IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

16/2/16

CASE NO: 4857/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

8 March 2016 EM Bush

In the matter between:

VODAFIN MINING (PTY) LTD	**APPLICANT**
and	
NKK MINERALS AND CONSTRUCTION CC	**1ST RESPONDENT**
MR RONAL KGOSANA	**2ND RESPONDENT**
AFRICAN COMPASS TRADING 565 CC	**3RD RESPONDENT**
LIVIERO MINING (PTY) LTD	**4TH RESPONDENT**
JABULA PLANT HIRE (PTY) LTD	**5TH RESPONDENT**
BURGH PLANT HIRE (PTY) LTD	**6TH RESPONDENT**
MR FRANS VAN JAARSVELD	**7TH RESPONDENT**

JUDGMENT

KUBUSHI, J

[1] The application in this instance was heard on 2 February 2016 in the urgent court and on that day I reserved judgment and undertook to hand it down on 4 February 2016. On 4 February 2016 I could not hand the judgment down and undertook to do so on 16 February 2016. On 16 February 2016 I granted an order dismissing the application with costs. On 29 February 2016 I received a request for reasons for judgment from the applicant's attorneys of record. It seems that by then the file had already been filed at the basement storage facility. I only received it back on 7 March 2016. These are the reasons for my judgment.

[2] The applicant launched an urgent application for interim relief against the first and second respondents. There are seven respondents cited in the application but no specific relief is sought against the other respondents except the first and second respondents. Amongst others, the main relief sought by the applicant is that the applicant be placed in possession of a mining site which is the subject matter of these proceedings, for the full term provided for in the agreement purported to exist between the parties until the said agreement is lawfully terminated or cancelled or until a court orders otherwise.

[3] The first and second respondents are opposing the application and besides other defences, have raised a point *in limine* which I intend to deal with first in this judgment.

[4] The point *in limine* raised in the first and second respondents' heads of argument, and as argued by counsel before me, is to the effect that the relief sought by the applicant is for a final interdictory relief rather than interim relief and as such the applicant has in its papers failed to demonstrate the existence of a clear right which is a requirement for a final interdictory relief. It is on this basis that the first and second respondents pray for the dismissal of the application.

[5] The relief sought by the applicant is couched as follows:

"1. . . .;

2. That, pending finalisation of an action to be instituted by the Applicant against the First and Second Respondents, within thirty (30) days of granting of this order, for inter alia, a declaratory order and specific performance of an agreement entered into between the Applicant and First Respondent (Annexure "C" hereto), the following order be issued as an *interim interdict*: [my emphasis].

2.1 That Applicant be placed in possession of a mining site known as the Kromkrans mine, situated at portions 4, 34, 44, 45, 46, 57, 58, 59 as well as the remaining extent of the farm Kromkrans 208 (hereinafter collectively referred to as 'the Kromkrans mine site'), for the full term provided for in Annexure "C" of these papers, until Annexure "C" is lawfully terminated or cancelled or until a court orders otherwise. [Annexure "C" is a copy of the

Management Agreement alleged by the appellant to exist between the Applicant and the First respondent].

2.2 That the First and Second Respondents be prohibited and interdicted to:

2.2.1 Interfere with the mining operations of Applicant at the Kromkrans Mine Site, directly or indirectly;

2.2.2 Report to any third party that the Applicant has no right to be on the Kromkrans Mine Site;

2.2.3 Fully cooperate with the Applicant and Applicant's appointed agents and contractors to immediately restore Applicant to the Kromkrans Mine Site and allow them full access to such site

2.2.4 That the Second Respondent inform the Kromkrans community that the agreement is binding and was never cancelled. . . ."

[6] It is evident from the quoted passage that the applicant seeks an interim interlocutory relief. However, the first and second respondents contend that the substance of the relief sought is not interim but final in nature. For the applicant to succeed in such an application, that is, for final relief, it should establish the three requirements for a final interdict, namely, a clear right, injury actually committed or reasonably apprehended, and the absence of similar or adequate protection by any other ordinary remedy, so it was argued. In this regard the first and second respondents' counsel referred me to the judgment in *Setlogelo v Setlogelo* 1914 AD 221 at 227 as authority for the requirements of a final interdict.

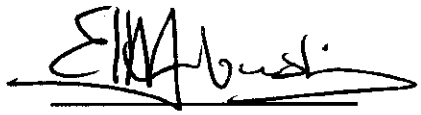
[7] It is trite that when determining whether the relief sought is interim or final, a court should look at the substance of the relief sought rather than the form in which the prayer is couched. According to counsel for the first and second respondents, the prayer in this instance is couched in such a way that it makes it clear that the interdictory 'interim relief' is sought 'for the full term provided for' in the Management Agreement, that is, for a period of 36 months from 15 November 2015. The submission being that the fact that the applicant seeks relief that will run until the expiry or earlier cancellation of the Management Agreement, renders the substance of the relief sought final.

[8] I am in agreement with the submission by counsel for the first and second respondents that the substance of the relief sought by the applicant renders the interdictory relief final. It is evident from prayer 2.1 of the notice of motion that the applicant seeks the purported interim relief to operate until the Management Agreement expires or cancelled. It follows that the purported interim relief is sought for the full term provided for in the Management Agreement, that is, for a period of 36 months from 15 November 2015. Put differently, the relief is final in nature in the sense that the effect of the order, should it be granted, is that it will remain in place only until the period of the agreement has run its course and will thereafter lapse. The substance of the relief sought is thus in my view final. The format, in which it is couched, that is, to operate as an interim interdict, does not change its nature. It remains final.

[9] Having concluded that the interdictory relief sought by the applicant is final in nature, it follows, therefore, that the applicant should have, in its papers, established a case for a final interdictory relief. As stated in the *Setlogelo*-judgment above, referred to by counsel for first and second respondents, the applicant should have in its papers established the three requirements for obtaining a final interdict, namely, the establishment of a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.

[10] Without having to go into the details of the applicant's papers, it is common cause that the objective intent of the applicant's case was for interim relief. In its founding affidavit the applicant's deponent submits that the applicant has a *prima facie* right to the relief requested in the notice of motion. Nowhere in the papers is a clear right canvassed. I concluded as such when dismissing the application that the applicant failed to establish a clear right in its papers.

[11] In the circumstances I dismissed the application with costs.



E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	**: 02 FEBRUARY 2016**
DATE OF JUDGMENT	**: 16 FEBRUARY 2016**
APPLICANT'S COUNSEL	**: ADV. J.L VAN MERWE**
APPLICANT'S ATTORNEY	**: TITINGERS INCORPORATED**
1ST&2ND RESPONDENT'S COUNSEL	**: ADV. B C STOOP (SC)**
1ST&2ND RESPONDENT'S ATTORNEY	**: ROOTH & WESSELS INCORPORATED**