IN THE LAND CLAIMS COURT OF SOUTH AFRICA
[HELD AT CAPE TOWN]

CASE NO: LCC 37/2003

Heard on: 27 August 2013
Delivered on: 8 November 2013

In the matter between:

THE MACASSAR LAND CLAIMS COMMITTEE	Applicant
And	
MACCSAND CC	First Respondent
THE GOVERNMENT OF THE RSA	Second Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
THE CITY OF CAPE TOWN	Fourth Respondent
THE EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN	Fifth Respondent
THE MUNICIPAL MANAGER OF THE CITY OF CAPE TOWN	Sixth Respondent
THE CITY OF CAPE TOWN ECONOMIC, ENVIRONMENTAL & SPACIAL PLANNING	Seventh Respondent

WESTERN CAPE PROVINCIAL Eighth Respondent

GOVERNMENT

JUDGMENT

MPSHE AJ

A INTRODUCTION

[1] This is an application in terms of section 6(3) of the Restitution of Land Rights Act (the "Act"). This application is premised on the fact that the continued mining operations conducted by first respondent if not stopped will defeat the achievement of the object of the Act. This in my mind, is centred around the departure application lodged by the first respondent with the fourth respondent regarding Erf 1197 Macassar in the Western Cape Province.

[2] The Notice of Motion reads as follows:

1. Dispensing with the provisions of the Rules prescribing forms, service requirements and time limits for applications and disposing of this matter at a time and place and manner and in accordance with a procedure (which must as far as practicable be in accordance with the Rules) as it considers just.

2. A *Rule nisi* be issued calling upon the first and fourth respondents to show cause on a date to be determined, at the Western Cape High Court, why an order in the following terms, should not be granted:

   2.1 Declaring that the first respondent is not entitled to mine erf 1197 Macassar, without having a temporary departure of the zoning of agriculture to permit mining and declaring that first and fourth respondents are not permitted to change the zoning of erf 1197 Macassar.

   2.2 Setting aside the application for a departure of the zoning of erf 1197 Macassar, under application no: 222703.

   2.3 Should the first, fourth, and seventh respondents not withdraw the application for a temporary departure of the zoning of erf 1197 Macassar from agriculture to permit mining, that they be found to be in contempt of this Court's order dated 28 August 2003, under case number LCC37/2003 and sanctioned in the discretion of the Court.

2.4 Alternative to paragraph 1.3 and only in the event of this Court not granting prayer 1.3 above, interdicting first and fourth respondent from considering the application for a temporary departure of the zoning of Erf 1197 Macassar from agriculture to permit mining.

2.5 Varying the order of this Court dated 14 August 2007, permitting the first respondent to mine erf 1197 Macassar, by deleting clauses 3(a)(i), (ii) and (iii) and (iv) thereof, annexure "G" to the attached application.

2.6 That this matter proceed to trial, the date of the commencement of which to be agreed at a pre-trial conference.

2.7 Alternative relief.

2.8 Costs of suit against any respondent t, only if it oppose the relief sought.

3. That paragraphs 1.1, 1.2, 1.4 and 1.5 above operate as an interim interdict, pending the return of the *Rule Nisi*.

B BACKGROUND

[3] A land claim in relation to various properties, including Erf 1197, was lodged on 3 March 1997 by the late Joseph Abraham de Wet on behalf of the "gemeenskap" in his capacity as chairperson of the Faure District Community Association – now known as the Macassar Land Claims Committee. The claim was accepted and published in General

Notice 293 in GG23177 of 1 March 2002 and revised in General Notice 932 in GG23493 of 5 June 2002.

[4] Erf 1197 contains vast deposits of sand which makes it suitable for said mining. On 6 January 2000 first respondent, obtained a mining right from the Department of Mineral and Energy Affairs. It was originally issued in terms of section 9(1) read with section 9(3)(e) of the Minerals Act, No. 50 of 1991 ("the 1991 Act") and was valid until January 2005.

[5] This is the third application regarding Erf 1197 Macassar. In all of these applications the issue is regarding mining operation by the first respondent. The first application including the current application are aimed at stopping the first respondent, mining operations in the belief that continuation thereof will undermine the land claim lodged by the MLCC, the applicant.

[6] I do not intend giving the whole background as the same has been captured sufficiently in the second application[1].

C. THE ISSUES

[7] I will deal with issues as directed by relief sought within the respective prayers.

[8] Applicant seeks a declaratory order stopping first respondent from continuing with the mining operations without a temporary departure authorizing the same.

[1] Maccsand CC v Macassar LCC (37/03) [2007] ZALCC 19

[9] It is a fact that first respondent does not have the temporary departure as contemplated in section 15(1)(a)(ii) of the Land Use Planning Ordinance 15 of 1985(LUPO).

[10] First respondent obtained a mining lisence valid until January 2005 on the 6 January 2000 in terms of section 9(1) read with 9(3) of the Minerals Act 50 of 1951 (‘the 1991 Act”).

[11] Since after obtaining the lisence, first respondent commenced with mining operations uninterrupted save after the judgment of MOLOTO, J in 2003. First respondent’s explanation to non-compliance with LUPO is that, first respondent was made to believe that there was no need to obtain permission from the fourth respondent in accordance with LUPO. The said belief was the result of Department of Minerals view that LUPO approval was not necessary whilst the local and provincial government held the contrary view.

[12] It is indeed true that provincial government took a contrary view having regard to the contents of the letter[2] dated 14 January 2000.

[13] The letter “SI” clearly advices first respondent to apply for a temporary departure. However, the advice was not heeded. It cannot be said that first respondent did not know about compliance with LUPO before mining could commence.

[14] However, despite the fact that first responded did not heed the advice; mining commenced and the matter enjoyed audience in different

[2] Page 311 & 312 of the record Annexure 51 & 52

courts from 2003 up to 2007 and the compliance or otherwise with LUPO was never determined at any of these fora[3] until 2012 when the Constitutional Court finally made a ruling[4]. **Maccsand (Pty) Ltd of Cape Town** held that: "*Therefore in terms of LUPO, mining may only be undertaken on land if the zoning scheme permits it (or a departure is granted). If not, rezoning of the land must be obtained before the commencement of mining operations. The zoning that permits that land be used for mining does not, however, license mining, nor does it determined mining rights. The role played by LUPO is limited to the control and regulation of the use of land*". It would therefore not be out of line for me to conclude in favour of the first respondent and hold that first respondent was under the impression that LUPO need not be complied with given the fact that the mining lisence fell within the competence of national government whilst LUPO fell within the provincial or local competence.

[15] I am called upon first to declare that first respondent is not entitled to mine Erf 1197, Maccasar, without having a temporary departure of the zoning of agriculture to permit mining.

[16] Secondly that first and fourth respondent are not permitted to change the zoning or land use zoning of Erf 1197 Maccasar.

[17] In the light of the Constitutional Court decision *supra*, it is pellucid that mining may only take place if allowed by the zoning scheme, if not then a departure is to be obtained. The first respondent had already commenced with the mining operations for a period of ten years then.

[18] First respondent realizing the importance of the Constitutional Court judgment *supra,* then decided to lodge an application with the fourth

[3] See in particular Macassar Land Claims Committee v Maccsand CC & Others (37/03) record page 1993 paragraph 20

[4] Maccsand (Pty) LTD v City of Cape Town 2012 (4) SA 181 (CC)

respondent for a temporary departure[5]. I need to mention further that the departure application would also be responding to the provisions of section 25(d) of the Minerals and Petroleum Resources Development Act ("MPARA").

[19] The departure application is intended to rectify the situation regarding compliance with LUPO. The departure application was lodged almost two months after the Concourt judgment. The departure application was received by fourth respondent who commenced with the processing thereof until being made to stop the process by the applicant. At no stage did fourth respondent stop first respondent from mining.

[20] First respondent has not to date obtained the departure permission. The logical consequence is to stop first respondent from continuing with mining.

[21] However, before ordering he said stoppage I have to consider all relevant facts in as far as prejudice is concerned. Applicant has an interest in the land claim whilst first respondent's interest is in the continued mining operations. I necessarily have to consider the prejudice that may befall the applicant should I refuse to stop the mining. Similarly, the prejudice to be suffered by the first respondent should I order immediate stoppage is of importance.

[22] Applicant has a substantial interest in Erf 1197. It expects, if physical restoration is ordered, to receive the land as it previously was before the mining operations could commence. It would like to, I suppose, utilize the land as before prior to the dispossession.

[5] Record pp. 200 - 227

Undoubtedly, mining operations have a tendency of changing the landscape and occasion damage to the land for any further proper utilization in the form of agricultural use for human subsistence. If this is allowed to happen, prejudice will befall the applicant.

[23] However, the order in the judgment of PIENAAR, AJ[6] amending that of the Supreme Court of Appeal provides a remedy. The order reads as follows:

> *"1. Paragraph 3(a) of the current Order is amended to read as follows:*
>
> > *"3(a) Pending the finalization of the claim for restitution of Erf 1197, Macassar, to the applicant, an interim interdict be issued against Maccsand:"*
> >
> > *3(a)(i) Interdicting Maccsand from continuing to mine sand on Erf 1197, Macassar, save for the area demarcated as Strips C to F on the General Site Layout Plan dated March 1997, which Maccsand shall be entitled to mine, on condition:*
> >
> > *3(a)(ii) that sum of R120 000is set aside in the trust fund established in terms of the Minerals Act, No. 50 of 1991, for purposes of rehabilitating Strips C to F on completion of mining on cach respective strip; and*
> >
> > *3(a)(iii) that such rehabilitation is in compliance with the approved Environmental Management Programme and done to the satisfaction of the Department of Mineral and Energy Affairs.*
> >
> > *3(a)(iv) Maccsand is given leave to approach this Court for a further variation of this paragraph as soon as the mining strips C to F and the rehabilitation thereof is complete."*

[6] Supra at note 1

2. No order as to costs."

[24] I have no doubt that continued mining will cause irreparable harm to the land but that harm has been catered for in the order above. Applicant would in addition be entitled to damages if need be to address the issue of harm.

[25] On the other hand first respondent is a close corporation mining sand from Erf 11197 for the building industry in the Western Cape Province. The financial survival of first respondent is dependent on the continued mining of the sand. It is common cause that substantial amounts of money have been invested in this project. Expenses have been incurred in the commencement of the operations. The mining operations has created employment to residents who may suffer harm should operations be stopped. I need not table in detail the harm that may befall the first respondent save to say that an abrupt stoppage of a business operation has dire financial consequences. I cannot think of any remedy in favour of the first respondent.

[26] Whilst in agreement that first respondent is not entitled to mine without the necessary departure approval, I am not inclined to permanently stop continued mining for the reasons set out above.

[27] I have difficulty in dealing with the second part of prayer 2.1. In my opinion the second part contradict the first part. The first part on its own formulation implies that first respondent in order to continue mining must first obtain the temporary departure approval whilst second part directs that first respondent be not allowed to apply for the same to enable further mining. The formulation of this prayer is unfortunate.

[28] There is a pending temporary departure application lodged by the first respondent. The fourth respondent has not taken any administrative decision on the application. There is consequently no decision before me to be set aside. I have to consider , however the issue whether this court has the authority to set aside the departure application lodged.

[29] The departure application is in the hands of the fourth respondent to decide upon. This Court has no jurisdiction to deal with and decide on the applications, neither can this court withdrawn or cause to be withdrawn an application lodged with fourth respondent.

[30] I have no evidence before me to justify an interdict against the fourth respondent from considering the departure application. In any event, fourth respondent has already made an undertaking in writing and *viva-voce* that it will not process the application any further pending the finalization of this application.

D. ON CONTEMPT OF COURT

[31] On the 28th August 2003 MOLOTO, J gave order 3(b) as follows:

> "(*b) that the first and second respondent, be interdicted from attempting to rezone, rezoning or considering any land use change application or development or Erf 1197, Macassar, except with the approval and consent of the applicant"*[7]. (***my emphasis)***

[7] Record pp 65 Annexure "E"

[32] In the month of June 2012 first respondent launched an application for a temporary departure from the zoning of Erf 1197 as agricultural to permit mining[8] in accordance with section 15(1)(a)(ii) of ("LUPO").

[33] Fourth respondent received the temporary departure application and set it in motion[9]. It is on the basis of actions of first and fourth respondents that contempt of this court is based.

[34] Contempt of court is said to be the violation of the dignity, repute or authority of the Court. It can be *ex facie curiae or in facie curiae*. In *casu,* the contempt is *ex facie curae* in the form of failure to comply with an order of court. The purpose of contempt proceedings is to enforce the courts orders by requiring compliance. The common law of contempt has been developed by CAMERON JA (as he then was) in *FAKIE N.O v CC 11 SYSTEMS (PTY) LTD* 2006(4) S.A 326 (SCA) .

[35] In order for the applicant to succeed in contempt proceedings, applicant must show that the order of Court with which respondent has failed to comply had either been served personally or has come to the respondent's personal notice, further that the respondent has neglected to comply with the court's order or disobeyed the same[10].

[36] In the FAKIE N.O *supra* CAMERON J then stated as follows[11]:

"*To sum up:*

[8] Record pp 200 Annexure "O"
[9] Record pp 182
[10] Heberstein & Vanwinsen Volume 2 5th Edition page 1103
[11] Forbid at p. 344H – 345B

(a) The civil contempt procedure is a valuable and an important mechanism for securing compliance with court orders, survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order, service or notice; non-compliance; and willfulness and ***mala fides****) beyond reasonable doubt.*

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and ***mala fides****: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and* ***mala fide****, contempt will have been established beyond reasonable doubt.*

(e) A declaratory and other appropriate remedies remain available to a civil applicant on a proof on a balanced of probabilities".

[37] It is common cause that an order was made against first and fourth respondents. Also that the said order was brought to their attention and they knew about the same. I confine myself only to the alleged contempt by first and fourth respondents.

E. FIRST RESPONDENT

[38] Applicant has served first respondent with letter of demand calling upon first respondent to withdraw the departure application or "not to

proceed with the application for a temporary departure[12].....". This was intended to allow first respondent to purge itself of the alleged contempt.

[39] First respondent submit that the non-compliance was neither willful nor *mala-fide*[13].

[40] Mr Rose-Innes for the first respondent submits that first respondent has not failed to comply with the 3(b) order of MOLOTO, J. He asserts that order 3(b) does not talk of departure but of rezoning, that the proper interpretation does not prohibit an application for a temporary departure[14]. He further submits that the departure application is not zoning nor rezoning of Erf 1197. I am inclined to agree in as far as zoning or rezoning is concerned but hold a different view as to the non-provision for departure application in the 3(b) order.

[41] The second part of the 3(b) order reads:

"or considering any land use change application or development of Erf 1197. Macassar, except with the approval and consent of the applicant. " (my underlining).

[42] In (LUPO) "departure" is defined as

"(a) an altered land use restriction –

(i) Imposed in terms of section 15(1)

(ii) ……..

(iii)

(b) a use right granted on a temporary basis in terms of section 15(1)

[12] Record pp 191 ANNEXURE "M"
[13] First Respondent's Heads of Argument p.47 par.120 and p.52 par. 135
[14] Transcript p.55 lines 19 - 25

> *"Use right "in relation to land, means the right to utilize that land in accordance with the zoning thereof including any departure".*

[43] The Oxford dictionary gives the meaning of "change" as "alteration". The word "change" in the 3(b) order should be read as meaning alteration as used in the definition of "departure". The import of 3(b) order is therefore aimed at preventing any alteration to the use of the land Erf 1197. I am satisfied that departure application is implied in order 3(b).

[44] In defence it is submitted that first respondent did not willfully nor with mala-fide fail to comply with the order 3(b) of MOLOTO, J, because it had actually forgotten about the said order[15]. The basis for forgetting is said to be found in the fact that the 3(b) order was granted 10 years ago. Further that whilst leave to appeal against both 3(a) and 3(b) order of MOLOTO, J, was granted only 3(a) was pursued in the SCA. A further reason advanced is that due to numerous applications between the parties, the 3(b) order got forgotten in the process.

[45] On the issue of not pursuing this 3(b) order in the SCA I can only come to a conclusion that it may be that any rezoning or alterations land use was not contemplated then by the first respondent in 2003 and up to the hearing in the SCA. First respondent acted inadvertently despite the fact that the matter has been dealt with by the same lawyers and had dragged with a history beginning in 2003. However, inadvertence is not entirely excusable but may have an effect on the element of willfulness and discharge the same[16]. I therefore find there was no willfulness on the part of the respondent.

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[15] Answering Affidavit p.402 par 101
[16] Putco LTD v TV & Radio Guarantee CO (Pty) LTD 1985 (4) SA 809 at 836 E-F

[46] In defence reference to the land claim settlement is made. It is submitted that the said settlement made first respondent to believe that the land claim issue was out of the way and therefore excluding the provisions of sections 6(3) and 38E of the A ("the Act").

[47] The settlement issue is said to be inadmissible and irrelevant and must be struck out. It is further submitted by Mr Krige for the applicant that the settlement proposal were inchoate and incomplete, is neither fixed nor certain and does not settle all issues. Further that the settlement proposal is done without prejudice.

[48] On the 5th April 2013 applicant wrote letters to first respondent[17] regarding the settlement proposal.

F. WITHOUT PREJUDICE AND PRIVILEGE

[49] It was held by Combrik J in *Jilli v South African Insurance Co Ltd*[18] at page 275B-D"

> "No conclusive legal significance attaches to the phrase 'without prejudice'. The mere fact that a communication carries that phrase does not per se confer upon it the privilege against disclosure, for example where there exists no dispute between the parties or it does not form part of genuine attempt at settlement (Merry v Machin 1926 NPD 236; Schmidt Bewysreg 2nd ed at 552-3); nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of settlement negotiations".

[17] Record p. 554 Annexure "MD26" and p. 349 Annexure "Y".
[18] 1995 (3) SA 269 (N)

[50] The phrase itself does not confer privilege but it is the context in which it is used. In fact the context is of such significance that it was so held Tshabalala JP in *Lynn & Main Inc. v Naido and Another*[19]

> "Now, a general rule, negotiations between parties, whether oral or written, which are undertaken with a view to a settlement of their disputes or differences, area privileged from disclosure. This is so, whether there are express stipulations that they shall be without prejudice or not".

[51] *In Naidoo v Marine & Trade Insurance Co. Ltd*[20] the Appellate Division per Trollip JA found that communications between parties in process of a settlement agreement rendered without prejudice are inadmissible. The rationale for this rule it was found lay in public policy, this being that parties to disputes are to be encouraged to avoid litigation and all expenses, delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank negotiations without fear that, that if the negotiations fail, any admissions made by them during discussion will be used against them in ensuring litigation[21]. Often such admissions are classified or described as privilege communications (albeit not correctly but conveniently)[22].

[52] In *Lynn & Main Inc v Naidoo and Another* [23] it was agreed that in order to render a privileged statement inadmissible the following requirements must be met:

(a) a dispute between the parties;

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[19] 1995 (3) SA 269 (N
[20] (1978) 666 (A)
[21] Supra note 4 at p677C-E
[22] Supra note 4 at p677E
[23] 2006 (1) SA 59 (N)

(b) a communication (oral or written) containing both:

(i) an admission;

(ii) an offer to achieve a compromise.

(c) Which is bona fide ("genuine negotiations")[24]

[53] If a communication meets the above requirements it would thus be inadmissible in litigation. Such is in line with public policy as discussed in the *Marine & Trade Insurance* case whereby prospective litigants will be less willing to attempt to settle if they could not do so fully or frankly without fear of their admissions being held against them.

G. ADMISSIBILITY

[54] Like all general rules, there are exceptions whereby an offer made without prejudice, adorned with a name 'without prejudice' can be admissible in evidence. Such exceptional circumstances were mentioned by Trollip JA in *Marine & Trade Insurance* where he held that:

> "It is true the purpose for which a party desires to adduce a "without prejudice" communication is all-important, for in exceptional circumstances it may well admitted in evidence despite the general rule in order to prove, for example, that it contains a threat, an act of insolvency, or possibly other matters that it would be contrary to public policy to protect from being admissible"[25]

[24] See Brauer v Markov 1946 TPD 344 at 350-355, Schikkard & van der Merwe Principle of Evidence 2nd Ed (2002) at 298-299.
[25] Supra note 20 at p677B-C

[55] Not every communication marked 'without prejudice' in the course of negotiation will be inadmissible. A more interesting exception occurred in *Gcabashe v Nene*[26] whereby negotiation that occurred without prejudice amounted in a settlement agreement. The Court per James JP held that:

> "Negotiations without prejudice are, of course, designed to resolve disputes between the parties and if the negotiations result in a settlement then logically evidence about settlement leading up to it should be available to the trial Court because the whole basis of non-disclosure has fallen away."[27]

[56] Therefore if matter is subsequently settled the basis of non-disclosure falls away and the contents of the negotiations are admissible.

[57] I am satisfied that reference to the settlement negotiations is to be struck out. Having dealt with all the evidence advanced by first respondent regarding contempt of court. I come to the conclusion that the evidence does not establish a reasonable doubt to exclude willfulness and mala-fide. The applicant has discharged the onus.

H. FOURTH RESPONDENT

[58] The charge of contempt against fourth respondent is premised on the fourth respondent's receipt of the departure application.

[59] I again refer to order 3(b) of MOLOTO, J second part thereof

[26] 1975(3) SA 912(D)
[27] Supra note 26 at 914G-H

> *"…….* *considering any land use change application* *or development of Erf 1197 Macassar, except with the approval and consent of the applicant ". (**my emphasis**).*

[60] The fourth or even any of its officials have not considered the application at all. The only action taken is that of the town clerk or secretary acting in accordance with sections 15(2)(a)(b) and (c) of "LUPO".

[61] After compliance with 15(2)(a)(b) and (c) *supra* the application would then be placed before the council or administrator for consideration. That which has happened so far is the collection of information required by the council or administrator to consider whether to grant or refuse the application.

[62] Annexure "M1" on page 189 pends the "processing of application No. 222703". The language herein is very clear.

[63] The letter dispatched by the secretary or town clerk to the owner of the neighbouring property to Erf 1197 is part of the processing of the application and not consideration thereof.

[64] I find no basis whatsoever for any charge of contempt of court against fourth respondent or any of its officials.

I. COUNTER APPLICATION BY FIRST RESPONDENT.

[65] First respondent argued for a rescission alternatively variation of order 3(b) of MOLOTO, J. I will consider only a variation herein on the

basis of changed circumstances after the granting of order 3(b) by MOLOTO, J in 2003. Such counter application states:

> "In the alternative, varying part of the order in respect of paragraph 3(b) handed down by Moloto J to read as follows:
>
> (i) Pending the finalization of the action instituted under Case No: 37/2003 in the Land Claims Court that the Plaintiff be afforded notice of any application pertaining Erf 1197 and be afforded a reasonable opportunity to make representation in relation to such application which must be duly considered by the City of Cape Town."

[66] The issue of the changed mining dispensation is fully canvassed in the previous judgment of the LCC and SCA and I shall not repeat it herein. Of importance is the fact that even if the applicant were to be awarded physical restoration of Erf 1197, the mineral therein found remain the property of the state. The first respondent's mining rights will not be affected thereby unless revoked or cancelled on legal transgressions. The harm that may ensue on the property due to continued mining is well provided for in the SCA and the last LCC orders. In addition to the rehabilitation order, applicant still has a remedy by way of damages.

[67] First respondent is in lawful possession of a mining lisence that is valid for some 10 years. First respondent has been conducting mining operations on Erf 1197 since 2003 and still is. It is not disputed that a vast amount of monies have been invested in the project with the consequent financial obligations to third parties.

[68] The Constitutional court decision of 2012 has introduced a new circumstance that did not prevail at the time of giving of the 3(b) order by MOLOTO, J in 2003. Both the SCA and LCC (MOLOTO,J) judgments did not consider and make a determination on need for land approval, the so-called “conflict of laws” in addition to the mining lisence issued in terms of section 23(1) of the MPRD Act). The compliance with LUPO is now clearly a requirement before mining could commence.

[69] First respondent is now under a legal obligation to comply with the provisions of LUPO. If first respondent fails to do so the consequences for its operations will be devastating. There is nothing in my view that prevents first respondent from complying with LUPO save the 3(b) order of MOLOTO, J.

[70] I fail to understand the attitude of the applicant regarding the compliance with LUPO as declared by the constitutional court. The relief sought is to the effect that first respondent be not allowed to continue with the mining operations without compliance with LUPO. However, if the court agrees with applicant it then means that the court should not allow or give first respondent an opportunity to comply with LUPO. This attitude puts first respondent in the middle of an intersection not knowing which direction to take.

[71] There is no evidence as to progress so far made regarding the land claim. This may, as it is the trend with land claims, take a long time before finalization.

[72] I am satisfied that based on the circumstances outlined herein, a variation is justified.

J. VARIATION OF COURT ORDER DATED 14 AUGUST 2007

[73] The relief sought as per Notice of Motion is to the deletion of clauses 3(a)(i), (ii), (iii) and (iv). However, in argument applicant abandoned variation of orders 3(a)(ii) and 3(a)(iii) and argued for 3(a)(i) and 3(a)(vi).

[74] No reasons are advanced for the said variation to be justified save contents of the founding affidavit[28]. This paragraph reads as follows:

> "Were this new matter to be considered, there can be no doubt about the veracity of the applicant's claim, justifying a variation of this Court's order of 14 August 2007 and the re-instatement of the original order to protect the integrity of the Land Claims Court and its process.

For the reasons mentioned I cannot accede to the variation application.

K. APPLICATION TO STRIKE OUT

[75] There are a number of applications to strike out certain parts in the record by both applicant and first respondent

[76] On striking out application Rule 33(10) to Rules of this provides".

> "The Court may, on application, order to be struck from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court must not grant

[28] Founding affidavit pp 031 pargraph 68.

the application unless it is satisfied that the applicant will be prejudiced in his or her case if it is not granted.

This Rule provides for striking out statements in an affidavit that are scandalous, vexatious or irrelevant. Rule 6(15) of the Uniform Rules is the same as Rule 33(10) and it was dealt with in Vaatz v The Law Society of Namibia, where the Court held as follows[29]:

> "The grounds for striking out as set out in the said Rule are, on a proper constructions, in the alternative viz., scandalous, or vexatious, or, irrelevant. Needless to say allegations may be irrelevant but not scandalous or vexatious. Even if the matter complained of is scandalous, or, vexatious, or, irrelevant, this Court may not strike out such matter unless Respondent would be prejudiced in its case if such matter were allowed to remain.
>
> All those words, "scandalous"' vexatious", "irrelevant" and "prejudice" are words used almost every day in courts of law. The context in which they are used can lead to variations of meaning but basically they have he meanings allotted to them by the Shorter Oxford English Dictionary.
>
> In Rule 6(15) the meaning of these terms can be briefly stated as follows:
>
> > Scandalous matter-allegations which may or may not be relevant but which are so worded to be abusive or defamatory.
> >
> > Vexatious matter-allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

[29] 1991 (31) SA 563 (NM)

> Irrelevant matter-allegations which do not apply to the matter in hand and do not contribute one way or another to a decision of such a matter".

The case above enunciates two requirements that must be met to render the allegation scandalous, vexatious or irrelevant and the first is that the alleged statement must meet the definition of one of the above and secondly the court must be satisfied that the applicant will be prejudiced if the application is not granted. This principle is enunciated in *Webber v Vermaak*[30] by the full bench, when it was stated that:

> "The Court shall not grant the application unless it is satisfied that the Applicant will be prejudiced in his case if it be not granted"

[77] The Court has a discretion whether or not to strike out a document or any portion of it. Such discretion is applied with regard to the object for Rules of Court with a caution against formalism.

[78] Applicant at paragraph 17[31] states the following:

> "It has lee a travesty to permit mining, notwithstanding failure to comply with the provisions of the Land Use Planning Ordinance of 1985 ("LUPO") ……".

[79] Counsel for first respondent submits that such a statement is improper and reflects on this court and the Supreme Court of Appeal. The statement is open to being interpreted as meaning that both this court and the SCA allowed first respondent to continue mining in the face of

[30] 1974(3) SA 207 (O)
[31] Founding Affidavit p.017

non-compliance within ("LUPO"). This plainly put may mean that the courts encouraged contravention of the law.

[80] The statement in my opinion is not scandalous, vexatious nor irrelevant. It is indeed in bad taste. The referral, in my mind to strike the statement out will not prejudice the case of the first respondent[32]. I do not accede to this application.

[81] Firs respondent content that the opinions evidence a contained in reports of GERHARD SWART[33], reference thereof by CALL WILTERS[34] and report by M.C LEGASSICK[35] be struck out as of inadmissible opinion evidence.

[82] I had the opportunity of perusing the said parts of affidavits and reports. I do not intend dealing with all these parts and posters of the affidavits. It suffices to state that they are irrelevant and inadmissible, the contents thereof don't seem to be able to assist the court appreciably[36]. In the case of *Hollinston v Huwthorn & co. ltd*[37] the following was said:

> "It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his

[32] WEBBER v VERMAAK 1974 (3) SA 207 (O).
[33] Annexure P1 & P2 record pp297 – 304
[34] Record p.37 paragraphs 87 & 88
[35] ANNEXURE V record pp 321 - 338
[36] SOUTH AFRICAN LAW OF EVIDENCE D.T ZEFFERT et al LEXIX NEXIS p. 290
[37] [1943] K B 587 [AD], [1943] 2 ALL LR 35 at 595
Vide also HOLTZHAUSEN v ROODT 1997(4) SA 766(W)

> opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not".

[83] I find the said reports and parts of the affidavits to be inadmissible and stand to be struck out.

[84] Applicant moves that paragraphs 6 – 8 of Lionel Egypt's supplementary affidavit be struck out[38].

[85] This is a telephonic conversation between Egypt and Ms Mordell of the City of Cape Town. Mr Krige for the applicant argues that the paragraphs boil down to hearsay and as such stands to be struck out.

[86] I do not find anything suggesting hearsay in the paragraphs. The fact that the matter is that Mr Egypt is telling about the telephonic conversation between himself and Ms. Mosdell. There was a direct communication between them. Position would be different if Mr Egypt was narrating what he had been told by someone else as to what Ms Mordell would have said. If the truthfulness of these passages was to be tested (probative value) it would be Mr Egypt, who would have to tend proof of his ascertain and not any other person.

[87] I find no basis for striking out contents of these paragraphs on the basis of them being hearsay.

[88] Having dispensed with striking out applications I need to mention that decisions arrived at in this judgment were based fully on the evidence before me.

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[38] Record pp 574

[89] It needs to be mentioned further that although certain decisions have ensued against any party herein, the matter revolved to a large extent around the balance of convenience. Fairness to all parties played a role given the peculiar circumstances in this matter and most importantly the history thereof.

L. COSTS

[90] The first respondent argued for costs its favour, whilst applicant did not show much interest. Applicant is financed by the state. The applicant has attained substantial success in this application as compared to first respondent. In the circumstances I will make no order as to costs.

[91] In conclusion I make the following order:

a) The contempt of Court application is dismissed regarding the First and Fourth Respondents.

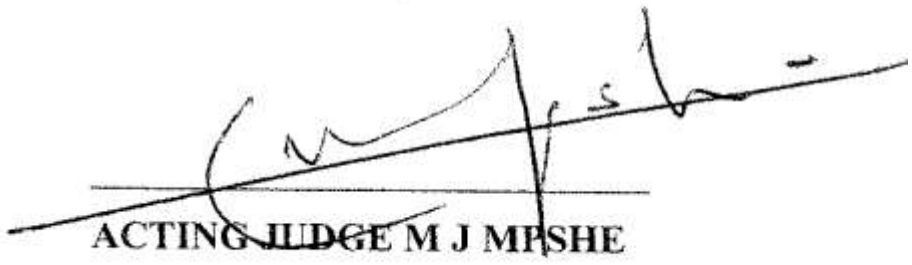
b) It is declared that the mining operation conducted by first respondent on Erf, 1197, Macassar is unlawful by reason of non-compliance with the provisions of ("LUPO") regarding depature on rezoning.

c) The first respondent is interdicted from continuing with the mining operations on Erf, 1197, Macassar, until and unless the land use restriction is obtained in terms of section 15(1)(a) of ("LUPO") to permit lawful mining operations on Erf 1197, Macassar.

d) Order 3(b) of MOLOTO, J dated 28 August 2003 ("MOLOTO judgment") is varied and substituted with the following:

"Pending the finalization of the finalization of the action instituted under case 37/2003 in the Land Claims Court that the Applicant as an interested and affected person be offered notice of any land application regarding [ERF 1197 and be offered a fair and reasonable opportunity to make representations regarding such an application before consideration thereof by the relevant authorities in terms of ("LUPO")]".

e) No order as to costs.



ACTING JUDGE M J MPSHE

For the Applicant: Advocate J Krige

Instructed by: Igshaan Saden Attorneys

For the First Respondent: Advocate Rose-Innes SC

Instructed by: Cliffe Dekker Attorneys

For Fourth-Seventh Respondent: Advocate M Greig

Instructed by: State Attorney Cape Town