IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

6/9/16

Case Number: 51602/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED. ✓

6/9/16 .....
DATE

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SIGNATURE

In the matter between:

INYAKU GAME FARM (PTY) LTD	APPLICANT

And

GELLETICH MINING INDUSTRIES (PTY) LTD	1ST RESPONDENT
MICA MARULA INVESTMENT COMPANY (PTY) LTD	2ND RESPONDENT
INGWE MICA INDUSTRIES (PTY) LTD	3RD RESPONDENT
MARULA COSMETIC PRODUCTS (PTY) LTD	4TH RESPONDENT
THE REGIONAL DIRECTOR DEPARTMENT OF MINERAL RESOURCES, LIMPOPO PROVINCE	5TH RESPONDENT
THE MINISTER OF MINERAL RESOURCES	6TH RESPONDENT

JUDGMENT

Fabricius J,

1.

Applicant herein initially launched an application in terms of which it sought that the First to Fourth Respondents be interdicted from pursuing any building activities on the property known as Portion 3 of the farm Hoofpyn in the Maruleng District of Limpopo Province and conducting any processing of marula nuts/pips on the property. It was also sought that the Respondents be ordered to vacate the property forthwith, and a cost order was sought. On 19 August 2014, the application served before Tuchten J, who made an order "noted undertakings in terms of Prayers 1 and 2", and "that the undertakings in this order shall remain in force pendent lite". The application was postponed *sine die.* The undertakings clearly relate to the building activities and the processing of marula products.

2.

Before me the only issue is whether or not the Respondents ought to be evicted from the property.

3.

The Applicants say that the remedy applied for by it is the *rei vindicatio,* and in order to succeed it must allege and prove:

3.1 Ownership of the property; and

3.2 That the Respondents were in possession of the property when the application was brought.

These two elements were in fact common cause. It was also averred that it was settled law that when a respondent relies upon a right to possession, that respondent must allege and prove that right.

See: ***Woerman v Basondo 2002 (1) SA 811 (SCA).***

4.

The Respondents rely, in this context, on an "Old Order Mining Right". This right is defined as follows in ***Item 1 of Part II of the Mineral and Petroleum Resources Development Act 28 of 2002***: ""Old Order Mining Right" means any mining licence, *mynpagten*, consent to mine, permission to mine, claim licence, mining authorization or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted".

Table 2 defines "Old Order Mining Right" in six categories, all six of which mention an underlying common law right in juxtaposition with a mining authorization issued to facilitate exploitation of the underlying right. As a consequence, so it was argued on behalf of Applicant, an "Old Order Mining Right", is in fact a new right created by statute.

See: ***Minister Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another 2014 (2) SA 603 (CC) at par. 57.***

The underlying common law mineral right is not preserved in terms of the new

statutory dispensation brought about by the mentioned ***Act***.

See: ***Holcim (SA) (Pty) Ltd v Prudent Investors (Pty) Ltd [2001] 1 All SA 364 (SCA) at par. 37*** and ***Xtrata South Africa (Pty) Ltd and Others v SFF Association 2012 (5) SA 60 (SCA) par. 8.***

5.

Applicant's Counsel therefore submitted that in order for an "Old Order Mining Right" to be established, the mining Respondents must allege and prove:

5.1 A valid mining authorization; and

5.2 An underlying common law or statutory right.

This was not done in the Answering Affidavit. The mining authorization on which the Respondents relied provides that it was issued to the First Respondent only and then for a limited period. ***Item 7 (1) of Schedule 2 of the Act*** provides as follows: "Subject to sub-items (2) and (8) any Old Order Mining Right in force immediately before this ***Act*** took effect continues in force for a period not exceeding five years from the date on which this ***Act*** took effect or the period for which it was granted,

whichever period is the shortest, subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued".

6.

Applicant's Counsel therefore submitted that the "Old Order Mining Right" can in law not exist beyond the expiry date of the mining authorization, and without the mining authorization the underlying common law or statutory right cannot survive even if the mining Respondents had applied timeously for the "Old Order Mining Right" to be converted into a "New Order Mining Right". Consequently, it was submitted that the only possible right which the mining Respondents may have had to remain upon the property has fallen away, and they ought therefore to be evicted.

7.

On behalf of the Respondents, and in the light of the fact that it was common cause that First Respondent was the owner of an "Old Order Mining Right", it was argued that only two issues remained for me to determine:

7.1 Whether, despite the legislative promises of a security of tenure, the "Old Order Mining Right" of First Respondent did indeed lapse by operation of law on 18 August 2012, as was alleged by the Applicant;

7.2 If this mining right had not lapsed, whether the Respondents are entitled to conduct mining operations on Portion 3.

8.

It was contended that the "Old Order Mining Right" had not lapsed:

8.1 First Respondent became the holder of an " Old Order Mining Right" with effect from 1 May 2004, when the ***Act*** came into effect; and

8.2 The said right had not lapsed by operation of law given the proper lodgement thereof for conversion.

It endures and gives First Respondent security of tenure.

When the ***Act*** came into effect on 1 May 2004, First Respondent lost all of its common law mineral rights under the previous legislative dispensation, but then became vested with the rights and obligations under the new statutory institution

created specifically for the purpose of transition to the new legislative dispensation. Reference was made in this context to ***Xtrata supra at par. 10***, and ***Holcim supra at par. 15 to 26***. It was submitted that formally First Respondent became the holder of an "Old Order Mining Right" in respect of Portion 3 of the relevant property, but in substance its rights, entitlements, duties and obligations remained the same.

9.

In the context of the question whether or not the "Old Order Mining Right" had lapsed by operation of law, the distinction drawn in ***Schedule 2 of the Act***, between "unused old order right" and an "Old Order Mining Right", needed to be considered. An "unused old order right" was defined to mean any right, entitlement, permit or licence listed in ***Table 3*** to the ***Schedule*** in respect of which no prospecting or mining was being conducted immediately before the ***Act*** took effect. An "Old Order Mining Right" was defined to mean any mining lease, *mynpagten*, consent to mine, permission to mine, claim licence, mining authorization or right listed in ***Table 2*** to the said ***Schedule*** in force immediately before the date on which the ***Act*** took effect,

and in respect of which mining operations were being conducted. In the present case, there were on-going and continuing mining operations on Portion 3. The concept of "security of tenure", had to be considered in this context as well, and Section 2 (g) of the ***Act*** stated the following: "The objects of this ***Act*** are to... provide for security of tenure in respect of prospecting, exploration, mining and production operations;..." ***Item 2 (a) of Schedule 2 of the Act***, which regulates a transition from the old order to the new order states that "The objects of this Schedule are an addition to the objects contemplated in Section 2 of the ***Act*** and are to ... ensure that security of tenure's protected in respect of prospecting, exploration, mining and production operations which are being undertaken". These objects were of special importance and relevance, because of Section 4 of the ***Act*** which provides as follows: "4 **Interpretation of Act**

1. When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.

2. Insofar as the common law is inconsistent with this Act, this Act prevails."

10.

In the abovementioned context ***Item 7 (1) of Schedule 2 of the Act*** needs to be considered. It reads as follows: "Subject to sub-items (2) and (8), any Old Order Mining Right in force immediately before this Act took effect continues in force for a period not existing five years from the date on which this Act took effect or the period for which it was granted, whichever period is shortest, subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued". First Respondent was granted mining licence ML14/2002 in terms of the previous ***Minerals Act 50 of 1991*** for a period of 10 years up to 18 August 2012. The ***Act*** took effect on 1 May 2004.

11.

It was contended that Applicant's argument was mis-conceived, because it ignored the introductory qualifier to Item 7 (1), namely the reference to sub-item 7 (2). This provides that the holder of an "Old Order Mining Right" must lodge the "Old Order Mining Right" for conversion "within the period referred to in sub-item (1)", at the

Office of the Regional Manager in whose region the land in question is situated. This could only be a reference to the shorter period for which the "Old Order Mining Right" continued in force, which meant that in this case the "Old Order Mining Right" had to be lodged for conversion before or on 30 April 2009. This was indeed done on 30 April 2009. It was contended that once the "Old Order Mining Right" was lodged timeously for conversion, it does no cease to exist, but continues in force. This was not only the common-sense interpretation, but also gave effect to the stated ideal of security of tenure. Item 7 (7), was also relevant in this context: "Upon the conversion of Old Order Mining Right and the registration of the mining right into which it was converted, the Old Order Mining Right ceases to exist". If all and any old mining rights would lapse on 30 April 2009, regardless of whether or not there was a timeous lodgement for conversion, this Item would have been superfluous and non-sensical.

12.

In the light of the above, there were only two circumstances under which an "Old

Order Mining Right" would cease to exist in terms of Item 7, namely:

12.1 Where the holder of the "Old Order Mining Right" failed to lodge it for conversion within the period stipulated in Item 7 (1) thereof; and

12.2 Where the holder thereof lodged the "Old Order Mining Right" timeously for conversion within the period stipulated in Item 7 (1) thereof, lapsing only on the moment of registration of the converted right.

It was therefore contended that Applicant's argument, namely that the "Old Order Mining Right", regardless of having been timeously lodged for conversion as First Respondent did, would simply lapse after the next period of five years from the commencement of the *Act*, even if that process was not completed because of problems within the Department of Mineral Resources over which an Applicant would have no control, made a mockery of the concept of security of tenure and of seeking a reasonable interpretation as enjoined by Section 4 of the *Act*. It was also contended that the interpretation advanced by Applicant would lead to the stultification and disruption of the mining sector, a consideration that was important and had to be avoided.

See: ***Holcim supra at par. 26.***

In the present instance the conversion had been approved, but registration had not yet taken place.

13.

It was therefore contended that there was no lapsing of the "Old Order Mining Right", and in fact it continued in force until registration thereof. On *litis contestatio*, the First Respondent was therefore the holder of an "Old Order Mining Right" which is in the nature of a limited real right in and upon Portion 3, and it was therefore entitled to be on the land.

14.

Upon a proper interpretation of the provisions that I have mentioned, I agree with the argument advanced on behalf of the First and Second Respondents, Mr M. Oosthuizen SC is indeed correct. The interpretation contended for by him makes practical sense, and gives effect to the intention of the legislature as well. Second

and Third Respondents were also entitled to be on the premises, having regard to the First Respondent's rights as a holder of a "Old Order Mining Right". They are present on Portion 3 through the employees they provide for the mining operations.

15.

Upon a proper interpretation of the order by my colleague Tuchten J, no interim interdict was issued, and there is no basis for making any order in accordance therewith.

16.

The following order is therefore made:

The application is dismissed with costs including the cost of two Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 51602/14

Counsel for the Applicant: Adv S. Mulligan

Instructed by: Nixon & Collins Attorneys

Counsel for the 1st to 4th Respondents: Adv M. M. Oosthuizen SC

Adv A. Higgs

Instructed by: Savage Jooste & Adams Inc

Date of Hearing: 30 August 2016

Date of Judgment: 6 September 2016 at 10:00