IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 11554/2014

In the matter between:

DANIEL JACOBUS LUKAS JACOBS	1st Applicant
LOURETHA JACOBS	2nd Applicant

And

TRANSAND (PTY) LTD	1st Respondent
MOSSEL BAY MUNICIPALITY	2nd Respondent

JUDGMENT DELIVERED ON 14 NOVEMBER 2014

YEKISO, J

[1] On 2 July 2014, and by way of a notice of motion issued out of this court, the applicants instituted these proceedings for interdictory and other ancillary relief. The first respondent opposes the relief sought. Whilst the second respondent does not oppose the relief sought, it had nonetheless taken the position that it be served with further processes in these proceedings through its attorneys of record. Further, the second

respondent, through its attorneys of record, made its offices available for any information the parties in dispute might have required.

[2] On 12 August 2014 this court, per Gamble J, issued a rule *nisi* calling on the respondents to show cause to this court, if any, why an order in the following terms should not be confirmed and made final:

[2.1.] an order interdicting and restraining the first respondent from conducting or permitting the conducting of any mining activities on Portion 11 (a portion of Portion 1) of the Farm Hartenbosch 217, known as Kleingeluk, in the district of Mossel Bay, Western Cape ("the farm"), unless and until authorisation has been granted under the Land Use Planning Ordinance, 15 of 1985 ("Land Use Planning Ordinance") or the scheme regulations promulgated thereunder authorising the land to be used for such activities;

[2.2.] an order directing the first respondent to pay the costs of this application, except in the event of opposition by the second respondent, in which case the respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved;

[2.3.] an order granting the applicants such further and/or alternative relief as may be deemed appropriate.

[3] Transand opposes the relief on the basis that the property which is the subject of these proceedings has never been zoned Agriculture 1 in terms of the scheme regulations; that the property does not appear on a zoning map as described in section 10 of the Land Use Planning Ordinance, nor in a register as described in section 12(1) of the Land Use Planning Ordinance; the *"zoning certificate"* that the applicants rely upon, merely purports to confirm the alleged zoning of the property as Agricultural 1, whereas, in fact, no document exists containing a recordal that the property has been zoned Agricultural 1; and that the zoning of the property has been determined, pursuant to the provisions of section 14(1) of the Land Use Planning Ordinance, by the relevant council concerned, as Industrial zone 3, comprising an area of approximately 181 hectares; and Agricultural zone 1, comprising an area of approximately 59,42 hectares.

[4] The applicants, who are married to each other in community of property, are the owners of the farm referred to in paragraph [2.1] above. The right on which the applicants rely for the relief sought is based on the contention by the applicants that the mining by the first respondent [Transand (Proprietory) Limited ("Transand")] on the property is unlawful because mining is not a permitted use of the property under the Land Use Planning Ordinance. This is because the property is zoned Agriculture Zone 1 in terms of the zoning scheme regulations promulgated in terms of section 8 of the Land Use Planning Ordinance and that mining is not a permitted use under that zoning. In the alternative, the applicants contend that the property has no zoning under the zoning scheme and, consequently, it has no lawful use right at all.

[5] The contention boils down thereto that the mining activity may only be undertaken on the farm if it is appropriately zoned for that activity or if an appropriate departure has been given and is current in terms of Land Use Planning Ordinance. In support of this contention, the applicants state in their founding affidavit that the farm is zoned Agriculture Zone 1 in terms of the applicable zoning scheme and mining is not a land use permitted as of right in that zone. In the alternative, so the applicants contend, the farm has no zoning, in which case there is no right to mine on the farm.

[6] In support of the contention that the zoning of the farm is Agriculture Zone 1, the applicants rely on two zoning certificates dated 8 September 2009 and 21 January 2014, as well as the approval of a departure application by the predecessor of the second respondent, the South Cape District Council, on 5 May 1999. The applicants contend that in terms of that decision, the zoning ascribed to the farm was that of Agriculture Zone 1.

THE PARTIES

[7] The first applicant describes himself in the founding affidavit as an adult male farmer residing at the farm Kleingeluk within the magisterial district of Mossel Bay. The second applicant is the first applicant's spouse, to whom she is married in community of property and similarly resides at Kleingeluk, Mossel Bay within the magisterial district of Mossel Bay. The first and the second applicant are the registered owners of the farm referred to in paragraph [2.1] above.

[8] The first respondent is Transand (Pty) Limited ("Transand") a private company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its registered office at 10 Church Street, Mossel Bay, Western Cape. Transand carries on the business of mining stone quarries for stone, gravel and sand. It is the holder of a mining right issued under the Minerals and Petroleum Resources Development Act, 28 of 2002 ("the Petroleum Resources Development Act") in respect of certain sections of the farm.

[9] The second respondent, the Mossel Bay Municipality, is a local authority duly established in terms of the Local Government: Municipal Structures Act, 117 of 1998, and the municipality as contemplated in section 2 of the Local Government: Municipal Systems Act, 32 of 2000, with its principal place of business at 101 Marsh Street, Mossel Bay. The municipality is cited for any possible interest it may have in the relief sought by the applicants. No relief is sought against the municipality, save for an order of costs in the event of it opposing the relief sought.

THE BACKGROUND FACTS

[10] Transand has conducted mining operations on a limited portion of the farm for decades. On 15 October 1974 Transand and the previous owner of the farm, Olaff Engelbertus Meyer, concluded a notarial lease of mineral rights which was subsequently registered against the title deed of the property. Clause 1 of the notarial lease reads as follows:

> "Dat die eienaar hiermee toestem dat die maatskappy geregtig sal wees om, in die uitoefening en eksploitasie van sy regte onder hierdie ooreenkoms, agente en/of

subkontrakteurs aan te stel om namens die maatskappy laasgenoemde se regte uit te oefen, op voorwaarde egter dat die maatskappy verplig sal word teenoor die eienaar om al sy verpligtinge teenoor die eienaar na te kom en uit te voer. Die maatskappy bly verplig en gebonde onder the kontrak, maar die maatskappy kan subkontrakteer."

[11] On 2 April 2002 Transand was granted a mining licence in terms of the Minerals Act, 50 of 1991, and on 31 August 2012 the mining licence was converted into a mining right in terms of the Petroleum Resources Development Act in respect of certain sections of the farm. The property was never zoned for mining activities. In 1998 Transand applied, on behalf of the former owner of the farm, for a temporary departure in terms of section 15 of the Land Use Planning Ordinance for its mining activities which it had then planned to expand.

[12] On 30 March 1999 the Director: Planning & Economic Development of the Mossel Bay Representative Council (the predecessor of the Municipality of Mossel Bay) produced a report in respect of that application. Annexed to the report are comments on the application by various departments and other stakeholders, as well as a motivation and comments by Transand, maps and diagrams of the mining area on the farm for which the departure was sought. The report of the Director: Planning & Economic Development recommended that the application for departure be approved subject to a list of conditions. One of the conditions was that the zoning of the farm would be determined as Agriculture Zone 1.

[13] The recommendation of the Director: Planning & Economic Development was accepted by the Mossel Bay Representative Council at a meeting held on 15 April 1999. At that meeting, it was resolved to recommend to the South Cape District Council that the departure be approved for a period of 6 years subject to a list of conditions set out in a document described as annexure 1 annexed to the report. The zoning of the farm as Agriculture Zone 1 was one of those conditions. The recommendation was, in turn, accepted by the Executive Committee of the South Cape District Council at its meeting held on 5 May 1999 and noted by the full council of the South Cape District Council held on 27 July 1999.

[14] The departure lapsed in May 2005. There is no evidence of any further departure which permits zoning being granted, or of any rezoning of the farm from Agriculture Zone 1 to a zone which permits mining. During June 2013 Transand indicated that it was planning to extend its mining activities on areas C and D on the farm as well as the approaches to those areas. The applicants objected to the proposed extension of mining activities. Correspondence between the parties and the Department of Mineral Resources ensued but the matter was not resolved.

[15] During August 2013 Transand requested the municipality to determine the zoning of the property as Industrial Zone III in terms of section 14 of the Land Use Planning Ordinance. The first applicant objected to that request and its processing was suspended by the municipality until such time that it was supported by the applicants as the owners of the farm.

[16] On 17 June 2014 Transand's attorneys of record addressed a letter to the applicant's attorneys of record confirming that Transand would extend its mining activities into areas C and D. In response to that letter, and by way of a letter dated 30 June 2014, the applicants' attorneys informed Transand that the zoning of the farm does not permit mining activities in the absence of land use authorisation for that activity. An undertaking not to conduct mining activities in the absence of such authorisation was requested by no later than 17h00 on 1 July 2014. No undertaking was provided and, consequently, on 2 July 2014, the applicants launched these proceedings.

[17] The application for a rule *nisi* served before Gamble J on 8 August 2014. On that occasion the applicants relied on two zoning certificates dated 8 September 2002 and 21 January 2014 in support of the contention that the zoning of the farm is Agriculture Zone 1. At the hearing of the rule *nisi* Transand produced an unreported judgment of a Full Bench of this Court in the form of *Frenvest cc & others v Smith & others* Appeal Number A476/96 handed down on 20 February 1997. The existence of this authority was not known to the applicants or their legal advisors. To the knowledge of the applicants' legal advisors that decision has never been reported; is not available on the South Africa Legal Information Institute (saflii.org) website; and has never been referred in any other decision which has been reported or which is available on saflii.org.

[18] On the basis of that authority the Full Bench of this Division held that a zoning certificate issued by a municipality such as the one issued by the Mossel Bay Municipality was not sufficient proof of the zoning of a property, and that evidence of a decision by the relevant council in respect of the zoning of the property concerned was required. Once they became aware of the need to produce that evidence, the applicants instructed their attorneys to undertake searches and to identify and consult with the municipal officials who could shed light on the decision of the Executive Committee of the South Cape District Council taken on 5 May 1999.

[19] In the course of such search the applicants' legal representatives managed to find the minutes of the meeting of the Mossel Bay Representative Council (the predecessor to the Mossel Bay Municipality) held on 15 April 1999. In terms of paragraph 29 of those minutes, the Mossel Bay Representative Council took a decision to recommend to the South Cape District Council that an application by Transand for a temporary departure be approved, subject to conditions listed in annexure 1 to the Director's report recommending approval of such temporary departure. On 5 May 1999 the South Cape District Council approved the recommendation by the Mossel Bay Representative Council subject to those conditions listed in annexure 1 thereof. The full council of the South Cape District Council noted the approval by the Executive Committee of the South Cape District Council on 5 May 1999. Item 9 of the conditions listed in annexure 1 to the Director's report records that the zoning ascribed to the property shall be Agriculture Zone 1.

[20] There are further facts that are worth mentioning within the context of background material preceding the launching of these proceedings. These relate to the dispute between the first applicant and Transand about the mining activities that appear to have been in existence for many years. On 6 August 2001, the first applicant launched an application in this court under case number 0926/2001 wherein the first applicant, amongst other relief sought, asked for an order confirming the cancellation of the notarial lease of minerals registered against the title deed of the property. It appears that that application was dismissed with costs (per Van Heerden J as she then was) without the Court finding it necessary to deal with the merits on the basis that the first applicant had launched motion proceedings notwithstanding the awareness of material disputes of fact that inevitably would arise.

[21] A further fact worth mentioning is the conclusion of the agreement between the first applicant and Transand during April 2004. That agreement was intended to resolve several disputes which had existed and remained unresolved between the applicants and Transand. That agreement included a clause in terms of which the applicants undertook not to institute legal proceedings against Transand arising from mining activities conducted on the property.

[22] On 13 August 2013 Transand's attorneys addressed a letter to the second respondent (Mossel Bay Municipality) seeking confirmation that the portion of the property that was subject Transand's mining right, was in fact zoned Industrial Zone 111. That letter was followed by a process which commenced on 9 September 2013 in

terms of which the Municipality informed all interested parties that it intended to grant the following split zoning to the property:

"Besonderhede van voorstel

Geagte verdeelde sonering

1. Nywerheidsone 111 – ongeveer 181 hektaar gedeelte aan die hand van die mynbou bedrywighede wat sedert 1974 op die eiendom bedryf word (Transand)
2. Landbousone 1 – 'n ongeveer 59,4200 restant."

[23] A further fact worth mentioning is that the applicants are holders of a 30% interest in a company known as Onifin (Pty) Ltd which unsuccessfully applied, during March 2010, for a mining right in respect of the same property where Transand is currently conducting its mining activities. That application was unsuccessful. An appeal against the refusal of that application appears to be still pending. It is thus against this background material that I have to make a determination if the applicants have made out a case for the interdictory and other ancillary relief sought in the notice of motion.

REQUISITES FOR A FINAL INTERDICT

[24] The requisites for the right to claim a final interdict are trite and these are:

[24.1.] A clear right – the first requisite to be established for the granting of a final interdict is a clear or definitive right. In order to establish a clear right the applicant has to prove on a balance of probability facts which in terms of substantive law, establish the right relied on. It has been held in authorities such as *Capital Estate & General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 (2) SA 916 (AD) 930-932 that whether an applicant has a right is a matter of substantive law.

[24.2.] An injury actually committed or reasonably apprehended – A reasonable apprehension of injury is one which a reasonable man might entertain faced with the facts; the test is thus objective, and the applicant need not establish on a balance of probabilities that injury will follow.

[24.3.] The absence of any other satisfactory or adequate remedy (*The Law of South Africa*, 2nd Edition Vol 11 paras 394 -399).

THE RIGHT ASSERTED BY THE APPLICANTS

[25] On the basis of the evidence on record it appears that the right on which the applicants rely is based thereon that the mining by Transand on the property is unlawful because mining is not a permitted use of the property under the provisions of the Land Use Planning Ordinance and the Zoning Scheme Regulations promulgated thereunder. In the alternative, the applicants contend that the property has no zoning under the Zoning Scheme Regulations and, consequently, it has no lawful use rights at all.

[26] In an attempt to show that the mining activity conducted by Transand on the property is unlawful, the applicants initially relied on the two zoning certificates issued by the Mossel Bay Municipality dated 8 September 2009 and 21 January 2014. However, in the light of the judgment of the Full Bench of this Court in *Frenvest,* supra, the applicants have since established that on 15 April 1999 the Mossel Bay Representative Council, based on the report of the Director: Planning & Economic

Development, recommended to the Executive Committee of the South Cape District Council that it approve the application by Transand for a temporary departure; that on 5 May 1999 the Executive Committee approved the temporary departure; and that, on the basis of such approval, the permitted land use of the property was determined Agriculture
Zone 1.

[27] During 1998 Transand had applied for a temporary departure in terms of section 15(1)(b) of the Land Use Planning Ordinance to permit mining on a 16ha portion of the property. The applicants contend that it was within the context of the approval of that application by the Executive Committee of the South Cape District Council on 5 May 1999, that a determination was made that the permitted land use of the property was Agriculture Zone 1. The applicants accordingly contend that the mining activity conducted by Transand on the property is unlawful on the basis that the property has never been zoned or rezoned for a mining activity.

[28] In contending that the Executive Committee of the South Cape District Council determined the land use of the property as Agriculture Zone 1, apart from the minutes of Mossel Bay Representative Council and those of the Executive Council, the applicants rely on the evidence, in the form of an affidavit, of Henry Hill

[29] Henry Hill states in his affidavit that he is currently the Manager, Regional Development and Planning of the Eden District Council, the latter being a successor-in-

law to the South Cape District Council. During 1999 he was the Deputy Director of the South Cape District Council and he was directly involved in the consideration and determination of the zoning of properties in terms of section 14 of the Land Use Planning Ordinance. He states in his affidavit that at that stage the determination of the zoning of farm properties was done on ad-hoc basis. It was general practice at the time not to make a zoning determination of a farm property until there was an application either for a relaxation, departure or consent use in relation to that property.

[30] When the application for a departure in relation to portion 11 of the farm Hartenbosch was received, he visited the farm to determine its utilisation. In relation to farm properties generally, a determination in terms of section 14 of the Land Use Planning Ordinance was done after considering the utilisation of the farm on 1 July 1986, which included the granting of the most restrictive zoning which would permit such utilisation. He states further in his affidavit that the application for a departure could not be considered without a determination of the zoning of the property in terms of section 14 of the Land Use Planning Ordinance. A section 14 determination and the consideration of the departure application would thus normally be done simultaneously.

[31] Hill cannot now remember what precisely was done to determine the utilisation of the property on 1 July 1986. However, he is certain that the limited areas on which mining was taking place when he visited the farm in 1999 in relation to the total area of the farm would have been considered, as well as the fact that the then current

application was for the extension of the existing quarry, which was an indication that up till then the extension areas had not been mined.

[32] Hill further refers to paragraph 4 of the report of the Director: Planning & Economic Development of the Mossel Bay Representative Council dated 30 March 1999 which contains a recommendation that the zoning of the subject property should be Agriculture Zone 1. He attended the meeting of the Mossel Bay Representative Council on 15 April 1999 which recommended the granting of the departure subject to those conditions listed in annexure 1 to the Director's report. He notes that paragraph 9 of those conditions states that the zoning of the subject property shall be Agriculture Zone 1 and thus, has no doubt that the Mossel Bay Representative Council took a decision to recommend that the zoning of the property shall be Agriculture Zone 1.

[33] The evidence of Hill is in direct contrast to that of Stefan de Kock who deposed an affidavit for Transand. De Kock is the author of the report which served before the Mossel Bay Representative Council at its meeting of 15 April 1999. He states that the purpose of the report was to assist the District Council in considering and determining the application for a departure use in respect of the property in order to allow the carrying on of mining activities thereon. When he drew the report he, as well as all his colleagues in the planning department of the District Council, merely assumed that the property, and all other land outside the township area of Mossel Bay, was zoned agricultural. There did not exist, at the time, any zoning map or other document that reflected the zoning of the property as Agriculture Zone 1. He states that the purpose

or focus of the report was not to zone or rezone the property but to assist the District Council in considering and determining the application of the departure use.

[34] Paragraph 1.2 of De Kock's report contains the following statement:

"Die huidige grensgroef word reeds vanaf 1974 op die eiendom bedryf en geen boerdery aktiwiteit vind op die eiendom plaas nie. Gedeeltes wat reeds gemyn word is hoogs versteurd en min, indien enige, natuurlike plantegroei bestaan."

[35] At the meeting of the Mossel Bay Representative Council on 15 April 1999, so states De Kock in his affidavit, the utilisation of the property, as reflected in paragraph 1.2 of the report and the annexures thereto, was considered by the Council and accepted when the application for a departure by Transand was determined. He states that there was no decision by the Council to zone or rezone the property. He goes on to say that the decision regarding the application for departure in terms of section 15 of the Land Use Planning Ordinance is reflected in paragraph 29 of the minutes and was premised on the basis that the then existing zoning of the property was Agriculture Zone 1, and the temporary departure was from the zoning so mistakenly ascribed. Finally, De Kock states that no zoning of the property as Agriculture Zone 1 in terms of the Land Use Planning Ordinance was effected or a resolution to that effect taken.

[36] Based on the evidence of De Kock, *Mr Olivier* SC (with him *Mr* Vivier) for Transand, submitted that the contention by the applicants that at the meeting of the Mossel Bay Representative Council on 15 April 1999 a determination was made with regards to the use of the property gives rise to a factual dispute. Based on this

submission, it is contended on behalf of Transand that having regard to (a) the allegation by De Kock that no zoning or rezoning of the property was considered at that meeting; (b) the contents of his report; and (c) the fact that the minutes of that Council meeting neither reflect that zoning or rezoning of the property was considered, or that a decision to that effect was taken, or, even further, that a resolution to that effect was taken, gives rise to a dispute which has to be decided on Transand's version based on De Kock's evidence.

[37] *Mr Breitenbach* SC (with him *Ms Van Huyssteen*), on the other hand, submits that the factual allegations raised in De Kock's affidavit, to the extent that they are in conflict with the allegations raised in Hill's affidavit, fall to be disregarded or rejected and that Hill's version should be accepted. Two reasons are advanced for this proposition, the first being, although De Kock's affidavit was procured in an attempt to meet Hill's affidavit, De Kock does not refer to Hill's affidavit, let alone grapple with the relevant factual allegations made in Hill's affidavit. The point being made in this submission is the fact that De Kock does not deal in his affidavit with factual allegations made in Hill's affidavit, and resigns himself to the fact that everyone at that meeting (the meeting of the Mossel Bay Representative Council) merely assumed that the property was already zoned Agriculture Zone I and that no decision was taken to determine Agriculture Zone I as its zoning, at best, is akin to a bare or general denial, the point being made that the affidavit of Hill was deposed to on 19 August 2014 whilst that of De Kock was deposed to on 22 August 2014.

[38] Hill, in his affidavit, refers to the limited areas on which mining was taking place; that the application that was considered by the Mossel Bay Representative Council was for the extension of the existing quarry; and that the section 14 determination and the consideration of the departure was normally done simultaneously. It is thus submitted on behalf of the applicants that De Kock does not refer to this factual allegations in his affidavit. Based on this submission, it is contended on behalf of the applicants that the failure by De Kock to seriously and unambiguously address those facts contained in Hill's affidavit which Transand seeks to dispute, does not give rise to a genuine and *bona fide* dispute of fact, the applicants relying on the authority of *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) paragraphs [12] to [13] for this proposition.

[39] Heher JA in *Wightman,* supra, puts the position as follows at paragraph [13]:

> "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

Based on this authority, I am urged by the applicants to reject De Kock's evidence and accept the evidence based on Hill's affidavit.

[40] A further point made by *Mr Breitenbach* in his submissions is that the allegation that everyone at that meeting merely assumed that the subject property was already zoned Agriculture Zone I and that no decision was taken to determine its zoning, is clearly untenable because (a) it is inconsistent with the contents of the key

contemporaneous documents relating to that meeting and (b) De Kock does not even refer to the inconsistencies contained in Hill's affidavit, let alone make any attempt to explain them. The first inconsistency is the recommendation in the Director's report and the subsequent resolution to recommend that the application for departure be approved subject to those conditions listed in annexure 1 to the Director's report.

[41] With regards to the contention that in 1999 there was an incorrect assumption that the property had an Agriculture Zone I zoning, Transand relies on the fact that the Director's report, at the first page thereof, states: "Huidige sonering: Landbou sone I." This may very well have been the basis of an assumption that the property was zoned Agriculture Zone I. But it does not detract from the fact that when the application for departure was considered, a resolution was subsequently taken to recommend to the Executive Council of the South Cape District Council to approve the application subject to those conditions listed in annexure 1 to the report, one of those conditions being that the zoning of the property shall be Agriculture Zone I.

[42] The ninth of those conditions listed in Annexure 1 to the Director's report does not state that it was noted that the zoning ascribed to the property is Agriculture Zone I. It is stated, in very specific language, that the zoning of the property shall be Agriculture Zone I, from which the application for a temporary departure was recommended, which recommendation was subsequently approved by the Executive Council and, ultimately, noted by the Full Council at its meeting of 27 July 1999.

[43] It therefore follows, in my view, the question as to whether the subject property was zoned Agriculture Zone 1, should be decided on the basis that on 15 April 1999 the Mossel Bay Representative Council resolved to recommend to the Executive Council of the South Cape District Council that Transand's application for a temporary departure be approved on condition that the property shall be zoned Agriculture Zone I; that on 5 May 1999 the Executive Council of the South Cape District Council accepted the recommendation of the Mossel Bay Representative Council that the zoning of the property be determined Agriculture Zone 1 in terms of section 14 of the Land Use Planning Ordinance; and that the Full Council of the South Cape District Council, at its meeting of 27 July 1999, noted the approval by its Executive Council of the recommendation by the Mossel Bay Representative Council.

[44] Finally, there is a matter of debate which arises from the affidavit of Bertus du Toit of the applicants' attorneys of record. Du Toit states in this affidavit that the fact that the Full Council of the South Cape District Council, at its meeting of 27 July 1999, merely noted the minutes of the meeting of the Executive Council of 5 May 1999, and did not confirm such minutes, gives rise to an inference that the Full Council may have delegated its decision making powers to the Executive Council. The record of those minutes state that the Full Council notes the minutes of the meeting of the Executive Council on 5 May 1999. There is no need for me to determine the merits or demerits of that debate. The issue with regards to which organ of the then South Cape District Council has decision making powers is not an issue before me for determination. That issue would be pertinent to review proceedings. The issue for determination before me

is whether the applicants have made out a case for the relief sought in the notice of motion and not the review of the extent of powers each organ of the South Cape District Council had in 1999.

TRANSAND'S ALTERNATIVE SUBMISSION

[45] Transand's alternative submission is based on what the municipality had anticipated to be a "notice and comment" process. On 13 August 2013, Transand's attorneys requested the municipality to confirm ("vir die goeie orde") that that portion of the property that was subject to Transand's mining rights, was zoned Industrial III in terms of section 14(1) of the Land Use Planning Ordinance in view of the fact that the property has been utilised for mining purposes since 1974. In response to that letter, and per its letter dated 9 September 2013 under the heading "to whom it may concern" the municipality informed all interested parties that it intended to grant a "split zoning" of the property in terms of section 14(1) of the Land Use Planning Ordinance. The intended split zoning was to be that of Industrial Zone III, which would permit a mining activity, and Agriculture Zone I.

[46] In the course of that process, Transand was required to obtain and submit to the municipality a written power of attorney from the applicants as the owners of the property. The applicants refused to furnish Transand with the required power of attorney. Once the applicants refused to give the required power of attorney, the process was not proceeded with. That notice was also published in the Mossel Bay Advertiser of 13 September 2013.

[47] Based on this process, which could not be finalised because of the refusal by the applicants to furnish the required power of attorney, it is contended on behalf of Transand that the communication of that notice to all interested parties and the publication thereof in the Mossel Bay Advertiser, clearly indicates that the municipality had made a determination of the utilisation of the subject property as contemplated in section 14(1) of the Land Use Planning Ordinance; and the fact that the municipality did not complete the process, does not detract from the fact that the municipality has, as a matter of fact, already determined the utilisation of the property as Industrial Zone III over and above utilisation thereof as Agriculture Zone I.

[48] *Mr Olivier*, in argument before me, was at pains to attempt to persuade me to accept that once the municipality decided to adopt and commence the "notice and comment" process, that in itself clearly indicates that a determination had been made to grant the zoning in terms of section 14(3) of the Land Use Planning Ordinance; and the fact that the process could not be finalised due to the fact that Transand could not obtain a power of attorney in regard thereto from the applicants, as the municipality had requested it to do, does not detract from the fact that the municipality had determined the utilisation of the property as being Industrial Zone III, which permits mining activity, and Agriculture Zone I.

[49] Section 14 of the Land Use Planning Ordinance under the heading "Use Rights" provides as follows:

"14. (1) With effect from the date of commencement of this ordinance all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the council concerned.

(2) (a) ...

(b) ...

(c) ...

(3) When land is deemed to be zoned as contemplated by sub-section (1), (2), (4)(d) or (5) of this section or section 16(2)(h) or 40(4)(c), the most restrictive zoning permitting the utilisation of the land concerned either in conjunction with a departure or not, as the council concerned may determine, shall be granted.

(7) Notwithstanding the applicable provisions of section (2)(b) and 40(4)(c) and of subsections (1), (2), (4)(d) and (5) of this section and subject to the provisions of subsection (6) of this section, land being utilised in conflict with the use right thereof, shall be deemed to have the lawful use right thereof; provided that where the lawful use right cannot be determined, use right shall be granted to the land concerned by way of rezoning in terms of section 16 or 18."

[50] In essence, Transand's submission with regards to the purported determination of use boils down thereto that in 1999 the South Cape District Council determined, under section 14(1) of the Land Use Planning Ordinance, that the utilisation of the property on 1 July 1986 was mining, but made no further determination under section 14(3) of the Land Use Planning Ordinance of the most restrictive zoning permitting

mining, with the result that the property has a deemed zoning of Industrial Zone III under section 14(1) of the Land Use Planning Ordinance which permits mining.

[51] It would therefore appear that Transand's approach is that section 14(1) and section 14(3) of the Land Use Planning Ordinance govern two distinct legal processes. Based on this approach Transand submits that when a municipality determines a utilisation in terms of section 14(1), there is a deemed zoning, and unless the section 14(1) deemed zoning is followed by a determination of the most restrictive zoning in terms of section 14(3), the more expansive section 14(1) deemed zoning stands.

[52] The applicants refute this approach as being untenable and incompatible with the approach adopted in authorities such as *Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs & Development Planning, Western Cape, & Others* 2007 (6) SA 65 (C) 72D-G and 80 G-I where it was held that both the section 14(1) process and the section 14(3) process must be completed for there to be a deemed zoning.

[53] Thring J, in *Hangklip Environmental Action Group,* supra, at 72E-G, made the following observation with regards to the interpretation and the application of the provisions of section 14(1) and (3) of the Land Use Planning Ordinance:

> "This process, whilst not described or specified in detail in the ordinance or the scheme regulations, entails in my view an enquiry of a purely factual nature into the purpose for and manner in which the land referred to was actually being used as at 1 July 1986: the process does not seem to me to require or permit the exercise of a discretion by the

local authority, or the expression of an opinion, or an exercise in speculation. Once the local authority has factually determined the utilisation of the land as at the relevant date in terms of section 14(1), it grants a zoning permitting of the utilisation of the land concerned which is the most restrictive zoning in terms of section 14(3). This is a separate and distinct process which may call for exercise of a discretion by local authority. But this second decision cannot be validly arrived at, in my view, unless the first step, the determination of the utilisation of the land as at the relevant date, has first been properly taken."

[54] And at 80G-H, Thring J further observes:

"As I have said, the third and first respondents were required, for the purpose of granting a zoning to the fourth respondent's land under section 14(1) and 14(3) of LUPO to embark on a process which comprised two separate stages; first a purely factual enquiry into the utilisation of the land as at 1 July 1986; secondly, and thereafter a choice of zoning which would be in accordance with the utilisation of the land as it had been determined by the third or first respondent."

[55] Based on *Hangklip Environmental Action Group,* supra, it would appear that what is required in a determination under section 14(1) is the utilisation of the land on 1 July 1986 followed by a determination under section 14(3) of the most restrictive zoning, with or without a departure, compatible with that utilisation. It therefore would appear that the section 14(1) determination alone is insufficient for there to be a deemed zoning.

[56] The further difficulty with Transand's submission that during 1999 there was a deemed zoning of Industrial Zone III under section 14(1) of the Land Use Planning Ordinance, is that there is no evidence in support of that submission. The Director's report on which Transand appears to rely neither refers to Industrial Zone III nor any such deemed zoning. The recommendation by the Mossel Bay Representative Council, and accepted by the Executive Council, similarly makes no reference to Industrial Zone III either. Furthermore, no evidence has been adduced of a decision by the relevant council in respect of the zoning of the property concerned in support of a contention that the subject property has since been ascribed Industrial Zone III land utilisation. And, lastly, a contention by Transand that a zoning determination was made of the subject property during 1999 flies in the face of the evidence of De Kock, based on his affidavit, to the effect that, at that meeting, there was no decision about the zoning of the property.

[57] I, therefore, conclude that the zoning of the subject property was determined during 1999. That determination was based on the recommendation of the Mossel Bay Representative Council; which recommendation was subsequently approved by the Executive Council; and, ultimately, noted by the Full Council of the South Cape District Council at its meeting of 27 July 1999. That determination was that the zoning of the property shall be Agriculture Zone 1, which does not permit mining.

[58] In *Maccsand (Pty) Ltd v City of Cape Town & Others* 2012 (4) SA 181 (CC) the Constitutional Court confirmed that in terms of the Land Use Planning Ordinance mining

may be undertaken if the land in question is appropriately zoned, and that in addition to a mining right granted in terms of the Mineral & Petroleum Resources Development Act, 28 of 2002, authorisation is also required in terms of the Land Use Planning Ordinance before any mining related land use may be undertaken.

[59] It therefore follows, in my view, that, based on the evidence, the applicants have succeeded to establish a clear right in that, in respect of the subject property, there is no zoning, departure or other use right which permits mining activities on the farm. It therefore follows that the mining activities that are currently conducted by Transand on the subject property constitute a contravention of the applicable scheme regulations.

[60] Section 39 of the Land Use Planning Ordinance prohibits contravention of a zoning scheme. Section 39(2)(a) provides as follows:

> "(2) No person shall—
>
> (a) contravene or fail to comply with—
>
> (i) the provisions incorporated in a zoning scheme in terms of this Ordinance, or
>
> (ii) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934, except in accordance with the intention of a plan for a building as approved and to the extent that such plan has been approved."

The section furthermore places an obligation on the municipality to enforce the provisions of the Land Use Planning Ordinance and any applicable scheme regulations promulgated thereunder.

[61] The contravention of section 39(2) of the Land Use Planning Ordinance is an offence which is subject to those penalties provided for in section 46 of the Land Use Planning Ordinance. Section 46(1)(a) provides :

> "46(1) A person who—
>
> (a) contravenes of fails to comply with the provision of section 23 (1), 33 (12), 35 (2) or 39 (2), or
>
> (b) threatens, resists, hinders or obstructs, or uses foul, insulting or abusive language towards a person in the exercise of a power under section 41 or refuses or fails to answer to the best of his ability a question put to him in terms of the said section, shall be guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

It therefore follows that the mining activity conducted by Transand on the subject property constitutes an offence.

THE PACTUM DE NON PETENDO

[62] It is contended on behalf of Transand that the applicants are not entitled to rely on any right based on their ownership of the subject property. This is because the applicants are bound by a *pactum de non petendo* in the agreement concluded between

the applicants and Transand during April 2004 in terms of which the applicants undertook not to launch any legal proceedings in respect of Transand's mining activities on the farm.

[63] The applicants' response to Transand's contention is as follows: At the time the 2004 agreement was concluded the mining on the subject property was lawful because the 1999 departure, which was due to expire during May 2005, had already been granted. The controversy between the parties which preceded the conclusion of the agreement was limited to Transand's alleged non-compliance with certain of the conditions on which the departure had been granted. That agreement, as a whole, and hence the *pactum de non petendo* contained in that agreement, was not directed towards future activity which was entirely unlawful, as for an example, because no land use right existed. If it was, so it is contended on behalf of the applicants, the *pactum* is *contra bonos mores* and, consequently, unenforceable.

[64] In the second instance, so the submission goes further, the agreement was premised on the continued existence of the 1974 notarial lease, which required the landowners' permission for the expansion of the mining into the arable lands. Following the conversion of the notarial lease into a new mining right in terms of the Mineral & Petroleum Resources Development Act, Transand has taken up the attitude, in correspondence with the Department of Mineral Resources and the applicants, that it no longer requires the landowners' permission because its new mining right is unrestricted. Based on this attitude, it is contended on behalf of the applicants that the agreement as

a whole does not cater for the situation which has now arisen and, consequently, the *pactum* does not preclude interdictory proceedings such as these arising from statutory and administrative developments which were not within the contemplation of the parties when the agreement was concluded. Based on these submissions, it is thus contended on behalf of the applicants, the circumstances on the basis of which the *pactum de non petendo* would be invoked, do not arise and that, in any event, the agreement as a whole was not directed to towards future activity which was entirely unlawful.

[65] Furthermore, and this is my personal view which does not arise either from the pleadings or from the evidence, section 34 of the Constitution of the Republic of South Africa, 1996, guarantees everyone's right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This is a fundamental right contained in the Bill of Rights which can only be limited in terms of a law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The 2004 agreement concluded between Transand and the applicants is no such law.

[66] It therefore follows, in my view, that the applicants' rights in the property, including the right to institute these proceedings, is not precluded by the *pactum de non petendo* contained in the agreement concluded between the parties during 2004.

AN INJURY COMMITTED OR REASONABLY APPREHENDED

[67] The applicants state in their affidavits that Transand's mining activities are causing extensive and permanent damage to the farm, to the remaining game on the farm, its vegetation and farming activities. They go on to state in their affidavits that, as at the time they deposed their affidavits, Transand had been digging a 40m deep trench and a retaining ridge which cannot be remedied and which, ultimately, will permanently dissect the farm without any right to do so. They go on to state that apart from the fact that the mining activities on the property have been unlawful since May 2005, such activity constitutes a criminal offence from which Transand has profited extensively for many years. They conclude by stating that Transand should not be allowed to flout the provisions of the Land Use Planning Ordinance to its financial advantage, and, thus, to profit from its unlawful conduct.

[68] The applicants' efforts to get the municipality to enforce the provisions of the Land Use Planning Ordinance have not yielded any positive results. Requests to Transand that it undertakes to suspend mining activities in the absence of land use authorisation have similarly yielded no positive results. Thus, they contend, there is no other remedy available to them other than the relief sought in the notice of motion.

[69] It is common cause that Transand has been conducting mining activities on the subject property since on or about 1969. In the course of that mining activity, Transand became contractually bound to several entities to whom it supplies material consisting of sand and stone from the subject property. These entities, in turn, are totally

dependent on Transand for the supply of the material for purposes of their construction activities. Transand employs approximately 110 workers who are totally dependent on it for their income. The granting of the relief sought will no doubt terminate Transand's income from the mining activities on the property which inevitably will cause severe prejudice to all those entities to which Transand is contractually bound, including its employees. This begs the question whether the interdict, if granted, could be suspended to afford Transand an opportunity to bring its mining activities within the realm of legality.

[70] In *Lester v Ndlambe Municipality* [2014] 1 All SA 402 (SCA) para 21 to 28, the Supreme Court of Appeal confirmed a long line of decisions which had held that a court does not have a discretion to suspend the operation of an interdict where the conduct complained of constitutes a criminal offence. Harms J, as he then was, puts the position as follows in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) at 347F-H:

> "It follows from an analysis of these cases that discretion can, if at all, only arise under exceptional circumstances. Furthermore, I am not aware of any authority which would entitle the court to suspend the operation of an interdict where the wrong complained of amounts to a crime."

[71] In paragraph [61] above I determined that the mining activity conducted by Transand on the property constitutes an offence. Whilst this Court has on occasions suspended the operation of an interdict in circumstances where the conduct complained of constitutes an offence, as had happened in *Intercape Ferreira Mainliner ((Pty) Ltd &*

Others v Minister of Home Affairs & Others 2010 (5) SA 367 (WCC); and *410 Voortrekker Road v Minister of Home Affairs* 2010 (4) SA 414 (WCC), such suspension has been limited to those instances where the rights of vulnerable groups, such as the refugees, have had to be safeguarded. Otherwise to suspend the operation of an interdict, in circumstances where the conduct complained of constitute an offence, would be to countenance an illegality. Whilst Transand will suffer prejudice in no small measure as a result of the order which will ensue, such prejudice has to yield to the primacy of the rule of law. As Harms JA puts it in *New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at para [63] p 270 D-E, we are, however, a nation that subscribes to the primacy of the rule of law and all measures to that end must comply with the principles of legality.

[72] Arising from the evaluation of the evidence as a whole I am of the view that the applicants have made out a case for the relief sought in the notice of motion. In the result, I make the following order:

[72.1.] The first respondent is interdicted and restrained from conducting or permitting the conducting of any mining activities on portion 11 (a portion of Portion 1) of the farm Hartenbosch 217, known as Kleingeluk, in the district of Mossel Bay, Western Cape, unless and until authorisation has been granted under the Land Use Planning Ordinance, 15 of 1985 or the Scheme Regulations promulgated thereunder authorising the land to be used for such activities;

[72.2.] The first respondent is ordered to pay the costs of these proceedings, on a party and party scale, duly taxed or as agreed, including costs consequent upon employment of two counsel.

N J Yekiso
Judge of the High Court