Carpe contends that Kasimira should be forced by this court to revert to an administrative appeal for which it has waited an unconscionable time. I do not agree. Justice and fairness demand that this matter be disposed of. To the extent that any

¹¹

Amler's *Precedents of Pleadings*, 7th ed (2009) 341-2

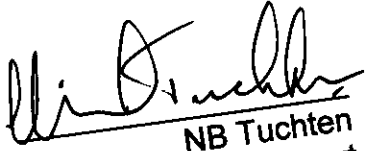
extension of time or release from the obligation to exhaust internal remedies is required in this case, it should manifestly be granted.

- 33 It follows from what I have said above that Carpe's application for condonation of its non-compliance with the Rules of this court should not on any basis be granted. Kasimira gave notice that it would seek a punitive costs order against attorney Bouwer in his personal capacity. Attorney Bouwer is certainly to blame for the procedural shortcomings in the manner in which the appeal was prosecuted. In my view, Mr Bouwer was guilty of gross negligence. An aggravating factor is that Mr Bouwer knew that a *nulla bona* return had been made against Carpe. He knew full well that Kasimira would be unlikely to recover any costs from Carpe arising from his negligence. In these circumstances a punitive costs order against Mr Bouwer *de bonis propriis* in relation to the costs of the application for condonation is fully justified. The application to declare that the appeal has lapsed is interwoven with the application for condonation and was brought, at least partly, because of the attitude of indifference displayed by Mr Bouwer towards the consequences of Mr Bouwer's own conduct which caused Kasimira prejudice and inconvenience. In addition, the appeal had to be postponed on 3 February 2016, with costs reserved, to enable Carpe to bring its application for condonation of its non-compliances with the Rules of this court. For this Mr Bouwer is equally


responsible and I consider that he should be held liable for the wasted costs arising from this postponement.

34 I accordingly propose the following order:


- 1 It is declared that the appeal has lapsed.
- 2 The appeal is struck from the roll.
- 3 The application for condonation brought by Carpe Diem Explorations (Pty) Limited, described in the papers as the appellant and the applicant for condonation, is dismissed.
- 4 Carpe Diem Explorations (Pty) Limited must pay the costs of the appeal of the first respondent on appeal, Kasimira Trading 82 (Pty) Limited.
- 5 Carpe Diem Explorations (Pty) Limited and its attorney, Willem Abraham Christiaan Boucher, must, jointly and severally, pay the costs of suit of Kasimira Trading 82 (Pty) Limited on the scale as between attorney and client in relation to:
 - 5.1 the application to declare that the appeal has lapsed brought by Kasimira Trading 82 (Pty) Limited;
 - 5.2 the application for condonation brought by Carpe Diem Explorations (Pty) Limited; and
 - 5.3 the wasted costs occasioned by the postponement of the appeal on 3 February 2016.


NB Tuchten
Judge of the High Court
13 December 2016

I agree. An order is made
as set out in paragraph 34 above.


RG Tolmay
Judge of the High Court
13 December 2016

I agree


H Fabricius
Judge of the High Court
13 December 2016