IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA] 14/3/2014

CASE NUMBER: 14612/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

2014/03/14 .....

DATE SIGNATURE

In the matter between:

AQUILA STEEL SA (PTY) LTD Applicant

and

SOUTH AFRICAN STEEL COMPANY (PTY) LTD Respondent

JUDGMENT

CILLIERS AJ

Factual background

[2] The Applicant is a private company and the holder of a prospecting right. The prospecting right was granted to it in terms of the provisions of Section 17 of the Act in respect of a prospecting area covering a number of farms in the district of Thabazimbi in Limpopo. This right commenced on 18 July 2007 and it continued to be in force until 17 July 2012.

[3] On 12 April 2012 the Applicant lodged an application for renewal of the prospecting right for a further period of three years. I have been made to understand that the Department of Mineral Resources had, at the time of the hearing of the application, not yet taken a decision on the application for renewal of the prospecting right.

[4] The provisions of Section 18(5) of the Act is clear that it has the effect that the Applicant's previous prospecting right remains in force until the application for renewal has been granted or refused.

[5] The prospecting area defined in the prospecting right comprises a number of farms, amongst them the properties. The entire prospecting area is generally referred to as the Rotterdam Tenement.

[6] At the time that the prospecting right was granted to the Applicant in 2007 the properties were owned by a previous owner thereof i.e. Southern Palace Investments 216 (Pty) Ltd ("*Southern Palace*").

[7] The Applicant commenced iron-ore prospecting activities on the properties shortly after it was granted the prospecting right and it did so with the full support, knowledge and consent of Southern Palace.

[8] Once a prospecting right is granted to a holder, he or she, as soon as that right becomes effective on date of approval of the Environmental Management Plan ("*EMP*"), is entitled to enter the relevant prospecting area together with his or her employees and may bring onto the land any plant, machinery or equipment and build, construct or lay down any surface infrastructure which may be required for purposes of prospecting.[1]

[9] The imperatives of Section 5(4)(c) of the Act, namely to notify the landowner and to follow a consultative process with the landowner is intended to afford a landowner the opportunity of "*softening the blow*" inevitably suffered as a consequence of the granting of a prospecting or other right under the Act. This is the only means afforded in the Act to a landowner to protect his rights as such, barring the mechanisms for the resolution of disputes provided for in the Act.[2]

[10] Post the granting of a prospecting right and before the commencement of prospecting activities on any land which is the subject of such prospecting right, it is accordingly imperative for proper notice of the intention to enter

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1 Sechaba v Kotzé and Others [2007] 4 ALL SA 811 (NC) at 821b.
2 Section 5(4)(c) of the Act; Sechaba v Kotzé and Others (supra) at 821e.

the land for purposes of prospecting to be given to the landowner, followed by a consultative process.[3]

[11] During or about August 2008 the properties were sold to the Respondent.

[12] Immediately thereafter, and on 15 September 2008 the Respondent informed the Applicant that it was aware of the Applicant's prospecting rights over the properties. The Respondent also informed the Applicant that it intended to challenge this prospecting right granted to the Applicant and/or to challenge the Applicant's general conduct in exercising the rights purportedly granted to the Applicant.

[13] The above communication sparked a protracted dispute between the Applicant and the Respondent. It is not necessary to deal with the particularity of these disputes. It suffices to say that, on 22 September 2008, employees of the Respondent changed the locks to the separate entrance gates to the properties that were previously used by the Applicant's employees to enter the properties.

[14] The persisted denial of access to the properties caused the Applicant to launch an urgent application on 21 October 2008 under case number 2008/44438 in which the Applicant applied, amongst other relief sought, for

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3 Sechaba v Kotzé and Others (supra) at 821f-g. This construction was cited with approval in Joubert v Maranda Mining Co (Pty) Ltd 2010 (1) SA 198 (SCA) at 202D-E.

an interdict against the Respondent not to deny the Applicant access to the properties for the purposes of conducting prospecting operations.

[15] In its response to the urgent application the Respondent agreed to allow the Applicant access for the purpose of exercising its prospecting rights, but the Respondent refused to allow the Applicant to have access to the property for any other purpose or for embarking on activities not provided for in terms of this prospecting right and/or activities that clearly exceed its rights in terms of the Act and/or the terms and conditions of the prospecting right.

[16] The outcome of the urgent application was recorded in a court order on 4 November 2008, that reads as follows:

> *"1. The Respondent's undertaking to allow the Applicant access to the properties, being the Remaining Extent of the Farm Koedoesvlei, Farm 128, Registration Division KQ, Limpopo and Portion 3 of the Farm Cornwill 313, Registration Division KQ, Limpopo for the purposes of conducting its prospecting operations on the properties, excluding any further drilling subject to any later amendment of the prospecting rights is made an order of court.*
>
> *2. Costs to be reserved."*

[17] It is common cause that, at the time that the urgent application was pending the Applicant undertook to apply for the amendment of the EMP that formed part of its prospecting right in order to specify the precise area defined as the area where prospecting activities could take place. This include targeting for drill testing in detail as well as the drill hole density and the drill grit. It is

also common cause that the Applicant undertook, pending its application to amend the EMP, not to conduct any further drilling on the properties.

[18] The above undertaking evidently underlies the portion of the court order of 4 November 2008 that excluded drilling activities subject to any later amendment of the Applicant's prospecting rights.

[19] Consequent upon the above undertaking and the court order, the Applicant made an application for an amendment of the EMP.

[20] This amendment was approved by the relevant State Department on 3 September 2009.

[21] The approved EMP provides, in relevant part with regards to the drilling of holes, the following:

(i) The ultimate depth of the prospecting operations is estimated to be in excess of 25m and the extent of each excavation is stipulated to be in excess of 20m x 20m;

(ii) Drilling is authorised to be done on a grid-spaced profile layout with the profile lines spaced at 50m to 75m intervals. A fan of 6 to 10 boreholes is authorised to be drilled per profile line and the area to be drilled was indicated on a specific plan annexed to the EMP. The drilling campaign authorised on the Farm Cornwill 313 KQ is in the

form of resource delineation drilling. Both diamond and percussion drilling are authorised to be conducted;

(iii) The estimated period of time for the prospecting operations is authorised to be in excess of 24 months;

(iv) The noise created from the use of the drilling rig is restricted to daylight hours;

(v) The EMP is approved on the basis that no blasting would take place;

(vi) The EMP was authorised on the basis that any area disturbed by the drill rig would be levelled and roughened to enable grass to grow in it again and potentials for erosion would be minimised by appropriate surface shaping;

(vii) The prospecting of iron-ore is authorised to only take place within the approved demarcated mining or prospecting area.

[22] It is not disputed by the Respondent that, after approval by the relevant department of the amended EMP on 3 September 2009, it continued to deny access to the Applicant to the properties for the purpose of it exercising its prospecting rights.

[23] In March 2010 the Applicant made arrangements for drilling rigs to complete the prospecting program on the properties.

[24] On 25 March 2010 further negotiations were commenced with between the Applicant and the Respondent. It is not required to deal with these negotiations or to take them into account as relevant to the outcome of these proceedings.

[25] In the meantime and whilst the parties endeavoured to reach a compromise (and thereafter) the Applicant took no further steps to acquire access to the properties.

[26] On 28 January 2011 a notice appeared in the Thabazimbi Local Newspaper, Die Kwêvoël. In this notice the commencement of a public participation process was announced in terms of the Environmental Impact Assessment Regulations with regards to a project that was to be undertaken by the Respondent on the Farm Cornwill. The project was described as "*metallurgical plant for the production of steel products from iron-ore and coal and associated activities.*"

[27] The publication of the above notice caused the parties to again commence with negotiations.

[28] The further negotiations also came to naught.

[29] Up to and inclusive of October 2008 – the date since the Applicant was last granted access to the properties for the purpose of prospecting activities – the Applicant drilled thirty boreholes on the properties and it established a

prospecting site and access roads. The prospecting site and the access roads could not have been rehabilitated by the Applicant since October 2008 by reason of the fact that it was not permitted to have access to the properties.

[30] The present application was launched during or about March 2013.

The Applicant's right to access to the properties to exercise its rights as holder of a prospecting right

[31] Section 5(4) of the Act reads as follows:

> *"(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –*
>
> *(a) An approved environmental management program or improved environmental management plan, as the case may be;*
>
> *(b) A reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and*
>
> *(c) Notifying and consulting with the landowner or lawful occupier of the land in question."*

[32] It is clear that once a person is in possession of an approved environmental management program or approved environmental management plan (as the case may be), as well as a valid prospecting right issued to it and after it has notified and consulted with the landowner or lawful occupier of the land in question, such a person is entitled to prospect for any mineral or petroleum

and to commence with any work incidental thereto. The exercise of this right is then subject only thereto that it has to be executed within the ambit of the prospecting right and the approved environmental management program or approved environmental management plan.

[33] In terms of the provisions of Section 5(3)(a) of the Act the holder of a prospecting right, once it had been granted to it, and as soon as that right becomes effective on the date of approval of the EMP, is entitled to enter the relevant prospecting area together with his or her employees. The holder of the prospecting right is also then entitled to bring onto the land any plant, machinery or equipment and build, construct or lay down any surface infrastructure which may be required for purposes of prospecting.[4]

[34] In my view the Applicant complied with all the provisions of Section 5(3)(a) and Section 5(4) of the Act.

[35] Firstly the provisions of Section 18(5) of the Act makes it plain that the Applicant's previous prospecting right remains in force until the application for renewal thereof has been granted or refused. This has not been done to date hereof. In consequence the Applicant's prospecting right is still in force. Secondly it is clear from the facts that the Applicant notified and consulted with the previous owner of the properties i.e. Southern Palace, at the time

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[4] Sechaba v Kotzé and Others (supra) at 821c.

when the Applicant acquired the prospecting right. The Applicant had access to the properties for the purpose of exercising all of its rights as the holder of the prospecting right in respect of the properties. In my view it was not required of the Applicant to consult again with the new owner of the properties or to notify the new owner of the properties at the time that the Respondent acquired ownership of the properties during or about August 2008. The Applicant had, by that time already complied with the imperatives of the provisions of Section 5(4)(c) of the Act. The Respondent acquired ownership of the properties, subject to this acquired right and imperative that had been complied with by the Applicant. The Applicant did, in my view, notify and consult with the Respondent as the new owner of the properties since during or about September 2008 and, in doing so, the Applicant complied with the imperatives of the provisions of Section 5(4) of the Act-also in respect of the Respondent.

[36] I have already stated that the purpose of the consultative process envisaged in Section 5(4)(c) of the Act is to afford a landowner the opportunity of minimizing the damages inevitably to be suffered as a consequence of the granting of a prospecting or other right under the Act. This, in my view, does not include that consensus during the consultative process is a pre-requisite for the holder of the prospecting right to enter the land on which the prospecting right is granted and to exercise all of its rights in terms of the prospecting right.

[37] If the imperatives of Section 5(4)(c) include that consensus has to be reached between the holder of the prospecting right and the landowner it would make a mockery of the purpose for which the State grants prospecting rights to the holders thereof i.e. the prevalence of State power of control over the mineral resources of the Republic of South Africa and the concomitant ousting of the mineral rights of the landowner and/or the holder of mineral rights.[5] The following should in this regard be borne in mind[6]:

> *"Firstly. We agree that chapter two of the MPRDA contains the fundamental principles subjacent to the legislative approach to the development and Regulatory Regime of the mineral and petroleum resources of the Republic of South Africa. It is our view that the provisions of the act should be interpreted with due regard to the constitutional rights, norms and values the Legislator sought to encapsulate, protect and advance in the act. The more prominent rights, norms and values appear to be the custodial role of the State over the mineral and petroleum resources of the nation and the concomitant disposal of the traditional concept of State and/or individual rights to unexploited minerals....., the State's obligation to protect the environment for the benefit of the present and future generations..... ; the right to equitable access to the natural resources of the country.....; and the right not be deprived of property arbitrarily....."*

[38] In the case of disputes that may arise between the holder of the prospecting right and the landowner the mechanisms provided for in Sections 10(2) and 54 of the Act (which mechanisms are designed to resolve objections or disputes between an Applicant for or a holder of a prospecting right and a landowner) can be followed. There is no evidence on the papers that such dispute resolution mechanism was employed at any stage by the Respondent.

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5 Section 3(2) of the Act.

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[39] It follows from the aforesaid that:

(i) The Applicant is entitled to exercise the prospecting right that it held at the time when it lapsed, by reason of the operation of Section 18(5) of the Act. This places the Applicant in the same position as the holder of a valid prospecting right. The Applicant, in this regard, complies with the provisions of Section 5(4)(b) of the Act;

(ii) The Applicant is the holder of an approved environmental management plan. In this regard the Applicant complies with the provisions of Section 5(4)(a) of the Act;

(iii) The Applicant notified and consulted with the landowner of the land in question. In this regard the Applicant complied with the provisions of Section 5(4)(c) of the Act.

[40] In the result I am of the view that the Applicant, as the holder of the prospecting right (which right is a limited real right[7]) has a clear right to access the properties, together with its employees and to bring onto the properties any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure as may be required for the purposes of prospecting, within the ambit of the prospecting right and the approved amended EMP.

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7 Section 5(3) of the Act.

The grounds on which the Respondent denies the Applicant access to the properties

[41] The Respondent advances that it is entitled to lawfully deny the Applicant access to the properties for the purpose of exercising the prospecting right.

[42] The first ground raised is that prospecting is a land use which requires approval of the local authority in whose jurisdiction the land is situated. The argument is developed to say that such requisite approval of the local authority was not obtained by the Applicant and that the Applicant is accordingly not entitled to exercise all of its rights in terms of the prospecting right of which the Applicant is the holder.

[43] The second of the grounds raised is that burial sites and graves are present on the properties and that the Applicant cannot enter the land and exercise all of its prospecting rights by reason of the operation of the National Heritage Resources Act, 25 of 1999 ("*the National Heritage Act*").

[44] The third ground raised is that the Applicant failed to comply with the court order of 4 November 2008.

[45] I turn to dealing with each of these grounds.

The approval of the local authority

[46] Mr Putter, on behalf of the Respondent, submitted in a very able argument that the local authority ought to have been joined to these proceedings by reason of the fact that prospecting is a land use which requires approval of the local authority in whose jurisdiction the land is situated.

[47] In support of the argument reliance was placed on the following:

(i) In reliance on the finding in *Johannesburg Municipality v Gauteng Development Tribunal*[8] the premise from which the argument is developed is that, in our new dispensation, a framework was established ensuring that all land, including farm land, which falls outside traditional town planning schemes of a municipality became subject to the authority of such a municipality to, *inter alia*, control and regulate land use, also on land situated outside its town planning scheme;

(ii) Section 151 of the Constitution of the Republic of South Africa, 108 of 1996 ("*the Constitution*") introduced the notion of wall-to-wall local government;

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8 2010 (6) SA 182 at paras 57, p203

(iii) In terms of the Municipal Systems Act, 32 of 2000 ("*the Systems Act*") a municipality is enjoined to undertake developmentally orientated planning and, in doing so, the municipality has to take account of certain statutory principles;

(iv) In terms of the Systems Act each municipality had to adopt an integrated development plan and one of the core components of the integrated development plan is a spatial development framework. The spatial development framework, amongst other things, incorporates an urban development boundary as one of its components, but also deals with the land uses within the municipality that falls outside the existing town planning scheme. This integrated development plan guides and informs all planning and development within the municipal area and it binds the municipality in the exercise of its executive authority;[9]

(v) The provisions of the Town Planning and Townships Ordinance (Tvl) 15 of 1986 ("*the Ordinance*") applies to all land within the area of jurisdiction of a local authority. In this regard reliance is placed on the provisions of Section 18 of the Ordinance and it is contended that the jurisdiction was extended in terms of Section 151(1) of the Constitution;

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[9] In this regard reliance is placed on the provisions of Section 35 of the Systems Act.

(vi) In the decision of the Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town and Others*[10] so the argument goes, the conclusion was reached that the holder of a prospecting right is not relieved of having to obtain the necessary land use planning permission, even where the activity falls outside the municipality's town planning scheme.

[48] Attractive as the argument may be on first consideration, I find myself unable to agree.

[49] It is now settled[11] that a holder of a mining right or a mining permit has to comply with zoning requirements in addition to the relevant provisions of the Act. In the decision of *Maccsand (Pty) Ltd v City of Cape Town and Others* the Constitutional Court held that, although there is an overlap between the functions exercised under the Act and the Land Use Planning Ordinance 15 of 1985 (Cape) ("*LUPO*") an impermissible intrusion by one sphere of government into the area of another does not occur because spheres of government do not operate in sealed compartments. The reasoning in the said decision can be summarised as follows:

(i) Mining is an exclusive competence of the national sphere of government and the Act regulates mining, whilst LUPO does not and does not purport to regulate mining. LUPO is concerned only with the

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10 2012 (4) SA 181 (CC)

11 Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC), and Minister for Mineral Resources v Swartland Municipality and Others 2012 (7) BCLR 712 (CC)

use of land which is a function allocated in the constitution to the local sphere of government.[12]

(ii) By reason of the fact that mining is carried out on land, the two functions overlap.[13] When a proposed activity requires approval under both the Act and LUPO the constitution requires the relevant spheres of government to co-operate with one another in mutual trust and good faith and to co-ordinate actions taken with one another. It does not give rise to the exercise of a veto power by the local sphere of government.[14]

(iii) Since spheres of government do not operate in sealed compartments, the overlap between the functions does not give rise to impermissible intrusion by one sphere of government into the exclusive sphere of another.[15]

(iv) there is nothing in the Act to suggest that LUPO will cease to apply to land in respect of which a mining right or permit is granted.[16]

(v) Because the application of the powers confirmed by the Act and LUPO does not give rise to a conflict, but merely to an overlap, sections 146 and 148 of the Constitution do not apply.[17]

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12 At paras 42 and 46 of Maccsand (Pty) Ltd v City of Cape Town and Others (supra).
13 Para 43 of Maccsand (Pty) Ltd v City of Capte Town and Others (supra).
14 At para 43 of Maccsand (Pty) Ltd v City of Cape Town and Others (supra).
15 At para 43 of Maccsand (Pty) Ltd v City of Cape Town and Others (supra).
16 Paras 44 and 45 in Maccsand (Pty) Ltd v City of Cape Town and Others (supra).

[50] Both the *Swartland-case* and the *Maccsand-case* dealt with the provisions and the zonings in terms of LUPO.

[51] LUPO applies in the whole of the Cape Province and in respect of all land in the Cape Province. All such land fall within Town-planning schemes.

[52] The properties in this matter are not situated in the Cape Province.

[53] Regard must accordingly be had to each provincial ordinance, because each ordinance is different and the result of any enquiry into whether or not land use approval by the local authority is required before mining may commence will depend upon the wording of the particular provincial legislation.[18]

[54] In *Mtunzini Conservancy v KZN Sands (Pty) Ltd and Another*[19] it was pointed out that, in the *Maccsand-matter,* the Minister had granted authority to Maccsand to mine sand in 2007 in terms of the Act, at a stage when zoning already attached to the land in question but, by contrast, the properties in respect of which the interdicts were sought in the *Mtunzini Conservancy-matter* were not inside a municipal area and were never the subject of any zoning controls when mining authorisation was granted and mining commenced. For this reason the court found itself unable, in the *Mtunzini Conservancy-matter* to grant an interdict restraining the holder of a converted mining right from commencing or continuing with mining in terms of

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17 Paras 50 and 51 in Maccsand (Pty) Ltd v City of Cape Town and Others (supra).
18 South African Mineral and Petroleum Law MO Dale and Others [Issue 14] at 197.
19 2013 (2) ALL SA 69 (KZD)

Sections 1 and 38(3) of the Kwazulu-Natal Planning and Development Act, 2008.

[55] The provincial legislation applicable to the present matter is the Ordinance.

[56] Section 18(1) of the Ordinance provides that a local authority may (my emphasis), of its own accord and the local authority shall, if directed to do so by the Administrator, prepare a town planning scheme in respect of all or any land situated within its area of jurisdiction and the local authority may, within a consent of, or shall, if directed to do so by the Administrator, prepare such a scheme in respect of specified land situated outside its area of jurisdiction and that of another local authority.

[57] It is, in my view, clear from the provisions of Section 18 of the Ordinance that all land within the area of jurisdiction of a local authority is not automatically part of a town planning scheme and zoned as such. Only those portions of land within the area of jurisdiction of the local authority in respect of which a town planning scheme was prepared falls inside a town planning scheme.

[58] Section 19 of the Ordinance provides that the general purpose of a town planning scheme shall be the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general

welfare of such area as well as efficiency and economy in the process of such development.

[59] Section 21(1) of the Ordinance provides that, subject to the provisions of sub-section 21 (3) and Section 22 of the Ordinance, a local authority shall not (my emphasis) prepare a town planning scheme in respect of land which is proclaimed land or land on which prospecting, digging or mining operations are being carried out, unless such land is situated within an approved township or within a township in respect of which a notice as contemplated in Section 111 of the Ordinance was published.

[60] Section 21(3)(b) of the Ordinance provides that, notwithstanding the provisions of sub-section (1) of Section 21, a local authority may prepare a town-planning scheme in respect of proclaimed land not used for mining purposes or purposes incidental thereto, excluding residential purposes, if the owner thereof with a written consent of the Director-General: Mineral and Energy Affairs and the holder of any mining title, so requests.

[61] It is, in my view, clear from the aforesaid provisions of the Ordinance that certain land within the area of jurisdiction of a local municipality that is governed by the Ordinance falls outside of the town-planning scheme and it would accordingly not be within a zoning scheme.

[62] The approval by a local authority governed by the Ordinance, for the exercise of a prospecting right, is thus not required in respect of land that falls outside

of a town-planning scheme and not with zoning scheme. The properties in the present matter fall outside of a town-planning scheme and not within a zoning scheme.

[63] The only remaining issue to be considered is the impact of the provisions of the Systems Act (if any), relating to the adoption by each municipal council of an Integrated Development Plan (with a Spatial Development Framework as a core component thereof) on the above.

[64] The answer to the last-mentioned issue is to be found in the wording of Section 35(1)(b) of the Systems Act.

[65] Section 35(1)(b) of the Systems Act provides as follows:

> "*35 **Status of Integrated Development Plan***
>
> *(1) An integrated Development Plan adopted by the council of the municipality –*
>
> *(a) ....*
>
> *(b) Bind the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's Integrated Development Plan and national or provincial legislation, in which case such legislation prevails;*
>
> *(c) ..... "*

[66] The provisions of Section 35(1)(b) of the Systems Act is clear that the Ordinance (as provincial legislation) would prevail in the event of a conflict between an Integrated Development Plan and the Ordinance.

[67] In my view the approval of the local authority was not required for the Applicant to exercise its right in terms of the Act and the local authority is not a necessary party to be joined to these proceedings.

The National Heritage Act

[68] The parties are in agreement that graves and burial sites are present on the properties. It appears, from a site inspection that was held after the present application was brought, that these graves and burial sites were subsequently discovered.

[69] The provisions of Section 36 of the National Heritage Act provide that graves and burial sites are protected.

[70] Section 36(3) of the National Heritage Act provides as follows:

> *"(3) No person may, without a permit issued by SAHRA or a Provincial Heritage Resources Authority –*
>
> *(a) Destroy, damage, alter, exhume or remove from its original position or otherwise disturb the grave of a victim of conflict, or any burial ground or part thereof which contains such graves;*
>
> *(b) Destroy, damage, alter, exhume or remove from its original position or otherwise disturb any grave or burial ground older than sixty years which is situated outside the formal cemetery administered by local authority; or*
>
> *(c) Bring onto or use at the burial ground or grave referred to in paragraph (a) or (b) any excavation equipment or any equipment which assists in the detection or recovery of metals."*

[71] The relevant provisions of Section 36 of the National Heritage Act prohibits the Applicant from undertaking certain activities at the burial ground or graves and from undertaking the actions described in Section 36(3)(a) and (b) of the National Heritage Act.

[72] The prohibition of certain conduct at the burial sites or graves contemplated in Section 36 of the National Heritage Act does not, in my view amount to a prohibition on the holder of a prospecting right to gain access to the property in respect of which he holds the prospecting right. The prospecting right can still be exercised outside of the specific location of the burial grounds or graves.

[73] It follows that there is, in my view, no merit in the Respondent's reliance on the provisions of the National Heritage Act to refuse access to the Applicant to the properties in order for the Applicant to exercise all of its rights as holder of the prospecting right.

Non-compliance with the existing court order

[74] The court order of 4 November 2008 excluded drilling, but this exclusion was made subject to a later amendment of the prospecting right. The prospecting right is conducted in accordance with the EMP. In the present matter the prospecting right is exercised in accordance with the amended and approved EMP.

[75] The amended and approved EMP specifically provided for drilling and the precise manner in which drilling is permitted.

[76] The undertaking of drilling activities in terms of the amended EMP is authorised by the court order of 4 November 2008. The PWP is not required to be amended in respect of the costs of the EMP in order for the Applicant to exercise all of its rights in terms of the prospecting right of which the Applicant is the holder.

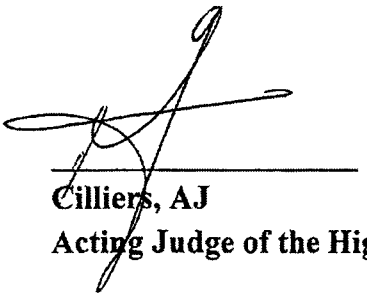
Conclusion

[77] **In the result no justification exists for the Respondent to deny the Applicant access to the properties in order for the Applicant to exercise the rights provided for in the prospecting right. I make the following order:**

1. **Prayers 1, 1.1, 1.2, 1.3, 1.4 and 1.5 of the Notice of Motion is granted;**

2. **The Respondent is ordered to pay the costs.**

SIGNED AT PRETORIA ON THIS 14 DAY OF MARCH 2014.



Cilliers, AJ
Acting Judge of the High Court of South Africa

Appearances:

For Appellant:	**Adv.: I Currie**
Instructed by:	**Webber Wentzel**
For Respondent:	**Adv.: L G F Putter**
Instructed by:	**Vezi & De Beer Inc.**