REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-080001

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 28 August 2023 [redacted] WJ du Plessis

In the matter between:

PALM CHROME (PTY) LTD	**APPLICANT**
and	
2 GLOWING SUNSET TRADING 56 CC	**FIRST RESPONDENT**
MAGEDELIE MALATJI CHENGETA	**SECOND RESPONDENT**
ALL UNLAWFUL ENTRANTS AND/OR POSSESSORS AND/OR OCCUPIERS OF THE MINING PROPERTY CONSISTING OF PORTIONS 2, 3, 4 AND 5 AND A PERTION OF PORTION 6 OF THE FARM PALMIETFONTEINT 208 REGISTRATION DIVISION JP, NORTHWEST PROVICE	**THIRD RESPONDENT**

GODFATHER SECURITY AND CLEANING PTY LTD	**FOURTH RESPONDENT**
BENNITO MOTITSWE	**FIFTHE RESPONDENT**
THE MINISTER OF POLIC	**SIXTH RESPONDENT**
THE STATION COMMANDER FOR SAPS, SUN CITY	**SEVENT RESPONDENT**
MINISTER: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**EIGHT RESPONDENT**
DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**NINTH RESPONDENTS**
BAPOLOMITI COMMUNAL PROPERTY ASSOCIATION	**TENTH RESPONDENT**
MINISTER: DEPARTMENT OF PUBLIC WORKS	**ELEVENTH RESPONDENT**
BATHLALERWA TRADITION COUNCIL	**TWELTH RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] This is an urgent application that, firstly, a declarator be issued in terms of which it is declared that the Applicant is not a party to, and bound by, an agreement between the Twelfth Respondent and the First Respondent, secondly that the First Respondent does not have a right to mine, followed by orders evicting First to Fourth Respondents from the mining area, and interdicting them, in short, from returning and interfering with mining activities.

[2] The Applicant is the holder of a mining permit and a prospecting right in respect of the mining area in question. None of the respondents hold a mining right, mining permit or prospecting right in respect of the mining area. However, the First and

Second respondents aver that the First Respondent has a right to mine and prospect for chrome in the mining area because of the purported agreement signed by the Second and the Fifth Respondent, purportedly on behalf of the Twelth Respondent trading as the Applicant (Palm Chrome Pty Ltd), on 12 August 2022.

[3] The First Respondent, represented by the Second Respondent, states that it has acquired this right to mine for chrome in the area by agreement with the Applicant (as explained in the previous paragraph), who is the lawful holder of a mining permit and prospecting right in respect of the mining area. The Applicant disagrees and, in this application, seeks a declaratory order that it is not a party to this contract and is not bound by the terms of the agreement.

[4] Should the court find in favour of the Applicant that it was not a party to this agreement and is therefore not bound by it, the respondents have no right to mine all prospect in the mining area. However, if the court were not to grant a declaratory order, then the Applicant states the agreement upon which the First Respondent wants to rely cannot give it the right to mine or prospect for chrome in the mining area. This is because the agreement does not provide the First Respondent the right to mine but merely is a framework agreement for future endeavours.

[5] The Applicant states that the relief it seeks aims to protect its lawful right to mine and prospect on the mining property. They say the right is not in dispute. They have a mining permit that will be up for renewal on 27 September 2023. Thus, to protect this right to mine and continue mining operations, the application is urgent. They argue they cannot obtain substantial redress in the motion court in the ordinary course as the application would not be adjudicated before 27 September 2023.

[6] They set out the facts from which this particular matter arises but also speak to the urgency as follows: Firstly, members of the Fourth Respondent armed with machine guns maintain a presence in the mining area to protect the First, Second and Third Respondents whom it says are engaged in illegal mining. These armed personnel of the Fourth Respondent preclude the Applicant from entering the mining area. Furthermore, while the First, Second and Third Respondents continued to mine

chrome on the mining property, or at least while there is a reasonable apprehension that they would do so, the Applicant loses approximately R1,000,000 daily.

[7] The First and Second respondents disagree that this matter is urgent. They say so for the following reasons: that the deponent of the affidavit for the Applicant has known of the existence of the disputed agreement since November 2022. Since then, the Applicant has been aware of the ongoing clashes at the site between the parties and security. The conflict over who is entitled to mine has been long-standing. The Applicant has disputed the First Respondent's mandate to mine since late 2022. They state "how exactly a declaratory order as regards to the disputed agreement has suddenly required the intervention of the urgent court to the degree claimed (at all) is a mystery".[1]

[8] Furthermore, the First Respondent launched a successful spoliation application on 22 March 2023. The order was handed down on 6 April 2023. They state that since the legal question centred on a factual dispute about the agreement's validity, one would have expected the Applicant to issue summons to seek a declarative that the contract is void or to launch an application for interim relief. The Applicant did not do any of these things and did nothing for approximately seven months when it enrolled the previous application in this matter as a matter of urgency. They state that there is no explanation on the Applicant's papers now before the court as to why it did nothing over the long periods.

[9] The First and Second respondents claim that this application is a gross abuse of the court process for the following reasons: a judgement is yet awaited in the previous application, there are various disputes of fact, and it is accompanied by an extreme degree of urgency. They seek dismissal, alternatively, a striking-off and a punitive order of costs.

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[1] HOA par 27.

Ad urgency

[10] Rule 6(12)(b) requires that

> "(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course (my emphasis)."

[11] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo*[2] stated

> t seems to me that when urgency is in issue the primary investigation should be to determine whether the Applicant will be afforded substantial redress at a hearing in due course. If the Applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the Applicant and any delay by the Applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.

[12] The Applicants are quite correct when they state it is for the Applicant to prove urgency and not for the respondent to prove or disprove that the Applicant has not proven urgency. The Applicant must demonstrate urgency by setting out the facts that render the matter explicitly in an affidavit. According to the First and Second Respondent, the Applicant already had all the facts needed to launch an application asking for a declaratory order that it seeks in this case in November 2022, which would by now have been heard in a motion court. If not November, at least during March 2023, when the First Respondent launched an urgent application (spolitation).

[13] The Applicant launched an application for interdictory relief in the ordinary course of motion proceedings on 19 May 2023. It accelerated the determination of the dispute by placing it on the urgent roll of 4 July 2023 when the Applicant learned that the First and Second Respondents were conducting illegal mining activities on the land.

[14] The 4 July 2023 application sought an interdict against the First and Second Respondents from mining in the mining area. In this application, they seek a

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[2] [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP).

declaratory order that the First and Second Respondent have no right to mine or to conduct mining exploration activities on the mining property and an order to evict those Respondents from the mining area. In its Founding Affidavit,[3] the Applicant states why it launched this application:

> "The Applicant launched an urgent applieaction which was set down on 4 July 2023, in which judgment has as of yet not been handed down. This application was set to follow the aforesaid urgent application in the event of the application not being successful. The Applicant can however not dealy the launching of this application any further."

[15] It is not because this application is urgent. The Applicant could not wait any longer on a judgment from the previous urgent application. However, launching another urgent application (with similar relief relying on similar facts) is not the answer. The matter is not urgent.

[16] In *Price Waterhouse Coopers Incorporated and Others v National Potato Co-operative Ltd*[4] it was stated (references omitted)

> It has long been recognised in South Africa that a court is entitled to protect itself and others against the abuse of its process but no all-embracing definition of 'abuse of process' has been formulated. Frivolous or vexatious litigation has been held to be an abuse of process and it has been said that 'an attempt made to use for ulterior purposes machinery devised for the better administration of justice' would constitute an abuse of the process. [….] Nevertheless it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court will close its doors to anyone who wishes to prosecute an action. The importance of the right of access to courts enshrined by section 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with *bona fide* disputes.

[17] I agree with the Respondents that the Applicant should have waited for the outcome of the 4 July 2023 proceedings before using the urgent court in its battle against the First and Second Respondent, especially since this application deals with the same issues as the 4 July 2023 application. Dressing up remarkably similar problems relying on the same facts in different clothes, notably the question whether the

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[3] Par 89 -90.

[4] 2004 (6) SA 66 (SCA).

Applicant is bound by what it calls the purported contract and placing it on the urgent roll, is improper and an abuse of the process.

Order

[18] I, therefore, make the following order:

1. The application is struck from the roll with costs on an attorney and client scale.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Mr N Martiz SC
	Mr R van Schalkwyk
Instructed by:	JW Botes Inc
Counsel for the 1st and 2nd respondents:	Mr BM Slon
Instructed by:	Nicqui Galaktiou Inc
Counsel for the 5th and 12th respondents:	Mr N Matidza
Instructed by:	Kgosi Sekele Inc
Date of the hearing:	23 August 2023
Date of judgment:	28 August 2023