THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 844/2024

In the matter between:

ZINCEDE NGOKWAKHO HOUSING (PTY) LTD FIRST APPELLANT

STONEWELL QUARRY (PTY) LTD
t/a DORNING CRUSHERS SECOND APPELLANT

and

MATATIELE LOCAL MUNICIPALITY RESPONDENT

Neutral citation: *Zincede Ngokwakho Housing (Pty) Ltd and Another v Matatiele Local Municipality* (844/2024) [2026] ZASCA 17 (13 February 2026)

Coram: MAKGOKA ADP, WEINER and BAARTMAN JJA, and STEYN and CHILI AJJA

Heard: 12 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be on 13 February 2026 at 11h00.

Summary: Mineral Rights – Mineral and Petroleum Resources Development Act 28 of 2002 – whether holder of mineral right entitled to access to property to exploit without consent of land owner – responsibilities of mining right holders and land owners.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Sipunzi AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the High Court is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

Baartman JA (Steyn AJA concurring):

Introduction

[1] On 23 November 2023, the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the High Court), granted the Matatiele Local Municipality (the Municipality) declaratory relief to the effect that there was no valid lease between it and the first appellant, Zincede Ngokwakho (Pty) Ltd (Zincede). The order also directed Zincede and the second appellant, Stonewell Quarry (Pty) Ltd t/a Dorning Crushers (Stonewell) to vacate the Municipality's property situated at Erf 1, Matatiele Commonage, known as Postershoek Quarry, (the property) within 1 month of the order and further ancillary relief. The appeal against that judgment is with the leave of this Court.

[2] The background facts are common cause. The Municipality is the owner of the property. On 22 May 2012, the Minister for the Department of Mineral Resources and Energy (the Minister) granted Zincede mining rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) over the property. The mining rights were valid for 10 years and permitted mining

of gravel in accordance with the relevant Mining Works Programme and the Environmental Management Plan. In this case, gravel is mined from a surface quarry with a system of surface crushers and stockpiles.

[3] In August 2016, the Municipality and Zincede settled pending litigation between them, under case No. 1674/13, and an eviction application under case No. 3634/2014, in a deed of settlement. The deed contains the following relevant terms:

'8. The [Municipality] shall lease to [Zincede] the leased area described in the diagram attached… a written lease that shall be concluded simultaneously with this settlement agreement…

8.2 The lease shall commence on date of signature by the last signing party thereto and endure for the period of the Converted Mining Right and any extension thereof in terms of the option contained in the lease agreement. …'

[4] On 10 August 2016, Zincede and the Municipality entered into the lease agreement. In terms of clause 2, the lease would endure 'for the currency of the. . . Mining Right, plus any extension. . . by the exercising of the option. . .' In terms of clause 15.1 Zincede had the option to extend the lease subject to 'reasonable market related rental as may be agreed between the parties.' The option would be exercised by Zincede giving written notice, of the intention to extend the lease 6 months prior to 'the expiration of the initial period (22nd day of May 2022)'. Clause 15.4 made the option to extend the lease subject to Municipal Council (the Municipal Council) ratification and the 'provisions of the Municipal Finance Management Act [56 of 2003 (the MFMA)] if applicable'.

[5] On 4 December 2020, Zincede, with the Minister concurring, ceded its mining right to Stonewell. On 15 November 2022, Stonewell gave written notice of its intention to extend the lease agreement. However, the Municipality's Council resolved not to ratify the option but instead to sell the property. In the

interim, Stonewell had applied for renewal of its mining right. That application is pending and the mining right remains in force until the new application process has been finalised. That is apparent from correspondence, dated 17 March 2022, from the Acting Regional Manager, Mineral Regulation, addressed to Stonewell to that effect. This is in accordance with section 24(5) of MPRDA.[1] On 17 August 2022, the Municipality gave the appellants notice to vacate the property within 60 days. They refused to comply and litigation followed.

[6] In the High Court, the Municipality contended that the lease with Zincede terminated when the latter ceded its mining right to Stonewell and that the Municipality had not consented to the transfer of the mining right. In addition, the Municipal Council did not ratify the renewal of the lease but instead resolved to sell the property, therefore the option to renew could not be exercised. In any event, the option to renew could not be exercised in the absence of a process of public participation as envisaged in Regulation 34(1) of the Municipal Asset Transfer Regulations.[2] As no public participation process had been conducted, the lease could, according to the Municipality, for that reason also, not be renewed.

[7] Conversely, the appellants argued that Stonewell's valid mining right over the property meant that it did not need a lease to conduct mining operations on the property. Therefore, so the argument went, Stonewell could not be evicted from the property. The appellants further alleged that Zincede was not on the property, therefore an eviction order would serve no purpose. The appellants further contended that the sale of the property would not affect the validity of Stonewell's mining right. The property could be sold subject to the existing

[1] Section 24(5) 'A mining right in respect of which an application for renewal has been lodged shall despite its expiry date remain in force until such time as such application has been granted or refused.'
[2] Published under GN R878 of 2008 in CG 31346 of 22 August 2008, in terms of the Local Government: Municipal Finance Management Act 56 of 2003.

mining rights. The appellants further disputed the Municipality's interpretation of clause 15.4 of the lease agreement.

[8] The High Court was persuaded that the lease between the Municipality and Zincede had expired and that the mining right, in and of itself, did not give Stonewell the right to remain on the property. Therefore, the court granted the following order:

'1. It is declared that there is no valid lease agreement between the applicant and the first respondent.

2. The first and second respondents, …are hereby directed to vacate the property within one (1) calendar month of this order.

3. The first respondent is hereby ordered to take steps to rehabilitate the applicant's property upon vacating the property at its own costs.

4. The first and second respondents are ordered to pay the costs of this application.'

[9] In this Court, the appellants argued that Stonewell's valid mining right was sufficient to grant it access to the property. A valid lease, so the argument went, was not a prerequisite for Stonewell to conduct mining operations on the property. The intended sale of the property would not affect the mining right as the right would remain in force post the sale. Hence Stonewell could not be evicted. The appellants further argued that reg 34 of the Municipal Asset Transfer Regulations had no application in the circumstances of this matter.

[10] The appellants further submitted that the High Court order was in line with the relief originally sought by the Municipality. However, at the hearing, in the Municipality's counsel's heads of argument, it sought only the following:

'4.1 In the premises the declaratory order should be granted against the First Respondent (and Second Respondent) and an eviction order must follow against First Respondent.

4.2 An eviction order can also follow against Second Respondent subject to its rights in terms of Section 24(5) of the MPRDA.

4.3 The rehabilitation order should be adjourned sine die pending the interim position under Section 24(5) aforesaid.
4.4 A costs order should follow the result of substantial success.'

[11] The Municipality, on the other hand, argued that the lease and the mining right had expired. The mining right was 'awaiting renewal'. The mining operations constituted a complete deprivation of property and the appellants insisted on staying on the property without compensation. The appellants had not engaged the Municipality on issues in terms of s 54 of the MPRDA. The Municipality therefore contended that the High Court was correct.

[12] The issues for determination in this appeal are the following:
(a) Whether a mining right gave the holder thereof access to the property to which that right pertains in the absence of the landowner's consent – without a valid lease.
(b) What are the requirements for ceding a mining right – can it be ceded without the consent of the landowner?
(c) Was s 54 of the MPRDA complied with?
(d) Was compliance with reg 34 of the Municipal Asset Transfer Regulations necessary?

Discussion

[13] Section 5(3) of the MPRDA, in relevant part, allows the holder of a mining right occupation of the relevant property. Such holder may

'(a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration, or production, as the case may be;
(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;

(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be; . . .'

[14] The mining right confers on the holder certain limited real rights in respect of the minerals and the land to which it relates. Section 5(3)(a), in unambiguous language,[3] permits the holder of a mining right to enter the relevant property. Subject to the provisions of the MPRDA, the mining right holder may also bring employees and machinery or equipment onto the property, among others. In *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (*Maledu*),[4] the Constitutional Court said that:

'It bears emphasising that the provisions of s 5(3) of the MPRDA echo two fundamental principles of the common law. First, that the owner of the land to which a mining right relates is obliged to allow the holder access to his or her land to do whatever is reasonably necessary for the effective exercise of the mining holder's rights.

Second, the mining right holder is in turn obliged to exercise his rights civiliter modo (in a reasonable manner) so as to cause the least possible inconvenience to the rights of the owner. Accordingly, the common law requires of both the landowner and the mining right holder to exercise their respective rights alongside each other to the extent that it is reasonably possible to do so. *It therefore fosters a situation where the rights of the landowner and the mining right holder co-exist*…' (my emphasis)

[15] Counsel for the Municipality submitted that Stonewell's reliance on its mineral right to remain on the property in the absence of a lease agreement was contrary to the Municipality's ownership rights. He relied on *Maledu* for that proposition. In *Maledu* the relevant property consisted of farmland that, in 1919, was registered in the name of the Minister of Rural Development and Land Reform in trust for the Bakgatla-Ba-Kgafela community. The respondents in *Maledu*, holders of the mining rights, had prior to commencing mining activities,

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[3] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014(4) SA 474 (CC); 2014 (8) BCLR 869(CC) para 28.

[4] *Maledu and Others v Itereleng Bakgathla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41; 2019 (2) SA 1 (CC); 2019 (1) BCLR 53 (CC) (*Maledu*) paras 57 and 58.

concluded a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority and the Minister of Rural Development and Land Reform. In 2014, the respondents commenced preparations for full scale mining. The applicants, of whom the first 37 applicants claimed ownership of the property, were negatively affected by the mining operations. They obtained spoliation orders in the High Court against the respondents. The latter, in turn, obtained eviction orders in the High Court, orders interdicting the applicants from entering the farm, from bringing their livestock onto the farm and from erecting any structures on the farm. This Court refused leave to appeal against the orders obtained by the respondents in the High Court.

[16] The Constitutional Court, however, entertained the matter and dealt with two issues:[5] (a) whether s 54 of the MPRDA was available to the respondents, 'and if it were, whether they are precluded from obtaining an interdict before exhausting the mechanisms for which s 54 provides'; and (b) whether the provisions of s 2 of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPLRA) had been complied with.

[17] Only the s 54 issue is relevant to this matter. The Constitutional Court held that s 54 is formulated in mandatory terms. Therefore, the respondents were obliged to take all reasonable steps to exhaust the s 54 process. Although, the respondents had initiated the s 54 process, they sought an eviction order before that process was finalised. The Constitutional Court held that to allow the respondents to approach the Court for an interdict, as they had done, would undermine the object of s 54.

[5] *Maledu* fn 4 para 22.

[18] It is obvious that the facts in this matter are distinguishable from those in the *Maledu* matter. The eviction order in *Maledu* was issued without the requisite consultation with the applicants, who themselves and through their predecessors had occupied the property for nearly a century. In this matter, the mining right at issue had been exercised, with the Municipality's concurrence for 10 years. The appellants are seeking to continue to exercise that same right pending finalisation of the application for a new mining right. The mining right was transferred from Zincede to Stonewell with the Minister's concurrence. In *Vantage Goldfields SA (Pty) Ltd and Another v Arqomanzi (Pty) Ltd and Others*,[6] this Court held that in complying with s 11(1)[7] of the MPRDA, Ministerial consent was required where ownership of a mining right changed from one owner to another. The appellants have complied with the legislative requirements for transfer.[8]

[19] Initially, the Municipality indicated that the Municipal Council had refused to extend the lease as it had resolved to sell the property. The mining right is not a hindrance to the prospective sale of the property. The Municipality further submitted that s 54 of the MPRDA had not been complied with. Therefore, the lease could not be renewed. Section 54 provides as follows:

'**Compensation payable under certain circumstances**

(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-

(a) refuses to allow such holder to enter the land;

(b) places unreasonable demands in return for access to the land; or

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[6] *Vantage Goldfields SA (Pty) Ltd and Another v Arqomanzi (Pty) Ltd and others* [2023] ZASCA 106; 2023 JDR 2275 (SCA); [2023] 3 All SA 667 (SCA) paras 47 – 49.

[7] Section 11(1) determines as follows: A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies'

[8] For a discussion of *Vantage Goldfields SA (Pty) Ltd v Argomanzi (Pty) Ltd* see D Hertog "Transferring a controlling interest under the Mineral and Petroleum Resources Development Act (2015) SALJ 28 -37, at 35 underlining this Court's interpretation of s 11(1) of the MPRD to be in line with the purpose of the MRPD.

(c) cannot be found in order to apply for access.
(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)-
(a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the . . . mining permit or mining right;
(b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;
(c) set out the provisions of this Act which such owner or occupier is contravening; and
(d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.
(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the . . . mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for the loss or damage.
(4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act 42 of 1965), or by a competent court.'

[20] In the circumstances of this matter, reliance on s 54 is misplaced as the Municipality has been aware of the mining right for 10 years and had co-operated with its exercise. Further, the Municipality and Zincede had litigated issues pertaining to the mining right and have reached a settlement in respect of their differences. The outcome of Stonewell's pending application for a new mining right might well invoke the section. The Minister can refuse the application, in which event the appellants would have no business on the property in terms of a mining right.

[21] However, a mining right exists subject to the provisions of existing legislation. Therefore, the Municipality relies on the non-compliance with regulation 34 of the Municipal Asset Transfer Regulations to oppose the appeal. The regulation provides as follows:
'Part 1- decision-making processes for municipalities:

34. Granting of rights to use, control or manage municipal capital assets

(1) A municipality may grant a right to use, control or manage a capital asset only after-

(a) the accounting officer has in terms of regulation 35 conducted a public participation process regarding the proposed granting of the right; and

(b) the municipal council has approved in principle that the right may be granted.

(2) Subregulation (1)*(a)* must be complied with only if-

(a) the capital asset in respect of which the proposed right is to be granted has a value in excess of R10 million; and

(b) a long- term right is proposed to be granted in respect of the capital asset.

(3)*(a)* Only the municipal council may authorise the public participation process referred to in subregulation (1)*(a)*.

. . .

(4) A municipal council may delegate to the accounting officer its approval power referred to in subregulation (1)*(b)* excluding the power to grant long term rights to use, control or manage capital assets of a value in excess of R10 million.'

[22] The Municipality relied on *Maccsand (Pty) Ltd v City of Cape Town and Others* (*Maccsand*)[9] for the submission that the Regulation should be complied with. In *Maccsand* the property was zoned as public open space under the Land Use Planning Ordinance 15 of 1985 (LUPO) when the holder permit, Maccsand, obtained a mining right permit in terms of the MPRDA. It was in issue whether the granting of the permit ended the application of the LUPO provisions to the property. The Constitutional Court held that:[10]

'. . . The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.

[9] *Maccsand (Pty) Ltd v City of Cape Town and Others* [2012] ZACC 7; 2012 (7) BCLR 690 (CC) 2012 (4) SA 181 (CC); 2012 (4) SA 181 (CC) (*Maccsand*).

[10] *Maccsand* paras 47- 48.

The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. . . . This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.'

[23] As indicated above, the mining right at issue is 10 years old and continues to exist until the pending application process is completed. It is ominous that the Municipality has not annexed any evidence of the regulation 34 process followed 10 years ago. On the Municipality's version, it must have followed that process. It is imperative that the landowner and the mineral rights holder co-operate to exercise their respective rights in good faith. In the circumstances of this matter, where the mining right has been exercised over an extended period after litigation ended in a settlement between the Municipality and Zincede, I accept that, to the extent necessary, the process was followed.

[24] The Municipality's complaint seems convenient and contrived to facilitate the sale of the property. Evidently, that conduct frustrates the objects of the MPRDA. The facts in this matter are distinguishable from those in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others*[11] where the minority interpreted ss 22 and 24 of the Electronics Communications Act 36 of 2005, in accordance with the common law, that requires an owner's consent for an intrusion of the owner's rights. In this matter, the owner's consent was obtained 10 years earlier. And the MPRDA makes adequate provision for a situation where consent is unreasonably withheld.

[25] I, for the reasons stated above, would make the following order:

[11] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC) 2015 (11) BCLR (CC).

The appeal is upheld with costs. The order of the High Court is set aside and replaced with the following:

'The application is dismissed with costs.'

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E BAARTMAN
JUDGE OF APPEAL

Makgoka ADP (Weiner JA and Chili AJA concurring):

[26] I have read the judgment prepared by my Colleague, Baartman JA (the first judgment). I agree with the order proposed in the first judgment. I write separately to address the following: (a) the legal impact of the cession of the converted mining right from Zincede to Stonewell, on the lease agreement; (b) the interpretation and application of regulation 34; and (c) whether it is competent for counsel to abandon the relief sought in the notice of motion without a formal notice of abandonment.

[27] The issue in this appeal concerns, on the one hand, the rights and responsibilities of a holder of a mining right to access the property to which the right relates, and, on the other, those of the landowner. The High Court concluded that the second appellant, Stonewell, a mineral rights holder, required a lease agreement with the property owner to mine on the property. Without the lease agreement, the High Court held that Stonewell had no right to occupy the property for mining purposes. Accordingly, it ordered the eviction of Zincede and Stonewell from the Municipality's property, together with further ancillary relief.

[28] Zincede and Stonewell are private companies and subsidiaries of the Dorning Group (Pty) Ltd (the Dorning Group). Stonewell holds the entire shareholding in Zincede. In turn, Stonewell is wholly owned by the Dorning Group's shareholders. I refer to Zincede and Stonewell together as 'the appellants'. The respondent, Matatiele Local Municipality (the Municipality), is a category B Municipality constituted in terms of the Local Government: Municipal Structures Act 117 of 1998.

[29] Zincede was previously a close corporation under the repealed Close Corporations Act 69 of 1984.[12] It held an 'old order mining right' over the property granted by the Department of Mineral Resources and Energy.[13] Zincede subsequently applied to convert that right under item 7 of Schedule II to the MPRDA. On 22 May 2012, the Minister of Mineral Resources and Energy (the Minister) granted Zincede's application and converted its old order mining right into a mining right (the converted mining right).[14] The converted mining right authorised Zincede to conduct gravel mining activities on the property. The mining right took effect on 22 May 2012 and was to remain in force for ten years until 21 May 2022, unless cancelled or suspended.

[30] On 10 August 2016, Zincede and the Municipality signed a settlement agreement in the High Court in respect of certain disputes between them. The settlement agreement recorded Zincede's converted mining right over the property. One of the conditions of the settlement agreement was that the Municipality would lease to Zincede a certain area of its property, and that a lease

[12] On 18 March 2019, Zincede converted into a private company, as a result of which, all rights and obligations of the erstwhile close corporation were transferred to and vested in the private company.
[13] An old order mining right is defined in Schedule II to the Act as 'any mining lease, mynpachten, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted.'
[14] A mining right is defined in the Act means a right to mine granted in terms of section 23(1)' and includes all the annexures to it, agreements and inclusions by reference.

agreement would be concluded simultaneously with the settlement agreement. The lease would 'endure for the period of the converted mining right and any extension thereof in terms of the option contained in the lease agreement.'

[31] A lease agreement was indeed concluded between the parties on 10 August 2016, as envisaged in the settlement agreement. Clause 1.2 of the lease agreement referred to Zincede's converted mining right and stated that it would subsist until 22 May 2022. Clause 15 of the lease agreement, titled 'Option', provides:

'15.1 The Lessee shall have the option to lease the leased area for a further period, equivalent to any periods of extension of its mining rights, on the same terms and conditions as set out in this agreement and subject to such reasonable market related rental as may be agreed between the parties.

15.2 This option is subject to the condition that the Lessee shall, in writing, notify the Lessor of its intention to exercise the option not less than six months prior to the expiration of the initial period (22nd day of May 2022).

. . .

15.4. The option set out herein is subject to the ratification by any subsequent Municipal Council, if required, and the provisions of the Municipal Finance Management Act, if applicable.'

[32] Properly construed in light of its context and purpose, the lease agreement gives effect to the settlement agreement. The settlement agreement expressly linked the lease agreement to be concluded between the parties to the mining right held by Zincede at the time. It also provided that the lease agreement would remain in force for as long as the mining right remained valid, including any renewal of the mining right. The settlement agreement was clearly intended to endure for the duration of the mining right, including any renewal. In this sense, its main purpose is to give effect to Zincede's right to mine in terms of the mining right. It must therefore be interpreted in harmony with the settlement agreement.

[33] Dorning Group's intention was to use Stonewell as a mining entity. On 4 February 2019, the Dorning Group purchased the shares and loan accounts in Zincede. It also acquired the right to mine on the property by procuring Zincede's cession of its converted mining right to Stonewell under a written agreement. The cession was subsequently consented to by the Minister on 4 December 2020. After Zincede ceded the converted mining right to Stonewell, Stonewell occupied the property and conducted mining operations there.

[34] Having acquired the right to mine on the property through the cession of the converted mining right, Stonewell considered itself entitled to the rights under the lease agreement. Armed with the cession, on 15 November 2022, Stonewell gave written notice to the Municipality of its intention to exercise the option to renew the lease agreement. The Municipality responded that it could not agree to renew the lease because it intended to sell the property. In the meantime, Stonewell had applied to renew its converted mining right. That application is pending, and under s 24(5), despite its stated expiry date, the converted mining right remains in force until the determination of the new application.

[35] This impasse led the Municipality to launch an application in the High Court seeking an order: (a) declaring that there is no valid lease agreement between the Municipality and Zincede; (b) evicting the appellants from the property; (c) directing Zincede to take steps to rehabilitate the property; and (d) for costs.

[36] The Municipality invoked clause 15.4 of the lease agreement, which provides that the option is subject to ratification by any subsequent Municipal Council if required by the Municipal Finance Management Act 56 of 2003 (the MFMA). It contended that clause 15.4 applied to the lease under s 34(1) of the Municipal Asset Transfer Regulations. That section requires public participation

when a municipality grants a right to use, control, or manage a capital asset if the asset's value exceeds R10 million and the right exceeds three years. As there had been no public participation, the Municipality contended that clause 15.4 stood in the way of the lease's renewal. In addition, the Municipality asserted that the lease terminated on 4 December 2022 when Zincede ceded its converted mining right to Stonewell. For those reasons, it said, the option to renew the lease could not be exercised.

[37] In their opposition to the application, the appellants raised three substantive grounds. First, they argued that Stonewell's converted mining right over the property gave it an unfettered right to conduct mining operations on the property. It did not need the lease. Thus, the Municipality was not legally competent to evict it from the property. In sum, irrespective of whether the lease agreement is still in force, Stonewell cannot be evicted from the property as the converted mining right remains in effect.

[38] Second, as the holder of the converted mining right, Stonewell is entitled to allow anyone it wishes, to exploit the mining right on the property. For that reason, the Municipality did not have the right to evict Zincede, as Zincede would be on the property at Stonewell's behest. In any event, the appellants averred that Zincede was not on the property, and therefore an eviction order against it would serve no purpose unless an order were also granted against Stonewell.

[39] Third, the intention to sell the property was irrelevant, as the validity of Stonewell's converted mining right would survive the sale. Thus, even if the property were sold, Stonewell would retain the right to occupy the property for mining purposes and could not be evicted for the duration of the converted mining right.

[40] At the hearing of the matter in the High Court, in his heads of argument, counsel for the Municipality abandoned the relief sought in the notice of motion, and instead sought:

(a) an order declaring that there is no valid lease agreement between the Municipality and Zincede;

(b) the eviction of Zincede.

(c) the eviction of Stonewell, 'subject to its rights in terms of section 24(5) of the MPRDA.'

(d) an adjournment of the rehabilitation order sine die pending the interim position under section 24(5).

(e) costs, based on 'substantial success.'

[41] In its judgment, the High Court found that regulation 34(1) applies to the converted mining right and that failure to comply with the public participation requirement impeded the lease renewal. It also observed that the cession of the converted mining right from Zincede to Stonewell did not indicate whether it had any bearing on the lease agreement between the Municipality and Zincede.

[42] The High Court then referred to the non-variation clause in the lease agreement. It held that Zincede could not cede its converted mining right to Stonewell without the Municipality's written consent. This, the High Court held, was because the non-variation clause provides that 'no amendments, alterations or variations of this agreement shall be binding on the parties unless reduced to writing and signed by both parties or their duly authorised representatives . . .'. The High Court explained:

'Notably, the lease agreement expressly prohibited any amendments, alteration or variations of the agreement unless reduced to writing and signed by both parties or their duly authorised representatives. Upon an application of *Endumeni* to clauses 14 and 15 of the lease agreement and with regard to the background in which the agreement was concluded, it was peremptory

for [Zincede] to seek the written consent of the [Municipality] in order to replace itself with [Stonewell] as [Zincede] and [Stonewell] are distinct entities. The [Municipality] was not a party to the cession of the mining right and the [appellants] have laid no basis upon which it could be found that the terms of that cession would have a binding effect on [the Municipality], or by extension vary the lease agreement that was in operation between [the Municipality] and [Zincede] . . .'.

[43] The High Court further accepted the Municipality's contention that the lease with Zincede terminated when the latter ceded its converted mining right to Stonewell. It held that, in the absence of a lease agreement between the Municipality and Stonewell, the appellants had no rights or legal title to the property. It rejected the appellants' contention that the converted mining right entitled them to remain in occupation of the property, 'even against [the Municipality's] will'.

[44] For these reasons, the High Court granted a declaratory order that there was no valid lease agreement between the Municipality and Zincede. It accordingly ordered: (a) the eviction of the appellants from the property within a month of the order; and (b) that Zincede take steps to rehabilitate the property upon vacating it. This was the order originally sought in the notice of motion. However, as mentioned, the Municipality's counsel had abandoned this relief in his heads of argument in the High Court. The High Court did not explain or deal with this in its judgment.

[45] In their application for leave to appeal, the appellants argued that the order was not competent because the original relief had been abandoned and replaced with that stated in counsel's heads of argument. In its judgment refusing leave to appeal, the High Court defended its order. It held that, because there was no formal notice of abandonment of the original relief, it was entitled to grant it. The High Court further held that it is not permissible for counsel, in their heads of

argument, to abandon or amend the relief sought in the pleadings. I do not wish to do injustice to the High Court's articulation by attempting to paraphrase it. I therefore quote the reasoning as is. The learned Judge said:

'Equally, as the role and value of heads of argument is common knowledge to litigants. It should not be permissible to any parties to a litigation to afford a value that is equivalent to that of pleadings to contents of heads of argument. With this background, and in the light of established procedure that ought to be followed for an expression of an abandonment of a right or portion of a claim, the applicant's argument in this regard failed as a ground as there are no prospects of success on appeal.'

[46] If I correctly understand the High Court's reasoning, it is that a party is not entitled to seek relief different from that originally sought in the pleadings unless it files a formal notice of abandonment. Although we uphold the appeal and the High Court's order falls away, it behoves this Court to clarify the point, to the extent that the High Court's approach may, in future, be considered by other courts to have some precedential significance.

[47] There can be no absolute procedural bar in this regard. It is not infrequent in our courts for counsel to abandon the relief originally sought or to make concessions during argument. In other instances, this is made in counsel's heads of argument, as was the case here. Either way, courts often accept counsel's authority to make these decisions on behalf of their clients, without requiring formal notice. Such an abandonment or concession is usually binding on the party on whose behalf it was made.

[48] I turn now to the merits of the appeal. In this Court, the parties persisted in the arguments advanced in the High Court. The appellants contended that Stonewell's converted mining right, without more, entitled it to access the Municipality's property for mining operations without the Municipality's cooperation. For its part, the Municipality argued that, without a valid lease, it

was entitled, in its own discretion, to decide whether to grant Stonewell access to the property. As I demonstrate below, both propositions are incorrect.

[49] Before I consider whether the Municipality's stance is sustainable, I first dispose of its stated reason for declining to extend the lease, namely that it intended to sell the property. As correctly submitted on behalf of the appellants, this is legally irrelevant. This is because, even if the property were sold, Stonewell would retain the right to occupy it for mining purposes and could not be validly evicted.

[50] Next, I consider whether Stonewell, as a cessionary of the converted mining right, was entitled to exercise the option to renew the lease. As mentioned, the High Court held that Zincede required the Municipality's written consent to cede the mining right and for Stonewell to replace Zincede as the lessee.

[51] I disagree for two reasons. First, the cession of mining rights is statutorily regulated under s 11 of the MPRDA, which deals with 'Transferability and encumbrance of prospecting rights and mining rights'. It expressly requires only the Minister's consent, not that of the landowner.[15] Under s 11(2)(*a*), one of the factors the Minister must consider when deciding whether to grant consent is the cessionary's capacity to fulfil and comply with the obligations and the terms and conditions of the right in question. In the present case, the Minister was satisfied with Stonewell's capacity and therefore granted consent.

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[15] Section 11 of the MPDRA reads:
'(1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.
(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of—
(a) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and (b) satisfies the requirements contemplated in section 17 or 23, as the case may be.'

[52] Second, the cession of the converted mining right is relevant to the Municipality only to the extent that Stonewell, rather than Zincede, would be the entity occupying the property for mining activities. This is because, upon such cession, Stonewell acquired all the rights previously held by Zincede, including, by extension, the rights that flow from the lease agreement with the Municipality.

[53] Although there is no written cession of the lease agreement between Zincede and Stonewell, such a cession can be tacit or inferred from their conduct, namely: Stonewell's purchase of Zincede's shares and the subsequent cession of the converted mining right from Zincede to Stonewell. From this, the ineluctable conclusion is that Zincede tacitly ceded its rights under the lease agreement to Stonewell. The High Court, therefore, erred in finding that Zincede's cession of the converted mining rights amounted to a variation of the lease agreement.

[54] The High Court also held that Zincede needed the Municipality's written consent for Stonewell to replace Zincede. It did so without analysing the parties' relationship or considering settled law. The general rule is that any right arising out of a contract may be ceded by the holder of that right to a third party without the other contracting party's knowledge or consent. In other words, there is generally an unlimited right to cede rights.

[55] There are two exceptions to the general rule. The first arises where a clause in an agreement prevents cession without the other contracting party's permission. In the present case, neither the lease agreement nor the settlement agreement precludes the cession of the rights Zincede enjoyed under the lease agreement. The second is the *delectus personae exception*: a contractual right cannot be ceded without the other contracting party's consent if the parties intended that the holder of the right alone should be entitled to it. Whether such

an intention is present depends on an analysis of the facts and the relationship between the lessor and the lessee.

[56] This is what the High Court failed to analyse. It concluded that, because the lease agreement contained no clause allowing cession, no cession could take place. As I demonstrate shortly, the High Court materially misdirected itself in this regard. The first judgment does not address this issue at all, and would dispose of the appeal only on the narrow basis that as long as the mining right is valid, Stonewell is, without more, entitled to occupy the property for mining purposes. I disagree with that approach because it ignores the clear legislative intent of s 5(3) of the MPRDA. In relevant parts, it reads:

'(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

(2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may—

(a) enter the land to which such right relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be; . . .

. . .

[57] Of particular relevance here is s 5(3). Its import was considered in *Maledu*, where the Constitutional Court held that the provision encompasses two principles of common law, namely: (a) the owner of the land to which a mining right relates is obliged to allow the holder access to his or her land to do whatever is reasonably necessary for the effective exercise of the mining holder's rights, and (b) the mining right holder is obliged to exercise its rights in a reasonable manner so as to cause the least possible inconvenience to the owner's rights. The Court emphasised:

'Accordingly, the common law requires of both the landowner and the mining right holder to exercise their respective rights alongside each other to the extent that it is reasonably possible to do so. *It therefore fosters a situation where the rights of the landowner and the mining right holder co-exist*…' (Emphasis added.)

[58] The rationale for this process of consultation was explained by the Constitutional Court in *Bengwenyama Minerals v Genorah Resources* (*Bengwenyama*)[16] as being that 'the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen.'

[59] The upshot of the above legislative provisions and judicial pronouncements is that there should be cooperation between the landowner and the holder of a mineral right before mining operations commence. How that cooperation manifests, is up to the parties and, to some extent, would be determined by the nature of the property and the relationship between the parties. For example, a community on communal land may opt for social upliftment programmes and beneficiation, while another owner may agree to a one-off payment from the holder of a mining right.

[60] In other instances, the parties may agree to a lease for the duration of the mining right. This was the case between the Municipality and Zincede. In other words, the lease became the basis for cooperation between the Municipality and Zincede. To hold otherwise would be contrary to the decisions in both *Maledu* and *Bengwenyama*. If that were the case, Stonewell would not have gone to the trouble of notifying the Municipality of its intention to exercise the option to renew the lease. This puts paid to the appellants' contention that the mere granting

[16] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 63.

of a mining right entitled them to access the property without the Municipality's cooperation or consent.

[61] The lease is therefore critical, as it is the basis for the parties' cooperation. For that reason, it cannot be ignored. In this light, the question of whether Stonewell can exercise the option to renew the lease is a threshold legal issue that must be resolved first. Put differently, it must first be determined whether Zincede's rights in the lease were *delectus personae*. Without that, the question of whether Stonewell is entitled to the rights under the lease agreement, and therefore to its concomitant right to mine on the property, cannot be satisfactorily resolved.

[62] I turn to consider the issue. An intention to exclude cession without the other party's consent is presumed where the nature of the transaction involves personal confidence between the parties. Thus, if the contract is so personal in character that it would make a reasonable or substantial difference to the other party, the rights are not capable of cession without the other party's consent. This was recently affirmed by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary* (*UJ*).[17]

[63] In *UJ*, a key consideration was that the parties to the lease intended the property to be used for tertiary education. The cessionary, however, intended to establish a religious-based school for primary and high school education on the leased premises – a purpose entirely different from that set out in the lease. The Court concluded that this mattered to the lessor, as the cession would result in the land being used for a purpose other than that envisaged in the lease. For this

[17] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 55.

reason, the Court held that the rights under the lease agreement were personal to the lessee and could therefore not be ceded without the lessor's consent.

[64] In the present case, nothing in the lease suggests that Zincede's rights were not intended to be ceded. As mentioned, the lease contains no express or implied provision that the rights are personal to Zincede. On the contrary, it is common ground that Stonewell intended to use the property for the same purpose envisaged in the lease, namely the exploitation of a mining right. This must be so, as the lease agreement was inextricably linked to the converted mining right, which was now held by Stonewell.

[65] Moreover, the option to renew the lease under clause 15 is directly linked to the renewal of the mining right, and the only issue to be negotiated is the market-related rental. Failure to reach an agreement on the market-related rental does not destroy the option, as clause 15.3 provides a deadlock-breaking arbitration mechanism. The option is therefore clearly designed to facilitate ongoing mining for so long as the mining right (including renewals) remains in force.

[66] It must also be borne in mind that the three companies, Dorning Group (the holding company), Zincede and Stonewell, are related companies controlled by the same shareholders. The cession of Zincede's rights under the lease agreement to Stonewell was clearly a matter of convenience for the related companies, to enable them to manage their affairs in line with their commercial objectives.

[67] It is also significant that the Municipality's assertion that Stonewell was not the party entitled to exercise the option to renew was raised for the first time when it launched its application in the High Court. In two pre-litigation letters responding to Stonewell's exercise of the option to renew the lease, the

Municipality did not dispute Stonewell's right to do so. In its first letter, dated 30 November 2021, the Municipality noted Stonewell's intention to exercise the option under the lease. Relying on clause 15.4, the Municipality indicated that it would refer the matter to the Municipal Council for consideration. In the second letter, dated 17 February 2022, the Municipality stated that it did not agree to renew the lease because it had decided to sell the property.

[68] Notably, the Municipality never suggested in either letter that Stonewell had no right to seek renewal of the lease agreement. This is because, like the respondents, the Municipality appreciated that the mining right and the lease agreement were inextricably linked.

[69] Accordingly, the rights under the lease were not *delectus personae* and were therefore not personal to Zincede. They were therefore capable of cession, and Zincede was entitled to cede the lease to Stonewell. It follows that the High Court erred in concluding that Zincede needed the Municipality's written consent to cede the lease to Stonewell.

[70] This brings me to the Municipality's position. It contended that clause 15.4 of the lease agreement applied to the contract. As mentioned, clause 15.4 provided that the option to extend the lease is subject to ratification by the Municipal Council, 'if required, and the provisions of the Municipal Finance Management Act, if applicable.' Thus, this clause would only be triggered if the Municipal Council 'is required' in terms of any law or the MFMA is 'applicable'.

[71] The phrase 'if required' is crucial to the interpretation of clause 15.4. This clause does not allow the municipal council to refuse to ratify the exercise of the option as a matter of general discretion. If that were the case, the words 'if required' would be nugatory. A sensible interpretation of the clause is that, if any

law requires ratification by the Municipal Council, the exercise of the option is subject to that ratification. Thus, clause 15.4 does not empower the Municipal Council to veto the exercise of the option. It is simply about compliance with the law, if any. Even without clause 15.4, if any law required the council's ratification, the option could not be validly exercised without it.

[72] Accordingly, the clause can only be sensibly interpreted as requiring the Municipality to act lawfully by complying with any law that requires the council to ratify Stonewell's exercise of the option. By contrast, if no law requires ratification, the Municipal Council's ratification is not required. It follows that if ratification is not required, any purported refusal to ratify is legally irrelevant. An interpretation of clause 15.4 that allows the Municipal Council to refuse to ratify the exercise of the option on any other basis it elects would not be commercially sensible, as it would empower the Municipal Council to undermine the settlement agreement.

[73] What remains to consider is whether any law 'requires' the Municipal Council's ratification. The Municipality identified regulation 34(1) of the Municipal Asset Transfer Regulations as such a law. The Municipality contended that the regulation applied by virtue of clause 15.4. Regulation 34(1) requires public participation when a Municipality grants a right to use, control, or manage a capital asset if the asset's value exceeds R10 million and the right exceeds three years.

[74] The Municipality contended that, because there had been no public participation, the Municipal Council had not ratified Stonewell's exercise of the option to renew the lease. The appellants disputed the applicability of this provision. The High Court accepted the argument that, because there had been no public participation regarding the option to renew the lease, the Municipality was

not authorised to agree to the lease extension. The Municipality persisted with that argument in this Court.

[75] The Municipality's argument regarding the application of regulation 34 is undermined by what it fails to say. First, it does not allege that the property is worth more than R10 million, as required by the regulation. For this reason, the requirement for public participation in regulation 34(1)(*a*) does not apply. Second, the Municipality does not allege that it was required to comply with regulation 34(1)(*a*) when it initially concluded the lease agreement with Zincede. If regulation 34 was not applicable to the conclusion of the lease agreement, it could never be a proper interpretation to require such compliance when the lease is renewed.

[76] Third, the Municipality does not explain why there was no public participation. Under regulation 34(3), only the Municipal Council may authorise the public participation process referred to in sub-regulation (1)(*a*). In its founding affidavit, the Municipality stated that:

'It is common cause that there has been no public participation process, and the Municipality Council has, in any event, resolved not to ratify the option because it intends selling the property.'

[77] Having failed to authorise it, it is not open to the Municipality to argue that, because of a lack of public participation, there was no authorisation for the lease extension. Instead of embracing this self-serving argument, the High Court should have summarily dismissed it.

[78] The Municipality called in aid *Maccsand*.[18] The case concerned the interplay between the MPRDA and LUPO in the mining sector. LUPO regulates

[18] Footnote 9.

municipal planning and rezoning. Maccsand held a mining permit for two dunes, both issued by the Minister. Both dunes were zoned as public open spaces under LUPO, meaning mining could not be carried out on them until they were rezoned. Maccsand commenced mining operations before the dunes were rezoned. The Municipality concerned argued that this was unlawful.

[79] Maccsand and the Minister contended that mining was conducted in accordance with national law, being the MPRDA. They argued that mining falls within the exclusive competence of the national government and that LUPO does not apply to land used for mining. They further argued that holding otherwise would be tantamount to allowing municipal government to intrude into the national sphere. The Constitutional Court rejected this argument. It held that the provincial and national laws served different purposes and fell within their respective spheres of competence. Each sphere exercised the power allocated to it by the Constitution and was regulated by the relevant legislation.

[80] In light of the issues considered in *Maccsand* and its key findings, it is clear that the case is of little relevance to the present case and thus of no assistance to the Municipality. That a mining right should be exercised subject to other relevant legislation is uncontroversial. However, where it is alleged that a mining right is being exercised in contravention of relevant legislation, that legislation should be identified. In *Maccsand*, the holder of a mining permit and right commenced mining operations in contravention of the express zoning provisions of LUPO. In the present case, the Municipality has not identified any relevant legislation that the appellants have contravened in exercising their converted mining right. This is unsurprising, as the appellants have not contravened any legislation. On the contrary, they have exercised their right for almost ten years without a single complaint from the Municipality.

[81] The Municipality also asserted that the lease terminated automatically when Zincede ceded its converted mining right to Stonewell, and that the option therefore no longer existed and could not be exercised by Stonewell. There is no merit in this contention. The effect of the cession of the converted mining right on the lease agreement was that Stonewell assumed all of Zincede's related rights, including the rights under the lease agreement. I have already concluded that the rights under the lease were not *delectus personae* and were capable of cession, and that Zincede was entitled to cede the lease to Stonewell. As mentioned, a tacit cession must be inferred from the conduct of Zincede and Stonewell.

[82] This also addresses the Municipality's residual argument that Stonewell's occupation of the property without a lease agreement infringed its ownership rights. This submission was predicated on the incorrect premise that the lease agreement terminated upon the cession of the converted mining right to Stonewell. Having found that the cession of the converted mining right did not terminate the lease agreement, this argument flounders.

[83] This conclusion renders it unnecessary to consider s 54 of the MPRDA. That provision does not apply to the facts of the present case. It applies where the holder of a mining right, etc, '*is prevented from commencing or conducting any mining operations*' because the owner or the lawful occupier of the land in question: (a) refuses to allow such holder to enter the land; (b) places unreasonable demands in return for access to the land; or (c) cannot be found in order to apply for access. (Emphasis added.)

[84] To trigger the section, the overriding jurisdictional factor must exist, namely that the holder of a mining right is being 'prevented from commencing or conducting any mining operations.' This is not the case here. Stonewell was never prevented from conducting mining activities on the land. As mentioned,

Stonewell had been in occupation of the property since 4 December 2020, after Zincede ceded the converted mining right to it, and had continued mining operations there. That explains why the Municipality sought an eviction order against Stonewell. This also takes care of the dependent jurisdictional factor in (*a*), as neither Stonewell nor Zincede were refused entry onto the property. The factors in (*b*) and (*c*) are self-evidently not applicable.

[85] It is instructive that nowhere in its papers did the Municipality raise non-compliance with s 54. It was only raised in its heads of argument in this Court, and only in passing. Unsurprisingly, counsel did not press this issue with much vigour in argument.

[86] The only dispute between the parties has always concerned the interpretation of a commercial lease agreement, which the parties placed before the court. Once it is found that the cession of the converted mining right entitled Stonewell to the rights under the lease, the only dispute between the parties dissipates. Section 54 finds no application.

[87] For these reasons, I concur in the order of the first judgment.

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T MAKGOKA

ACTING DEPUTY PRESIDENT

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