REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO
[3] REVISED
DATE 24/2/16 SIGNATURE

26/2/2016

CASE NO: 7178/16

In the matter between:

CANDERO MINING AND CONSULTING (PTY) LTD	Applicant
and	
DARREN JAMES STMITH	First Respondent
AURICO GOLD RECLAMATION (PTY) LTD	Second Respondent
RAYMOND ROSELT	Third Respondent
MINGOLD (PTY) LTD	Fourth Respondent

JUDGMENT

J W LOUW, J

[1] This application served before me in the urgent court. The applicant applies for an order interdicting the first, second and third respondents, to whom I shall refer as the respondents, from removing material from a mine dump, referred to in the application as the "main dump", pending judgment in a trial in which the present applicant was the plaintiff and the respondents were the fifth, sixth and seventh defendants and which proceeded before De Vos J during October 2015. The parties closed their cases and the matter was postponed for argument. No date has yet been set for the hearing of argument.

[2] The main dump is situated on the farms known as Portion 5 of the farm Strathmore 436IP and Portions 69 and 71 of the farm Nooitgedacht 434IP in the district of Klerksdorp. The issue in the trial is whether the applicant is the owner of the main dump. The respondents deny that the applicant is the owner but do not themselves assert ownership or any other right to remove and sell material from the main dump. The question whether the applicant is the owner depends on whether or not the main dump is movable. If it is, it is capable of being owned separately from the land on which it is situated. The applicant contends that it is movable, that the owners of the farms abandoned any right they may have had to the main dump and that it has become the owner. If, on the other hand, the main dump is immovable, i.e. if it has acceded to

the land beneath it, it is owned by the owner of the farms. This is what the respondents contend.

[3] In order to succeed in the present application, the applicant must firstly show, at least *prima facie*, that the main dump consists of movable material. In this regard, the applicant states in its founding affidavit that the evidence of an expert, Mr. Croll, was presented at the trial who expressed the view that the material of the dump did not accede to the soil on which it was deposited. An inspection *in loco* was held during which the main dump was inspected by the court. It appears from a summary of the observations made during the inspection, which is attached to the applicant's founding affidavit, that Mr. Croll attended the site inspection and pointed out why he held that opinion. The respondents did not present any evidence in this regard at the trial.

[4] I have studied the photographs which form part of the summary of the site inspection, and they show what I would describe as a mound of loose rocks. Without making any final finding in this regard, I am of the view that the applicant has shown, at least *prima facie,* that the main dump consists of movable material.

[5] The next issue to be considered is whether the applicant has shown, again *prima facie,* that it is the owner of the main dump or that it has some other right which entitles it to possession and exploitation of the

dump. The evidence presented by the applicant in this regard in the founding affidavit is that in approximately 1995, one Cecil Dean Holmes, acting on behalf of the applicant, purchased and took possession of the dumps[1] from their previous owners, the trustees of the Muldal Trust and Bruno Lombardi, and that it thereafter, on 19 November 2003, became the holder of a permit in terms of sec. 161 of the Mining Rights Act 20 of 1967, issued by the erstwhile Department of Minerals and Energy pursuant to a series of successive transfers by previous holders of the permit. The deed of transfer in favour of the applicant, a copy of which is annexed to the founding affidavit, was registered in the Mining Titles Office, Pretoria. Sec. 161(1) provided as follows:[2]

"Any person who has abandoned any mining title or allowed it to lapse may, subject to the provisions of this section, obtain a permit to retain possession of and treat or otherwise utilize any tailings, slimes, waste rock or other residues on any proclaimed land produced by such person or his predecessor in title in the course of mining operations on the land which was the subject of such mining title."

[6] The applicant states that it thereafter retained possession and ownership of the main dump and sold materials processed from it, but that it lost possession in 2012 when the respondents took possession thereof by virtue of the grant of a prospecting right to the first respondent by the Deputy Director General of the Department of Mineral Resources in

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[1] Apart from the main dump, there is a further dump which is referred to as the second dump.
[2] The Act has since been repealed.

terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA"). The applicant successfully appealed the decision to the director General, who held that the MPRDA does not apply to mine dumps[3]. The first respondent has lodged an appeal to the Minister of Mineral Resources, which appeal is yet to be determined. As matters presently stand, the first respondent no longer holds a prospecting right to conduct prospecting activities in respect of the main dump.

[6] The respondents disputed that the applicant had proved or adduced evidence that Holmes or his predecessors in title had ever become the common law owners of the dumps and say in their answering affidavit that it was established at the trial that the current management of the applicant is completely reliant on deficient paper records and has no personal knowledge of the previous transfers of either the permits or rights. What the respondents have, however, not challenged is the validity of the sec 161(1) permit which was granted to the applicant on 19 November 2003. In the absence of any evidence to the contrary, I must accept that the permit is still valid. I therefore find that the applicant has shown, again at least *prima facie,* that it has a valid sec. 161(1) permit. Even if the permit is no longer valid, the applicant's evidence shows that it was in possession of the dumps and conducted crushing operations and sold material extracted from the dump until the respondents took possession by virtue of the prospecting right which was granted to them.

[3] There were in fact two appeals, the one dealing with portions 5 and 71 and the other with portion 69. The decision of the Director General was the same in both.

The applicant therefore, again at least *prima facie,* became the owner of the dump by *occupatio.* I stress that I make no final finding in this regard.

[7] The next requirement for the grant of an interim interdict is a well-grounded apprehension of irreparable harm. The case made out by the applicant is that the respondents are removing large quantities of material from the main dump, that it has no means to recover the material which belongs to it and that the applicant is being prejudiced since the removal of the material decreases the value of the property which the applicant claims to own. On 14 December 2015, the applicant's attorney wrote to the respondents' attorney informing him that the applicant had been advised that, notwithstanding the current litigation between the parties, the respondents had entered into an agreement with the fourth respondent in terms whereof the respondents sold waste rock fines from the main dump to the fourth respondent and permitted the fourth respondent to remove such material from the dump. The applicant's attorney demanded an undertaking that no material from the dump would be removed by the respondents and that no further agreements would be entered into by the respondents in terms of which material from the dump would be sold to third parties or removed by third parties from the dump. The undertaking sought was not forthcoming.

[8] The applicant thereafter proceeded to gather evidence of the removal of material from the dump. Aerial photographs were taken on 23

December 2015 indicating activity on the dump and on 13 January 2016 trucks were observed exiting the properties on which the main dump is situated. On 15 January 2016, a private investigator appointed by the applicant and one of the applicant's employees saw large double-trailer trucks which were empty enter the properties and later saw the same trucks leaving the properties fully loaded with material. Photographs of the trucks were taken. They followed one of the trucks which transported the material to the premises of Rainbow Ready Mix Minerals in Krugersdorp. The respondents deny that they have sold large quantities of material and say that they have sold small quantities for testing purposes. They say that if the value of the gold retrieved remained a viable proposition then bigger quantities would be sold for testing. Those quantities would still be very small in relation to the size of the dump. The respondents say that one thousand tons of material next to the gate was sold to the fourth respondent during the first half of December 2015. The respondents further allege that the material which was removed during January 2016 was their own material, about 5000 tons, which they brought from a property about 600 m from the main dump to be screened by the mechanical screen at the site of the main dump.

[9] It is not necessary to find that the respondents have removed large amounts of material from the dump. On their own version they have removed and sold small quantities of material and intend removing larger quantities of material for testing purposes if the value of the gold

retrieved remained a viable proposition. They are not entitled to do this if the applicant is the owner of the material or the holder of a sec. 161(1) permit. They also do not deny that they have concluded an agreement with the fourth respondent for the sale of waste rock fines, neither have they given any information about whether or not further sales to the fourth respondent will take place in terms of the agreement. In my view, the applicant has established a reasonable apprehension of irreparable harm. The applicant's claim is of a vindicatory or quasi-vindicatory nature, in which case irreparable harm is, in any event, presumed unless rebutted by the respondent.[4]

[10] The next requirement for the granting of an interim interdict is that the balance of convenience favours the applicant. In light of the fact that the respondents have no rights in respect of the main dump, the balance of convenience is clearly in favour of the granting of a temporary interdict. The respondents' present activities on the main dump are clearly unlawful.

[11] The last requirement for the grant of an interim interdict is that the applicant must have no other satisfactory remedy. In the case of a vindicatory or quasi-vindicatory claim, this is again presumed and need not be shown by the applicant.[5]

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[4] See *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others* 2003(3) SA 268 (WLD) at 278B-F

[5] See *Fedsure, supra* at 278E-F

[12] In the result, the applicant has satisfied the requirements for an interim interdict and an order is granted in terms of prayers 2, 3 and 4 of the notice of motion.

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Instructed by: Rontgen & Rontgen Inc, Pretoria