IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
25/10/'16 **DATE** **SIGNATURE**

21/10/2016

Case Number: 15736/2016

In the matter between:

MAKOLE RESOURCES (PTY) LTD	1st APPLICANT
BLACK ROYALTY MINERALS (PTY) LTD	2nd APPLICANT
and	
ROCKBLEND MANUFACTURING CC	1st RESPONDENT
KEVIN NELSON	2nd RESPONDENT
OWEN NELSON	3rd RESPONDENT
ZWELAKHE SITHOLE N.O.	4th RESPONDENT
LEAH MADALANE N.O.	5th RESPONDENT

PETRUS GERHARDUS HUMAN N.O.	6th RESPONDENT
BANGISWANI KETTY PHALATSE N.O.	7th RESPONDENT
HELENA GELDENHUYS N.O.	8th RESPONDENT
MAWATILE JEREMIAH MOJALEFA N.O.	9th RESPONDENT
PIETER JACOBUS BENDER N.O.	10th RESPONDENT
ROBERT GRAHAM RANSOM N.O.	11th RESPONDENT
DAVID MASANABO N.O.	12th RESPONDENT
THEMBA TSHABANGU N.O.	13th RESPONDENT
DINEO NYANA SIKO N.O.	14th RESPONDENT
DINEO NYANA SIKO	15th RESPONDENT
ANDRIES SKOSANA	16th RESPONDENT
TSHEPO MLALA	17th RESPONDENT
CHARLES MASANGO	18th RESPONDENT
L. MSIBI	19th RESPONDENT
ROCKSHIELD	20th RESPONDENT
THE CITY OF TSHWANE	21th RESPONDENT

JUDGMENT

SWARTZ AJ

[1] On 25 February 2016 the applicants obtained on an urgent basis and *ex parte* an interdict in the form of a *rule nisi* with a return date 10 March 2016. The applicants now seek a final interdict restraining the respondents from unlawfully interfering with the business of the applicants; unlawfully intimidating or impeding the work of the applicants' employees; unlawfully damaging the property of the applicants and inciting members of the public to engage in unlawful conduct.

[2] The facts presented to the court on 25 February 2016 were as follows: In the founding affidavit on behalf of the applicants, one Ndavheleseni Lodwick Mareda ("Mareda") avers that he is the sole director and shareholder of the first and second applicants. The first applicant is a coal mining company and conducts coal mining and related activities on its farms. The second applicant is also a coal mining company and possesses a coal mining permit for the purpose of conducting coal mining and related activities. The first applicant is the owner of a portion of a farm in

Bronkhorstspruit and the holder of a mining license. During or about October 2015 the first applicant began its mining operations on a portion of the farm. It engaged the services of the first respondent on the basis that the first respondent would conduct the mining operations for and on behalf of the first applicant.

[3] Mareda avers that on or about 10 February 2016 the first applicant had a scheduled site inspection meeting with officials of the Department of Mineral Resources. Approximately sixty members of the community arrived at the mining premises and demanded to see the officials.

These 'protesters' were hostile and hurling insults at the mine's Chief Executive Officer. They were demanding that the first applicant's employees leave the premises and, they were demanding to meet with Mareda. Subsequent to that a meeting was held on 15 February 2016 where the 'protesters' demanded employment. At a follow-up meeting on 17 February 2016 a community representative, one Kate Nene 'hi-jacked' the meeting and informed the community

members that they were mining illegally on the land. On 23 February 2016 a mob that was uncontrollable, hostile and armed with traditional weapons such as knobkierries and sticks arrived on site, mobilized by one Lucky Msibi. They informed the mine Chief Executive Officer that they were against labourers who were not from the local communities.

[4] The applicants sought an interim order as it alleged to have a *prima facile* right, as owners of the property on which the mine is situated, to reserve access to its property. Furthermore, they have a mining permit in existence and as such, have a right to conduct their mining operations uninterrupted. The respondents were not entitled to proceed with a protest march nor were they entitled to intimidate any of the applicants' employees, or incite members of the community to support unlawful actions. Mareda averred that the applicants would suffer irreparable harm if the interim order was not granted. The applicants' employees cannot return to work freely and it had no other remedy than to obtain the interdict.

[5] In the founding affidavit, no allegations whatsoever was made against the first, second and third respondents, demonstrating why an urgent order was sought and obtained against them. The interim order obtained on 25 February 2016 was published and displayed on the gates of the mining premises. The first, second and third respondents served their opposing affidavit on 8 March 2016. The applicants had ten days thereafter to file its replying affidavit. On 10 March 2016 the rule *nisi* was extended to 20 April 2016. On that day the rule *nisi* was further extended to 6 June 2016. On 20 April 2016 the applicants served their replying affidavit, which should have been filed on or before 29 March 2016, without applying for condonation for the late filing thereof. On 6 June 2016 the matter was postponed "*sine die* to the opposed roll on 1 November 2016" (sic). The court order clearly does not state that the rule *nisi* was further extended.

[6] The requirements for interdictory relief are trite, namely: conduct on the part of the respondent which could either actually be taking place or which is reasonably feared will occur in future; the respondent's conduct actual or threatened, must be wrongful; the applicant should have no other remedy and, for interim interdictory relief, the balance of convenience should favour the applicant. See in this regard, ***Setlogelo v Setlogelo*** **1914 AD 221** at 227.

[7] Over and above these well established requirements in order to obtain the relief sought, it is trite that all necessary allegations relied upon by the applicant must appear in the founding affidavit. See ***Director of Hospital Services v Mistry*** **1979 (1) SA 626 (A)** at 635-636 where it was stated as follows:

> "When, as in this case, the proceedings are launched by way of notice of motion, it will be to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahamas* 1924 WLD 67 at 68 and as has been said in many

other cases: '...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon with either to affirm or deny'".

[8] Counsel who appeared before me on behalf of the applicants confirmed that subsequent to the respondent filing an opposing affidavit, the applicant did not file the replying affidavit within the time limits prescribed in terms of the Rules of Court. The evidence contained in the replying affidavit is not before court until such time as condonation has been granted. The applicant is obliged to seek condonation for the non-compliance with the Uniform Rules of Court, which was not done. As was stated with approval in the Supreme Court of Appeal, 'condonation of the non-observance of the Rules of this Court is not a mere formality'. See: ***Waltloo Meat and Chicken SA (Pty) Ltd V Silvy Luis (Pty) Ltd & Others*** **2008 (5) Sa 461 (T)** on page 472 G-H: '...the court may not resort to information contained in a document

that is not before it. That, in my view, is akin to the case of an additional affidavit after the traditional founding, answering and replying affidavits had been filed, which cannot be considered as part of the evidence until the court exercises its discretion in terms of rule 6 (5) (*e*) (***Standard Bank of SA Ltd v Sewpersahd and Another*** **2005 (4) SA 148 (C)** para 13 at 155E). In that judgment Dlodlo J expressed himself as follows:

> "Clearly a litigant who wished (*sic*) to file a formal affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as appears to be the case in the instant matter). I am of the view that this affidavit falls to be regarded as *pro non scripto."*

See also ***Beweging vir Christelik-Volksele Onderwys and Minister of Education and others*** **[2012] 2 All SA 462 (SCA)** par 25 & 26 on page 470: "...a court may on good cause shown, condone any non-compliance with these rules ....

Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases some acceptable explanation ... must be given."

[9] Not only did the applicants before me not apply for condonation for the late filing of the replying affidavit, which I regard as *pro non scripto,* counsel for the applicants were taken by surprise when counsel for the first, second and third respondents argued, correctly, that the rule *nisi* was not further extended on 6 June 2016, when the matter was postponed "*sine die* to the opposed roll on 1 November 2016' (*sic*), and had lapsed. Clearly the rule *nisi* was not extended. Over and above this, as mentioned above, there is no mention, whatsoever, in the founding affidavit, to the first, second and third respondent or to any conduct on their part. No interdictory relief ought to have been granted against them.

[10] I now turn to the position regarding the fourth to fourteenth respondents. Even if I were to accept that the interim relief granted against them had not lapsed, the difficulty for the applicant is its failure to disclose material facts in seeking the interim

relief. Disclosing these facts would have influenced the court in determining whether to grant the interim relief or not. The applicants have not established a clear right to conduct mining operations. During argument of the matter it became common cause that the applicants lack the necessary zoning approval.

The fourth to fourteenth respondent's are the Trustees of the Bronkies Community Development Trust ("the Trust"). The Trust was established for the benefit of property owners and legal occupiers of areas affected by coal mining in the Bronkhorstspruit area. The deponent of the answering affidavit for the Trust, Mr Zwelakhe Sithole ("Sithole"), avers that "coal mining impacts on the community positively in the sense that it creates employment and stimulates economic development but it also can have very negative social and environmental impacts as a result of pollution and destruction of agricultural land and damage to property". Letters dated 10 July 2013, addressed from the Department of Mineral Affairs to a company addressed as "Messrs Makole Electrical (Pty) Ltd" merely confirm that it had applied for mining permits. The letters clearly states amongst others that: "...

the acceptance of your application does not grant you the right to commence with the mining activities ... Should you engage in activities not authorized you will be in contravention of section 5 (4) of the Act and guilty of an offence ..."

[11] It is common cause that Sithole addressed a letter to the Executive Mayor of Tshwane on 31 August 2015 stating that mining was taking place and that such activity was unlawful. Furthermore, a criminal case was opened at the Bronkhorstspruit SAPS in mid-September 2015. The applicants applied to the City of Tshwane on 9 December 2015 to re-zone parts of the farm and the motivation memorandum clearly states that, while rezoning was still required, mining activity had already commenced. It is common cause that the applicants had commenced mining activities without the appropriate zoning permission. I am satisfied that the applicants have not established a clear right to conduct mining operations. This is also a material fact that had not been disclosed to the court in the founding affidavit when the interim order was obtained. In ***Schlesinger v Schlesinger*** **1979 (4) SA 342** at 349 A-C, it was stated as follows:

"It appears quite clearly from the authorities that:

(1) in *ex parte* applications all material facts must be disclosed which *might* influence a Court in coming to a decision;

(2) The non-disclosure or suppression of facts need not be willful or *mala fide* to incur the penalty of rescission; and

(3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.

Although these broad principles appear well settled, I have not come across an authoritative statement as to when a Court will exercise its discretion in favor of a party who has been remiss in its duty to disclose, rather than to set aside the order obtained by it on incomplete facts ..."

[12] The applicants obtained the order on 25 February 2016. It is common cause that, on 16 February 2016, the first respondent, who was contracted to the first applicant in its mining operations, had seized operations on site and withdrew all its machinery and equipment from the property. I am persuaded by the argument that the entire

application brought as a matter of urgency, repeatedly extending the rule *nisi,* was an abuse of the court process. I am satisfied that a punitive costs order is justified.

In the result, I make the following order:

1. The rule *nisi* is discharged.

2. The applicants are ordered to pay the costs of the first to fourteenth respondents on the attorney-client scale, including the costs reserved on 10 March 2016, 20 April 2016, 6 June 2016 and 17 October 2016.

E.L. SWARTZ

ACTING JUDGE OF THE HIGH COURT

CASE NO: 15736/2016

HEARD ON: 17 October 2016

FOR THE APPLICANTS: ADV. T. MOTLOENYA

INSTRUCTED BY: ME Lemekwana Attorneys

FOR THE 1st-3rd RESPONDENTS: ADV. J.J. GREEFF

INSTRUCTED BY: Wynand Prinsloo & Van Eeden Inc

FOR THE 4th -14th RESPONDENTS: ADV. MOSIKILI

INSTRUCTED BY: RICHARD SPOOR INC. ATTORNEYS

DATE OF JUDGMENT: 21 October 2016