IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 46483/16

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

30/11/2016 ....

30/11/2016

In the matter between:

VDH HOLDINGS (PTY) LTD	First Applicant
ABSOLUTE GROUP MANAGEMENT (PTY) LTD	Second Applicant
and	
MINISTER OF POLICE	First Respondent
NATIONAL HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Second Respondent

In re:

MINISTER OF POLICE	First Applicant
NATIONAL HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Second Applicant
and	
VDH HOLDINGS (PTY) LTD	First Respondent
ABSOLUTE GROUP MANAGEMENT (PTY) LTD	Second Respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This matter has a chequered history. A number of orders have been granted since the launching of the main application. Pending the determination of the main application, an interlocutory order was granted by consent between the parties during June 2016 (the June order).

2. The application presently before court relates to an application to reinstate the operation and execution of an order granted pending an application to the Supreme Court of Appeal for leave to appeal and/or any further appeal steps that may follow thereafter.

3. I have already granted two orders in this matter. The first order was granted on 27 October 2016 in the urgent court in favour of the applicants, the reasons for that order were contained in a written judgment delivered on 4 November 2016. The second order was granted on 10 November 2016 wherein I refused an application by the respondents for leave to appeal against the order granted on 27 October 2016.

4. Subsequently, the respondents filed an application to the Supreme Court of Appeal for leave to appeal the order of 27 October 2016. In terms of the provisions of section 18 of the Superior Court Act, 10 of 2013 (the Act) the operation and execution of the order of 27 October 2016 is suspended pending the determination of the that application for leave to appeal.

5. Section 18(1) of the Act provides as follows:

> *"Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal."*

6. The test to be applied when considering an application such as the present is provided in subsection (3) of the Act. The test is:

> *"(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders"*

7. The courts have considered the aforesaid test. In this regard, the judgement of Sutherland, J. in *Incubeta Holdings (Pty) Ltd v Ellis*[1] is instructive. Sutherland, J. held as follows:

> *"15. The thesis advanced on behalf of the Respondent is that the discretion hitherto exercised by the court is history and that one must now look exclusively to the text of Section 18. Emphasis was placed on the heavy onus on the litigant who seeks to execute on an order, pending an appeal, as formulated in the Sections 18(1) and (3).*
>
> *16. It seems to me that there is indeed a new dimension introduced to the test by the provisions of Section 18. The test is twofold; the requirements are:*
>
> *16.1. First, whether or not 'exceptional circumstances 'exist, and*
>
> *16.2. Second, proof on a balance of probabilities by the applicant of-*

[1] 2014(3) SA 189 (GJ)

16.2.1. The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order, and,

16.2.2. The absence of irreparable harm to the respondent/loser, who seeks leave to appeal."

8. When considering the issue relating to what constitutes "exceptional circumstances", Sutherland, J. held:

> *"18. Significantly, although it is accepted in that Judgment that what is cognisable as 'exceptional circumstances' may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case, is not a product of a discretion, but a finding of fact.*
>
> *...*
>
> *21. The context relevant to Section 18 of SCRT is the set of considerations pertinent to a threshold test to deviate from a default position; ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision, in case the last court decides differently, the reasonable prospect of such an outcome, being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons, to rest on the same footing.*
>
> *22. Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be*

derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by Section 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually, the practice as exemplified by the text of Rule 49(11), makes the notion of the putting into operation an order in the face of appeal process a matter which requires particular ad hoc sanction from a court. It is expressly recognised; therefore, as a deviation from the norm, ie an outcome warranted only 'exceptionality'.

...

25. Turning to the circumstances of these litigants, what is relevant, in my view, is the following:

25.1. If the order is not put into operation, the relief will, regardless of the outcome of the application for leave to appeal, be forfeited by Incubeta because the short duration of the restraint will expire before exhaustion of the appeal processes.

25.2. The only value in the relief is to stop the breach and protect legitimate interests during the precise period of the next 4.5 months. Unrebutted evidence in the affidavits alleges a breach is taking place at this very time.

25.3. Damages are not an appropriate alternative remedy precisely because the very relief obtained is posited on the absence of such a remedy being available. This places a restraint interdict in a different position to other forms of relief, such as money claims, where the aspect of irreparable harm is

a factor extraneous to the substantive relief procured.

...

26. I have made no reference to the 'merits' of the case which resulted in the interdict. In my view they are not pertinent to this kind of enquiry. The considerations that are valuable pre-suppose a bona fide application for leave to appeal or an actual appeal. No second guessing about the judgment per se comes into reckoning.

27. Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'

28. The plight of the victor alone is probably all that is required to pass muster. Nonetheless, I am not unconscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture. A court order ought not to be lightly allowed to evaporate, a fate, which seems to me, would tend undermine the role of courts in the ordering of social relations."

9. I agree with the views expressed by Sutherland, J. in the quote above.

10. In my judgment of 4 November 2016 I comprehensively dealt with the reasons for the order granted on 27 October 2016 and do not intend reiterating the reasoning contained therein. Likewise, I comprehensively dealt with the reasons for refusing leave to appeal

set out in my judgment of 10 November 2016. For present purposes I am not obliged to deal with the merits of those judgments, save to the extent that those merits may have a bearing on the issues relevant in the present application.

11. Applying the aforementioned principles to the present instance the following is apparent:

(a) The applicants obtained an order by consent during June 2016;

(b) Part of that order, specifically dealing with the respondents' obligations, was endorsed in the order of 27 October 2016;

(c) Should the operation and execution of the said orders be suspended, the entire rational and purpose of the orders shall be negated, the duration of the operation of the said orders will expire before the exhaustion of the appeal processes;

(d) The only value of the relief of the order of 27 October 2016 is to compel the respondents to stop the illegal activity addressed in the June order and to protect legitimate interest during the period until the main application is heard;

(e) The unrebutted evidence contained in the application in respect of the 27 October 2016 order is that the respondents have breached the June order and that the applicants continue to suffer irreparable harm;

(f) It will be gleaned from the judgments of 4 November 2016 and 10 November 2016 that the respondents have not explained their non-compliance with the June order since late August 2016, whilst admitting that the situation of illegal mining is of utmost concern and requires urgent attention;

12. In my opinion the aforementioned facts constitute exceptional circumstances as intended in section 18 of the Act.

13. The second leg of the inquiry relates to the issue of irreparable harm. In this regard the following is of importance.

    (a) The respondents concede and admit that the illegal mining is of great concern;

    (b) The respondents further concede and admit that steps are to be taken to prevent such illegal activity or at least to curb such activity;

    (c) The respondents bear a constitutional obligation to protect the applicants, their rights, the resources of the State, the assets of the State and that of the public. This is also entrenched in the Act governing the police;

    (d) There is no explanation why there was initial compliance with the June order obtained by consent and thereafter non-compliance.

14. In my opinion, where the respondents have a constitutional obligation to protect the public, the assets and resources of the public and of the State, adhering to court orders and the law, they can suffer no prejudice should the order of 27 October 2016 be put in to operation and execution.

15. On the other hand, the applicants stand to suffer severe prejudice and irreparable harm should the order of 27 October 2016 not be out into operation and execution. It follows that should the order not be put into operation and execution, the entire rational and purpose of the order shall be negated, the duration of the operation of the said orders will expire before the exhaustion of the appeal processes. The issue

of damages has no application and is of no consequence or effect in the present instance.

16. Lead counsel for the respondents submitted that the issue of *locus standi* is alive and well and hence the applicants are not entitled to have the orders put into operation and execution pending the application to the Supreme Court of Appeal and, if granted, such appeal.

17. Section 18(3) of the Act contemplates that the party applying for an order in terms of section 18(1) of the Act is the party in whose favour the order was granted. Such party would have the required *locus standi*. Any issue relating to an issue in respect of *locus standi* in the main proceedings is in my view, in the present instance, of no consequence. Such issue does not extend to an application in terms of section 18(1) of the Act. Furthermore, the June order was granted in the applicants favour by consent. That order stands until set aside. That order has not been set aside or rescinded.

18. Further in this regard, the point was taken on behalf of the respondents that the deponent to the affidavit has no authority to depose to the affidavit and to bring the application. That challenge was taken up and a resolution authorising the deponent was attached to the replying affidavit. The further submission that the case is to be made in the founding affidavit and that proof of authority is to be shown in the founding affidavit has no merit. It is trite when challenged a deponent is entitled to show the necessary authority in reply.

19. It is further contended on behalf of the respondents that the present application is premised upon the principles of the repealed Rule 49(11), and hence the application stands to be dismissed. Whatever the application is termed, the essence of the application and the requirements to be complied with relate to the provisions of section 18

of the Act. Those requirements are dealt with in the founding affidavit of the present application and in the heads of argument submitted on behalf of the applicants. No prejudice to the respondents can be found merely because the naming of the application relates to a repealed Rule of Court. The respondents were prepared to argue the relevant principles. Nothing turns on the incorrect naming of the application; the substance thereof is in accordance with the provisions of section 18 of the Act.

20. In response to the requirement relating to exceptional circumstances, the respondents submit that the issue of irreparable harm is to be considered as part of those facts. It is clear from the *Incubeta*-judgement, *supra,* that the facts in respect of a consideration of exceptional circumstances and that relating to irreparable harm are distinct. I have dealt with the issue of irreparable harm above.

21. The respondents further submit that the 27 October 2016 order is final in effect and hence appealable. It is not necessary to determine that issue for present purposes, the applicants having launched a substantive application in terms of section 18 of the Act.

22. Ms Cassim SC, on behalf of the respondents sought a punitive cost order in respect of the attendances on 3 November 2016. I have dealt with the attendances of 3 November 2016 in my judgment in the application for leave to appeal. It will suffice to re-state that no cost order was applied for or debated on that date. The further submission that the court was obliged to grant a punitive cost order is contrary to the trite principle that the granting of costs is discretionary. It is also clear from the judgment of 10 November 2016 that the attendance on 3 November 2016 was to obtain a directive when the application for leave to appeal could be considered expeditiously.

23. There is no reason to deviate from the trite principle that costs follow the event.

24. It follows that the application is to succeed.

I grant the following order:

(a) The operation and execution of the order under case number 46483/2016, which was granted on 27 October 2016, a copy which is attached hereto marked "A", is not suspended and is of full force and effect pending the finalisation of the respondents' application to the Supreme Court of Appeal for leave to appeal and/or any further appeal steps that may follow thereafter;

(b) The respondents are directed to pay the costs of this application, such cost to include the costs incumbent on the employ of two counsel.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants:	K W Lüderitz SC C Woodrow
Instructed by:	Steyn Kinnear Inc
On behalf of Respondents:	N Cassim SC B Mathlape
Instructed by:	State Attorney

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

On 27 October 2016, before His Lordship Mr Justice VAN DER WESTHUIZEN (AJ)

CASE NO: 46483/16

In the matter between:

MINISTER OF POLICE	First Applicant
NATIONAL HEAD OF THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION	Second Applicant
and	
VDH HOLDINGS (PTY) LTD	First Respondent
ABSOLUTE GROUP MANAGEMENT (PTY) LTD	Second Respondent

In re:

VDH HOLDINGS (PTY) LTD	*First Applicant*
ABSOLUTE GROUP MANAGEMENT (PTY) LTD	*Second Applicant*
and	
MINISTER OF MINERAL RESOURCES	*First Respondent*
AND 11 OTHERS	

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2016 -10- 27
J. MAKUNGO
REGISTRAR
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

DRAFT ORDER

Having perused the documents filed, and having heard counsel for the parties, it is ordered:

1. THAT the rules pertaining to the service, times and filing of applications are dispensed with, and that the application and counter application are determined on an urgent basis in terms of the provisions of Rule 6(12)(a) and (b) of the Rules of Court;

MR NKOSINATHI NHLEKO

MR MTHANDAZO BERNING NTLEMEZA

THAT it is declared that the first and second applicants are in contempt of the order granted by his Lordship Mr Justice Prinsloo on 28 June 2016, a copy of which is attached to the respondents' affidavit and marked "VDH1" ("the June order");

3. THAT the first and second applicants are to be committed to imprisonment for a period of 30 days, but that the aforesaid order is suspended on condition that the aforesaid applicants comply with the June order and with this order pending the outcome of the main application under the abovementioned case number;

4. THAT the applicants are ordered and directed forthwith to take all such steps necessary and at all times to:

4.1. Initiate and pursue crime prevention measures in respect of any and all illegal mining on the Farm Wintersveld 417 KS, the Farm Jagdlust 418 KS, and the Farm Zeekoegat 421 KS ("the subject farms") situated in the Limpopo Province of South Africa;

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4.2. Effect the arrest of any and all persons conducting illegal mining on the subject farms;

4.3. Seize and detain any and all equipment and/or vehicles used to commit such illegal mining on the subject farms or to transport illegally mined chrome ore from the subject farms;

5. ~~THAT the applicants' application is dismissed~~;

6. THAT the applicants are directed to pay the costs of ~~the application and~~ of the counter application on an attorney and own client scale, including the costs incumbent upon the employment of two counsel.

7. THIS ORDER MUST BE SERVED ON THE FIRST AND SECOND APPLICANTS PERSONALLY

BY ORDER
REGISTRAR OF THE HIGH COURT

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2016 -10- 27
J. MAKUNGO
REGISTRAR
GRIFFIER VAN DIE HO" HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA