101/86

THE MONASTERY DIAMOND MINING CORPN (PTY) LTD APPELLANT

and

FRANS JOHANNES VON MALTITZ SCHIMPER 1st RESPONDENT

MARGARETHA ENGELA SCHIMPER 2nd RESPONDENT

THE MINISTER OF MINERAL & ENERGY AFFAIRS 3rd RESPONDENT

CASE NO. 144/85
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE MONASTERY DIAMOND MINING CORPORATION (PROPRIETARY) LIMITED	APPELLANT
and	
FRANS JOHANNES VON MALTITZ SCHIMPER	1st RESPONDENT
MARGARETHA ENGELA SCHIMPER	2nd RESPONDENT
THE MINISTER OF MINERAL & ENERGY AFFAIRS	3rd RESPONDENT

CORAM: RABIE CJ, JANSEN, JOUBERT, JJA et BOSHOFF, NESTADT AJJA

HEARD: 19 AUGUST 1986

DELIVERED: 17 SEPTEMBER 1986

J U D G M E N T

NESTADT/ .....

NESTADT, AJA:

Only issues of costs fall to be decided in this appeal. They concern orders made in certain motion proceedings brought by first and second respondents against appellant in the Orange Free State Provincial Division and, on appeal, to the full bench thereof.

The judgment of the court a quo has been reported (see The Monastery Diamond Mining Corporation (Edms) Bpk vs Schimper en Andere 1983(3) S A 538 (O)). It details the facts giving rise to the dispute between the parties and the course the litigation between them took. However, for the sake of convenience

I summarise, in simplified form, that which is relevant to a proper understanding of the proceedings before this court. Respondents (being son and mother, and to whom I refer as "the Schimpers") are respectively the owner and usufructuary of a farm in the district of Marquard. Appellant ("the company") is, in terms of a notarial deed of lease entered into in 1966 with the Schimpers' predecessors in title, the lessee of the mineral rights thereto. As such, it is entitled to mine for minerals "subject to such restrictions as may be imposed by any law in regard to such mining". Since then it has, by prospecting and mining for diamonds, actively been engaged in exploiting its rights on two adjacent, fenced-

off parts of the farm, namely, the so-called mining and servitude areas. Permission to extend to the latter had been granted the company by the Schimpers in 1979 consequent upon the conclusion between them of a written agreement (referred to in the papers as Annexure H). Clause 1 thereof authorised the company to establish there "verdere uitbreidings tot die bestaande mynaanleg ... en, in besonder ... 'n vergruisingsaanleg, herwinningsaanleg en kantoorgeboue ... asook om op gemelde gebied mynuitskot vanuit die mynarea op te hoop en te versamel." A feature of the farm is a furrow which runs across the lands and carries storm water

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from its catchment area to a dam situated on the eastern side of the two areas referred to. A portion of it traversed a small segment of the mining area. In about March 1981 the company caused overburden and tailings from its mining operations to be dumped on this part of the furrow so that it was covered up and the flow of water to the dam entirely cut off. This, according to the Schimpers, would have caused them grave prejudice. In due course, the dam, no longer having a supply of water, would become empty and their farming activities would thereby be adversely affected. In addition, there was a danger of flooding and consequent damage to their farm

buildings occurring in the vicinity of the obstruction. They reacted to what the company had done by instructing their attorneys to write a letter to it. This was done on 21st April 1981. It demanded an immediate undertaking that the dump be removed by September 1981, being the anticipated commencement of the next rainy season. The reply on behalf of the company (by letter from its attorneys dated 24th April 1981, the terms whereof are quoted at 540 H - 541 F of the reported judgment) was a firm refusal to comply or even desist from continuing to dump in the furrow. It went further. It warned the Schimpers that the company urgently required three additional defined areas of farm land, comprising approxi-

mately 33 hectares, for dumping and "ander myn-bedrywighede". These, it was envisaged, would take place within the next two years and involved inter alia the construction of a hostel, a workshop, a slimes dam, storerooms and a parking area (for vehicles and equipment). Though not stated in the letter, the company's right to act in this way purported to be based on what has been referred to as an extra-statutory permission (buite-statutêre vergunning). It had been granted to the company by the mining commissioner at Welkom on 28th February 1980. Its terms appear at 547 A - H of the reported judgment.

It was against the background of this

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clash of interests between the parties that the Schimpers, by notice of motion dated 15th May 1981, sought two main orders against the company (both to operate on an interim basis pending the outcome of an action claiming permanent relief in similar terms). One, in terms of prayer 1(a) thereof, was a mandamus that it remove the obstruction to the water furrow. In support hereof their founding affidavits alleged that the company was not entitled to interfere with it as had been done. The other, in terms of prayer 1(b), was for an interdict, in effect, restraining the company from carrying out its threat to extend its mining pursuits beyond the mining and servitude areas. The case made out here was that

if this took place their farming operations would be seriously impaired; they would, as a result, suffer irreparable damage in a number of particularised respects. The company, it was alleged, was prohibited from doing what it contemplated, firstly, because the intent and effect of annexure H was to restrict the mining activities therein referred to, to the areas in question, and secondly, because the extra-statutory permission (on which, as I have said, the company relied) was invalid. Accordingly, two forms of relief (respectively founded on the above-mentioned causes of action) were claimed, namely that, outside the mining and servitude areas, the company be restrained from

(i) dumping or erecting a crushing or recovery plant or offices (prayer 1(b)(i)) and (ii) mining (as opposed to prospecting) in terms of the Precious Stones Act, 73 of 1964 (prayer 1(b)(ii)). Costs of the application were sought. The verbatim terms of the prayers are set out at 539 D - 540 A of the reported judgment.

The company opposed the application. In its answering affidavits it is stated that neither the furrow nor the dam is of much practical use to the Schimpers in their farming operations. Besides, whereas it would cost thousands of rands to remove the obstruction, it would be a simple and inexpensive

matter for the Schimpers themselves to by-pass that part of the furrow in the mining area. This, the company, without prejudice to its contention that it was entitled to dump as it had done, in order to effectively prospect and mine, tendered to do itself. Its proposed mining activities, beyond the mining and servitude areas, were defended on the basis that the notarial lease granted it the right to mine over the whole property; annexure H was not intended to and did not derogate therefrom; the extra-statutory permission was valid. Even if it did not have a clear right in this regard, the balance of convenience favoured the company being allowed to extend its operations in

the manner contemplated. In a counter-application, an order was sought, pendente lite, that it be granted leave to dump and erect a slimes dam and labour compound in the areas beyond the mining and servitude ones. In a supporting affidavit a Mr Cooper, the company's attorney, deposed to a conversation he had on 29th June 1981 with the mining commissioner concerning the circumstances under which the extra-statutory permission was issued.

The matter came before Erasmus J on 27th August 1981. By this time, the Schimpers having filed a replying affidavit (in which inter alia the diversion of the furrow pursuant to the

company's tender was accepted as a temporary measure) the record comprised some 450 pages. For a number of reasons which it is unnecessary to canvass, prayer 1(a) of the notice of motion (the claim to a mandamus in respect of the furrow) was refused. However, (permanent) interdicts in terms of prayer 1(b)(i) and (ii) (the latter in a slightly amended form) were granted. The former, as I understand it, was on the basis that annexure H only afforded the company the right to prospect; the latter because, so it was held, the extra-statutory permission was invalid. The reason for the relief being permanent and not interim, as originally claimed, is given as follows:

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"The applicants therefore have in this application proved successfully not only that they have a clear right but also that they are entitled to a permanent interdict.
As my findings on prayer (b) are based on the interpretation of Annexure H and the Act, and purely legal findings, there appears to be no reason why I should not at this stage grant a permanent interdict, under the heading 'alternative relief' and perhaps save the Applicants the necessity of instituting the action they are contemplating. Cf. Fourie v Olivier 1971(3) S A 274 (T)."

The counter-application was dismissed. As to costs it was stated:

"Notwithstanding the fact that prayer (a) of the application cannot succeed the Applicants have met with sub-

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stantial success and they are in my judgment entitled to the costs of these proceedings."

It was so ordered. (For the exact terms of the order see 542 A - C of the reported judgment). In addition, on the application of the Schimpers, Cooper's affidavit was struck out with costs. (The judgment on this aspect has been reported; see Schimper and Another vs Monastery Diamond Mining Corporation (Pty) Ltd and Another 1982 (1) S A 612 (O)).

The company appealed against the whole of the order (save, of course, for the refusal of prayer 1 (a)). As appears from the judgment of the

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court a quo, it was partially successful. Essentially, (the order is not entirely clear) what it achieved was (i) the alteration of the award of costs to one that the company pay 90% thereof (rather than all the costs as the court of first instance had directed), and (ii) the setting aside of the interdict granted in terms of prayer 1(b)(i). However, the appeal against the interdict granted in terms of prayer 1(b)(ii), the refusal of the counter-application and the striking out of Cooper's affidavit failed. The costs of appeal were apportioned 40 : 60 against the company. Still feeling aggrieved, it sought and was granted leave to appeal by the full bench (though

unfortunately without any recorded reasons therefor or definition of the issues).

Before us, the first and main attack by Mr Maritz, on behalf of the company, was directed against the order of costs of the application (which, as I say, was altered to 90 : 10 against it). The submission here was that it was still inequitable and should be interfered with so that: (i) 30% of the costs (being those in respect of prayer 1(a), i e, the furrow issue) be paid by the Schimpers; (ii) a further 30% (in respect of prayer 1 (b)(i), i e, the annexure H issue) be similarly borne, alternatively that they be costs in the cause; (iii) the balance of the costs of the

application (relating to prayer 1(b)(ii), i e, the extra-statutory permission issue) be costs in the cause. Secondly, so it was argued, the court a quo should have awarded the company all its costs of appeal (rather than just 40% thereof).

In order to properly evaluate the argument relating to the costs of the application and before dealing with it in more detail, it is, I think, necessary to determine the court a quo's reasons for making the order it did. It is plain, from what is stated at 543 G - 544 A, that the furrow issue was held to be a separate and divisible one and that the company, having been the successful party in relation

to it, was entitled to its costs. Not so clear is whether this constituted the sole justification for the (slight) adjustment of the original order. As I read the judgment, and especially the passages at 550 H and 551 A, it does; in other words the costs in respect of the other two issues (i e raised by prayers 1(b)(i) and (ii)) were awarded to the Schimpers in their entirety (because, so it was held - see 551 A - B - they were substantially successful).

On this basis, and in relation to the costs awarded in respect of prayer 1(a) (being the first issue with which I deal), the question that arises is whether the court a quo's apportionment of only 10% of the total costs was too little. In submitting the

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affirmative and, as indicated, that it should have been 30%, counsel (before us, though, significantly, not in his heads of argument) contended that the notice of motion was founded on the furrow issue; a good proportion of the three sets of affidavits was devoted to it; and that it even led to an inspection in loco being held by Erasmus J. To begin with, I have some doubt as to the correctness of the premise on which the argument is based, namely, the refusal of prayer 1(a). It is, however, in the absence of a cross-appeal, impermissible to explore this. Even so, and despite not having the benefit of knowing how the court a quo arrived at the apportionment it did, I am of the

opinion that there is no warrant for interfering with the 90 : 10 allocation. The onus was on the company to satisfy us in this regard (Katz N O vs Marine & Trade Insurance Co. Ltd 1980(1) S A 497(A)at 502 E). Whilst the obstruction of the furrow was the first issue dealt with in the application, it was by no means the main one. My impression of the papers is that it is only a relatively small part thereof that is concerned exclusively with prayer 1(a). For the rest, they deal with matters relevant only to prayer 1(b) or common to both. I do not, in the circumstances, believe that, but for the furrow issue, the costs would have been substantially less. The company

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itself made the point, in its answering affidavits, that, in relation to it, the Schimpers were making "a mountain out of a molehill" and that it was of "minor" importance. In any event, it was the company which, despite this attitude, went to considerable (and I would add unnecessary) lengths to deal with it. In view of the company's tender and its acceptance by the Schimpers, very little time could have been devoted to the furrow issue in argument. Not only was the inspection at its instance, but the request (contained in its affidavits) that it be held was also motivated by its desire that the court should observe matters relevant to prayer 1(b). In the

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very nature of things a precise assessment by the court a quo of what the apportionment should be was not possible; it had to make an estimate which would achieve substantial and practical justice between the parties (Gentiruco A G vs Firestone S A (Pty) Ltd 1972 (1) S A 589(A) at 672 H - 673 A). Perhaps an award slightly more in favour of the company would not have been out of place but I am not persuaded that the object referred to was not attained.

I turn to the argument concerning the costs of prayer 1(b)(i). The full bench set aside the interdict granted in terms thereof because there was a factual dispute about the meaning of

annexure H and this could only be resolved by oral evidence; accordingly, contrary to what Erasmus J had held, the principle of Fourie v Olivier (supra), namely, that, where in an application for an interdict the decision rests on a point of law, a final interdict can be granted under the claim for alternative relief, was not applicable (see 546 A - B). At the same time, however, on the basis that the balance of convenience was in favour of the Schimpers, they were held (at 546 H) entitled to interim relief. The only reason why this was not, in the result, granted, was because (as appears from 546 fin and 551 B - C) counsel for the Schimpers stated, during

the hearing of the appeal, that it was no longer sought.

It is in the light of the afore-going that the submission that the company should have been awarded the costs of this issue (which, as I have said, was suggested as being 30% of the total), alternatively that they should have been ordered to be costs in the cause, must be considered. The former rested on the proposition that, seeing that the relief in question had been abandoned, all the costs incurred in connection therewith, had been wasted and that the Schimpers, being responsible therefor, ought to pay them. The basis of the latter was that at

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worst for the company the principle usually applicable to the grant of interim relief, namely, that costs be in the cause (as to which see E M S Belting Co of S A (Pty) Ltd & Others vs Lloyd and Another 1983(1) S A 641 (E)) should have been followed. In either event, so it was said, the court a quo had misdirected itself by, in effect, linking the costs of this issue to the outcome of prayer 1(b)(ii) and, in the result, awarding them to the Schimpers.

In my view, both must be rejected. They are obviously based on the general rule that where issues are separate and distinct, each carries its own costs (Cilliers, Law of Costs, 2nd ed para 2.14

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p 15). In the words of Gardiner AJP in Union Share Agency and Investment Ltd vs Green 1926 CPD 129 at 141:

> "The victor had no right to make defeat unnecessarily expensive for the vanquished, and if he has not been content to rely on a good point, but has added to the expense by raising weak issues, he should bear the additional expense to which his adversary has been put."

The rule, however, is not an invariable or unqualified one. Thus, it has been held, that where there is a main claim and an alternative claim, and the applicant or plaintiff succeeds on the main claim, the successful party should receive the whole of the costs (Jenkins vs S A Boiler Makers, Iron and Steel

Workers and Ship Builders Society, 1946 W L D 15).

To similar effect are the following remarks of Galgut J, as he then was, in Transvaal and Orange Free State Chamber of Mines vs General Electric Co 1967 (2) S A 32 (T) at 72 A, namely:

> "I hasten to say that it can never be a rule that a successful party who fails on some of the issues raised in his pleadings should be deprived of his costs on those issues. Generally speaking a successful party should be awarded all his costs. Each case will, however, be decided on its own facts."

It seems to me that those in the present matter were not such as to warrant the Schimpers being deprived of the costs under consideration. In their replying

affidavits they made it clear that they primarily relied on the invalidity of the extra-statutory permission (though they also contended that annexure H had the contractual effect of confining the company's mining activities to the fenced-off area). And the matter obviously proceeded to argument on that basis. In any event, though they may have been over-cautious, it was not unreasonable for them to have, so to speak, a second string to their bow ("a belt and braces" form of relief as counsel for the Schimpers described it - although he did not explain into which of these categories the two causes of action respectively fell). Even then, if the Schimpers be regarded as having failed on prayer 1(b)(i),

(a matter I deal with shortly), it would, in my view, be wrong, in the circumstances, where they have succeeded on prayer 1 (b)(ii), to penalise them by awarding the costs of the former to the company.

A second reason for not acceding to the argument under consideration is the allied rule that where a number of issues, even though technically separate:

> "had to be raised in order to lead evidence so as to enable the trial Judge to give a correct judgment upon the issue on which the litigant succeeds, then there must be some exceptional reason for not adopting the general principle that the successful litigant is entitled to all his costs."

(per Wessels, CJ in Penny v Walker 1936(A D) 241 at 260).

In other words, where all the evidence is relevant to give a complete picture of the whole affair, the

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general principle that the overall successful litigant is entitled to his costs, will usually be adopted. (May vs Union Government 1954(3) S A 120 (N) at 132 F - G; see too, the General Electric Co case, (supra) at 72 A - B). A fortiori would the same apply where the issues are interwoven or closely connected. Here, too, the court is reluctant to make separate awards of costs on each issue (Cilliers para 2.16 p 17). In casu, it is true, as pointed out by Mr Maritz, that the full bench held:

> "'n Groot deel van die aansoek het beëdigde verklarings van verskillende persone bevat oor die omstandighede waaronder aanhangsel 'H' aangegaan is sowel as die beweerde gemeenskaplike

bedoeling van die partye."

(545 (F)). It also rejected an argument that annexure H had been referred to merely "as deel van die geskiedenis en om openhartig met die Hof te wees sodat, indien sy beswaar teen die geldigheid van die buite-statutêre vergunning sou slaag, respondente nie die appellant se regte in die myn- en serwituutarea sou aantas nie."

(546 B - C) in the following terms:

> "Indien dit die bedoeling was, kon hierdie feite kortliks in die stukke genoem gewees het en smeekbede 1(b)(ii) kon so ingeklee gewees het dat gemelde areas die trefkrag van hierdie smeekbede uitgesluit het.
> Instede daarvan het respondente die bewerings rakende die myn- en serwituutareas soos in bewysstuk 'H' vervat 'n

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> afsonderlike smeekbede gemaak wat buitengewone lang beëdigde verklarings deur verskeie persone aan die kant van appellant ontlok het en waarop respondente weer breedvoerig geantwoord het."

(546 C - D). This, however, is not inconsistent with the clear impression that is to be gained that the facts of each cause of action (on which prayers 1 (b)(i) and (ii) were respectively based) were so interrelated as to justify a composite order for costs. A line cannot readily be drawn between them. Moreover, both were directed to a single end, i e,to ward off the threatened extension of the company's mining activities on the Schimpers' farm. The substantial

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dispute was its right to do this. The company itself, in its affidavits, acknowledged this. Annexure H, and the circumstances in which it was entered into, formed an integral and thus relevant part of the events which culminated in the launching of the application. I am, with respect, unable to agree with the court a quo's criticism of the Schimpers for setting them out. It may be that in doing this, they were too prolix. But the company was not found wanting in this respect; it was, at least, equally to blame. In any event, this factor ought not, and apparently did not, affect the approach, inherent in the judgment of the full court, that the fate of the costs of prayer 1 (b)(i) should

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be tied to, and be determined by, the outcome of prayer 1 (b)(ii).

There is a third reason, as far as the main argument is concerned, for it failing. It proceeds on the assumption that the company be regarded as the successful party. I do not think that this was the effect of the waiver, on behalf of the Schimpers, of their (ex hypothesi) right to an (interim) interdict. It was not an admission of defeat. It was dictated by practical considerations. Once they had the protection of a permanent interdict, in terms of prayer 1 (b)(ii), an interim interdict under prayer 1 (b)(i) became redundant. Indeed, its grant would have led to

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the incongruous situation of an action having to be instituted for a permanent interdict when the latter had already been ordered. In the result, this course has been avoided.

This brings me to that part of the appeal concerning the award of costs of the interdict granted in terms of prayer 1(b)(ii). The court a quo (especially at 546 fin - 549 F), endorsed the finding of Erasmus J that the extra-statutory permission was invalid and that the company therefore had no right to extend its mining activities over the farm as a whole. There apparently being no alternative argument that, in any event, only interim relief should have been granted, the appeal

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against this part of the judgment of the court of first instance was, as I have said, dismissed. Before us, however, the submission was that a final interdict was not justified; the principle of Fourie vs Olivier (supra) should not have been applied; oral evidence might be available and was receivable to interpret Act 73 of 1964 and in particular to show that, in practice, the Act was construed in accordance with the company's contentions (as advanced in and referred to by the court a quo) and that what the company was engaging in, and what the extra-statutory permission related to, was merely prospecting and not mining; accordingly, only an interim interdict should have been granted; costs

should thus have been in the cause.

The initial problem that I have with this argument is that, somewhat paradoxically, counsel did not ask, or at least press, that the permanent interdict, under prayer 1(b)(ii) be set aside. I am not sure that this does not *per se* preclude the point now taken. This aside, however, it has, in my view, no merit. No doubt, the principle of *Fourie vs Olivier* (*supra*) (the correctness whereof was queried in *Du Plessis v Administrateur-Generaal SWA en Andere* 1980(2) S A 35(SWA) at 42, but followed in *South West African Peoples Democratic United Front en 'n Ander v Administrateur-Generaal, Suidwes-Afrika, en Andere* 1981(2) S A 570(SWA)

at 577)) has to be applied with circumspection. Indeed, as counsel told us, on appeal in that matter, the full bench of the Transvaal (whose judgment is not reported), holding that oral evidence of the circumstances surrounding the entering into of the agreement there in issue, and on the basis of which the interdict had been granted, might be relevant to its interpretation, substituted an interim order. Here, the position is otherwise. The whole tenour of the company's own allegations is that what the extra-statutory permission authorised it to do, and what it was proposing to do in terms thereof, was to extend its mining activities. The principle relied on by Mr Maritz, namely, that it may

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be permissible to look at the manner in which a statute is applied and understood in practice, in order to interpret it (as to which see Steyn, Die Uitleg van Wette, 5th ed, 157-9), does not avail him. An essential prerequisite to its application is that the legislation be unclear or ambiguous. It was not submitted that Act 73 of 1964 was in this way defective in any relevant respect. My conclusion is that both courts were fully entitled to grant a final interdict on prayer 1 (b)(ii) and, with it, the costs thereof (including, for the reasons given, those incurred in respect of prayer 1(b)(i)).

To sum up thus far, I am of the opinion

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that there is no reason to disturb the court a quo's award of 90% of the costs of the application to the Schimpers, and that the appeal against it must fail. On a broad and robust view of the matter, this is a fair result. It was the company that initiated the dispute by blocking the furrow and threatening to extend its mining activities. It, through its attorneys' uncompromising letter of 24th April 1981, prompted, and indeed, instigated the application. To their credit the Schimpers resisted the request to bring it urgently. The outcome thereof was, for all practical purposes, the re-instatement of the furrow and, through the grant

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of prayer 1(b)(ii), the curtailment of the company's activities to the fenced-off area. By and large then, the proceedings that gave rise to the orders for costs, now in issue, terminated in favour of the Schimpers. Seeing they were originally seeking only interim relief, they should not have claimed the costs of the application in their notice of motion, but, in the light of the ultimate, justifiable grant of a permanent interdict in terms of prayer 1(b)(ii), this mattered not.

The complaint that the costs of appeal in the court below should not have been apportioned, can be briefly dealt with. There is a general rule

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that an appellant who succeeds in having the judgment substantially altered in his favour, is entitled to the costs of appeal to an extent dependent on the circumstances of the case (Mahomed v Nagdee 1952(1) S A 410(A) at 420 E). It is apparent (from 551 C - D of the reported judgment) that the approach of the court a quo was that it did not apply because the company was not substantially successful. In my view, no fault can be found with this, or with the decision, in the circumstances, to apportion the costs of appeal, or with the percentage thereof. The appeal against the judgment of Erasmus, J, was an all-embracing one. Whilst it succeeded to the extent that the award of costs of

the application against it was reduced to 90% thereof, and the permanent interdict, in terms of prayer 1 (b)(i), was, in substance, altered to an interim one, it failed in major respects. The appeals against the grant of prayer 1 (b)(ii), the dismissal of the counter-application and the striking out of Cooper's affidavit, were dismissed. In the result, therefore, the company remained permanently restrained from proceeding with its proposed mining activities; what was achieved by it, on appeal, was insubstantial. In appeals against costs, the question is whether there was an improper exercise of judicial discretion by the court whose order is brought into question, (Ward v Sulzer 1973(3) S A (A) 701 at 707 A). I am satisfied there was not.

In a recent notice (dated 28th November 1985) the Schimpers made certain formal concessions in favour of the company. These included the amendment of the order for costs of the application, so that the apportionment, in their favour, be reduced to 80 : 20; and the alteration of the order on the application for leave to appeal, from one that the costs thereof be costs in the cause, to one that the company be awarded 30% thereof, the balance to be costs in the cause. These are to be construed as a pro tanto and unconditional abandonment of the original orders, and not merely as tenders, so to do. No acceptance thereof by the company was

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therefore necessary. Presumably, they were made ex abundanti cautela with a view to safeguarding the Schimpers' costs in this court. In the view taken, that was not necessary. However, for the reasons stated, they must be given effect to. Certain aspects of the order of the court a quo need clarification, or correction. These, too, I propose to incorporate in the re-drafted order, which follows.

The result is that the following composite order is made:

(A) The order of Erasmus J is altered to read:

(1) Prayer 1(a) of the notice of motion is refused;

(2) No order is made on prayer 1 (b) (i) thereof;

(3) In regard to prayer 1 (b)(ii), a permanent interdict is granted, restraining the first respondent from carrying on mining, as opposed to prospecting operations in terms of the Precious Stones Act 73 of 1964, under the authority of the so-called extra-statutory permission (referred to in the application) outside the mine and servitude areas (as described in the first applicant's founding affidavit) of the farm "The Monastery" in the district of Marquard, prior to the proclamation of a mine thereon in terms of the said Act.

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(4) First respondent's counter-application is refused;

(5) The affidavit of Peter Gordon Leith Cooper is struck out with costs;

(6) First respondent is to pay 80% of the applicants' costs of the application, and applicants are to pay 20% of first respondent's costs thereof.

(B) As ordered by the court a quo, the appellant (i e the company) is to pay 60% of the costs of appeal thereto, and the first and second respondents (the Schimpers) are to pay 40% of the appellant's costs thereof.

(C) The first and second respondents are to pay 30% of the appellant's costs of its application for leave

to appeal to this court; the balance of the costs of that application are to be costs in the appeal.

(D) The appeal to this court is dismissed with costs.

NESTADT, AJA

RABIE, CJ)
)
JANSEN, JA)
) CONCUR
JOUBERT, JA)
)
BOSHOFF, AJA)