THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 619/12

In the matter between:

DENGETENGE HOLDINGS (PTY) LTD **Appellant**

and

SOUTHERN SPHERE MINING AND DEVELOPMENT COMPANY LIMITED **First Respondent**

RHODIUM REEFS LIMITED **Second Respondent**

MINISTER OF MINERALS AND ENERGY **Third Respondent**

DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION DEPARTMENT OF MINERALS AND ENERGY **Fourth Respondent**

REGIONAL MANAGER: MPUMALANGA REGION, DEPARTMENT OF MINERALS AND ENERGY **Fifth Respondent**

REGIONAL MANAGER: LIMPOPO REGION, DEPARTMENT OF MINERALS AND ENERGY **Sixth Respondent**

ABRINA 1998 (PTY) LTD **Seventh Respondent**

Neutral citation: *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* (619/12) [2013] ZASCA 5 (11 March 2013)

Bench: **NUGENT, PONNAN, SHONGWE and THERON JJA and ERASMUS AJA**

Heard: **21 FEBRUARY 2013**
Delivered: **11 MARCH 2013**
Corrected:

Summary: **Failure to comply with rules of court – appeal lapsing – application for condonation – factors to be considered – cumulative effect of such factors – condonation refused.**

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Tuchten J sitting as court of first instance):

(a) The application for condonation is dismissed with costs.
(b) The applicant for condonation is ordered to pay the costs incurred by the respondents in opposing the lapsed appeal.
(c) In both instances (a) and (b) the costs shall include the costs of two counsel.

JUDGMENT

PONNAN JA (NUGENT, SHONGWE and THERON JJA and ERASMUS AJA concurring):

[1] After the record had been filed in this matter the appeal lapsed for failure on the part of the appellant (now the applicant) – Dengetenge Holdings (Pty) Ltd (Dengetenge) – to prosecute it by timeously filing its heads of argument. The initial question that is before us is whether the default by Dengetenge should be condoned and the appeal revived. Before turning to that question it is convenient to describe how the appeal arose and the circumstances in which it came to lapse.

[2] The dispute in the matter pertains to prospecting rights for the platinum group metals in respect of two properties situated in the Limpopo Province, namely Portion 1

and the remaining extent of Boschkloof 331 KT (Boschkloof) and Portion 1 and the remaining extent of Mooimeisjesfontein 363 KT (Mooimeisjesfontein) (the properties). After sub-division of those properties they came to be transferred, in accordance with the then spatial development policies of the State, to the South African Bantu Trust and thereafter vested in the self-governing territory of Lebowa. In terms of s 12(1) of the Lebowa Mineral Trust Act 9 of 1987 the mineral rights in respect of the properties vested in the Lebowa Mineral Trust (LMT). With the adoption of our interim Constitution the ownership of the properties minus the mineral rights in respect thereof, which had been severed from the land and vested in the LMT, reverted to the Republic of South Africa. And thereafter by virtue of s 3(1)*(b)* of the Abolition of Lebowa Mineral Trust Act 67 of 2000 the mineral rights which had previously vested in the LMT vested in the Republic of South Africa. Whilst the LMT was the holder of the mineral rights it had entered into a notarial mineral lease agreement and a prospecting agreement in respect of the properties with Southern Sphere Mining and Development Company Ltd (Southern Sphere) and Rhodium Reefs Ltd (Rhodium), the first and second respondents respectively.

[3] On 7 April 2003 Rhodium applied in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), to the Minister of Minerals and Energy (the Minister) for a renewal of its prospecting agreement with the LMT. Its application was refused. Rhodium immediately launched an urgent application in the then Transvaal Provincial Division of the High Court. Neither the Minister, who was cited as the first respondent or the Deputy Director-General: Mineral Regulation, Department of Minerals and Energy (Deputy DG), who was cited as the second, opposed the application. The order which issued was:

'2. THAT, subject to 3 below:

2.1 the first respondent is hereby interdicted and restrained from granting any rights in terms of sections 17 and/or 23 of the Mineral and Petroleum Resources Development Act no. 28/2002 ("the Act") in respect of the portions of the remaining extent and portions 1 and 2 of the farm Boschkloof 331 K.T., Mpumalanga Province which are the subject of the applicant's application dated 27 October 2004 for a prospecting right ("the properties"); and

2.2 the second respondent is hereby interdicted and restrained from granting any rights in terms of section 17 and/or 23 of the Act in respect of the properties arising from any delegation effected in his favour by the first respondent.

2.3 the third respondent is interdicted and restrained from accepting any application in respect of the properties in terms of section 16 and 22 of the Act.

3. THAT the interdict set out in 2 above shall serve as a temporary interdict pending the final determination of review proceedings to be launched by the applicant against the respondents, seeking the review and setting aside of the decision in terms of section 17 of the Act by the first and/or second respondents to refuse the applicants application dated 27 October 2004 for a prospecting right in respect of the properties, on condition that such review proceedings shall be initiated within 30 days from the date hereof.'

[4] On 2 December 2005 Rhodium instituted the envisaged review application. That application was also unopposed. On 6 December 2006, the following order issued:

'1. The refusal decision by the First Respondent and/or the Second Respondent on the 14th of September 2005 taken in terms of section 17(2) of the Mineral and Petroleum Resources Development Act, No. 28 of 2002, not to grant the prospecting right applied for by the Applicant in terms of an application for a prospecting right relating to platinum group metals and all minerals associated therewith ("the prospecting right") in respect of Portions 1, 2 and the remaining extent of the farm Boschkloof 331K in the Magisterial District of Lydenburg ("the property"), is hereby reviewed and set aside;

2. The First Respondent and/or the Second Respondent are directed to grant and issue to the Applicant the prospecting right applied for in respect of the property;

3. The First Respondent is directed to pay the costs of this application.'

[5] On 15 April 2005 Southern Sphere lodged with the Regional Manager of the Department of Minerals and Energy, Limpopo (RM Limpopo) an application for a prospecting right in terms of s 16 of the MPRDA in respect of properties that it described as Boschkloof 331 KT and Mooimeisjesfontein. On 4 October 2006 the RM Limpopo informed Southern Sphere that it had been granted a prospecting right in terms of s 17 of the MPRDA over Portion 1 and the remaining extent of Boschkloof 331 KT and Portion 1 and the remaining extent of Mooimeisjesfontein.

[6] On 7 February 2006 Dengetenge applied to the Regional Manager of the Department of Minerals and Energy, Mpumalanga (RM Mpumalanga) for a prospecting right in respect of Portion 1 of Boschkloof and Portion 1 and the remaining extent of Mooimeisjesfontein. The application was granted on 23 August 2006 and registered with the Mineral and Petroleum Titles Registration office on 28 November 2006. On 20 December 2005, Abrina 1998 (Pty) Ltd (Abrina), lodged an application with the RM Mpumalanga for a prospecting right in respect of the remaining extent and Portion 2 of Boschkloof. That application was accepted on 9 February 2006 and subsequently granted on 26 July 2006.

[7] On 17 August 2007 the Director-General: Department of Minerals and Energy wrote to Southern Sphere:

‘1. I refer to the abovementioned matter and wish to advise that the Minister of Minerals and Energy has, after careful deliberation, decided to withdraw the decision of the Deputy Director-General: Mineral Regulation to grant a prospecting right to Southern Sphere in as far as it overlaps with the right granted to Rhodium Reefs in respect of the properties in question.

2. The reasons for this decision are as follows:

2.1 On or about 26 October 2005, the Court granted an interdict by way of a court order, whereby the Department was interdicted from granting any rights in respect of the properties forming the subject of an application for prospecting rights by Rhodium Reefs Limited, pending the finalization of review proceedings to be instituted by Rhodium Reefs Limited.

2.2 In terms of a court order dated 6 December 2006, the refusal decision was set aside and the Department was directed to grant and issue to the Applicant the prospecting right applied for in respect of the property.

2.3 Subsequent to the above Court Order, the Minister was made aware by the attorneys of the Applicant "Rhodium Reefs" that your client has been granted a right which extends to the properties granted to Rhodium Reefs Limited in terms of the Court Order.

2.4 It is evident that the granting of the prospecting right in respect of the "Rhodium properties" to your client was an unfortunate error, and is in contravention of both Orders of Court and as such may result in Contempt of Court proceedings being instituted against the Minister.

2.5 After careful deliberation, the Minister has therefore now decided that the only legal manner to rectify the situation, would be to invoke the provisions of section 103(4) of the Act,

and to withdraw the granting of the right to Southern Sphere in as far as it overlaps with the right granted to Rhodium Reefs in respect of the properties in question.

3. The effect of this decision is therefore that your prospecting right is hereby amended to include the area applied for by your client, but excluding the properties awarded to Rhodium Reefs in terms of the Court Order of 6 December 2006.'

[8] Against that backdrop, Southern Sphere launched a review application in the North Gauteng High Court. It cited the Minister, the Deputy DG, the RM Mpumalanga, the RM Limpopo, Rhodium, Abrina and Dengetenge as the first to seventh respondents respectively. Southern Sphere sought various orders, not all of which are relevant for present purposes. After initially opposing the application, Abrina withdrew its opposition. Affidavits were filed on behalf of the Minster, the Deputy DG and the Regional Managers, not with a view to opposing the relief sought, but, as it was put, to assist the court below. The matter came before Tuchten J who made inter alia the following orders:

'3. THAT the decision of the third respondent as delegate of the first respondent to award to the seventh respondent ("Dengetenge") prospecting rights for the platinum metals group as contemplated in Section 17 of the MPRDA over one or more properties is reviewed and set aside ….

4. It is declared and directed that:

4.1 The first respondent validly took the decision in terms of Section 103(4) of the MPRDA which was communicated to the applicant's attorneys of record on 3 September 2007;

4.2 The applicant ("Southern Sphere") has been validly awarded prospecting rights over the northern parts of Portion 1, Portion 2 and the Remaining Extent of Boschkloof 331 KT and Mooimeisjesfontein 363 KT;

4.3 The fifth respondent ("Rhodium") has been validly awarded prospecting rights over the southern parts of Portion 1, Portion 2 and the Remaining Extent Boschkloof 331 KT;

4.4 The common boundary between the northern and southern parts of Boschkloof 331 KT is as depicted on the map, which forms an annexure to this relation to the properties or any of them;

4.5 Save as set out in this order, no prospecting rights has validly been granted in relation to the properties or any of them;

4.6 Any mineral titles, such as there may be, registered under the provisions of the Mining Titles Registration Act, 16 of 1967, in favour of the Abrina or Dengetenge over any of the properties must forthwith be cancelled;

4.7 The first, second, third and fourth respondents (collectively "the DME respondents") must, without delay, do all things and take all such steps as may be necessary to give effect to the grant of prospecting rights to Southern Sphere over the northern parts and to Rhodium over the southern parts of Boschkloof 331 KT as set out in this order.'

[9] On 17 June 2011 Dengetenge obtained leave from the high court to appeal to this court. After obtaining two extensions of time Dengetenge filed the record of appeal with the registrar of this court on 15 December 2011. That meant that its heads of argument had to have been filed by 23 February 2012 (SCA Rule 10). Appreciating, it would seem, that it would be unable to meet that deadline Dengetenge sought the consent of the other parties to the matter for the late filing of its heads by 13 April 2012. Although the Minister and the State functionaries (who had been cited as respondents in the high court) took no part in the appeal, the State Attorney consented to the late filing of the heads of argument. Southern Sphere and Rhodium did not. Dengetenge was thus forced to file a substantive application for condonation with the registrar of this court. That application only reached the registrar on 24 February 2012 by which stage the appeal had already lapsed. By way of a letter dated 2 March 2012 the registrar notified Dengetenge that its appeal had lapsed due to non-compliance with the rules of this court. An application for condonation was thus required to revive it (*Court v Standard Bank of SA Ltd; Court v Bester NO & others* 1995 (3) SA 123 (A) at 139 F-H).

[10] On 8 March 2012 Southern Sphere's attorney wrote to Dengetenge's attorney 'there is no need for our clients to respond to your client's application dated 23 February 2012 as your client's appeal has lapsed'. That letter, as also the earlier one from the registrar, failed to elicit a response. After a silence of some four months, on 12 July 2012 Dengetenge served on Southern Sphere a copy of an application for condonation and reinstatement of the appeal. When it was pointed out to Dengetenge that its heads of argument had still not been filed, it re-served those documents on 27 August 2012

accompanied by its heads of argument. The heads of argument were thus some six months late.

[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G). I shall assume in Dentenge's favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors.

[12] In *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6 this court stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[13] What calls for some acceptable explanation is not only the delay in the filing of the heads argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay (*Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449 G-H). There are huge gaps in the chronological sequence advanced by Dengetenge. But what is evident is that from 2 March 2012 it knew that its appeal had lapsed on account of its failure to file its heads with the registrar of this court by 23 February of that year. From then onwards it must have been quite clear to it that an application for condonation was necessary. And yet aside from an abortive attempt on 12 July it did

nothing until 27 August 2012. The closest that one gets to anything amounting to an explanation for the delay is the following from the affidavit of Dengetenge's attorney filed in support of the application for condonation:

'22. ... Subsequent thereto, and whilst Counsel were busy with preparation for the Heads of Argument, it was discovered during the second week of April 2012 that there were important documents, including the final judgment and order of the Court *a quo* appealed against, which were missing from the record of the appeal lodged on 15 December 2011. The other documents included the processes filed by the parties in April 2011, pursuant to an invitation of the Court *a quo* in terms of paragraph 5 of its judgment and order of 24 February 2011 and 1 March 2011.

23. It was also important for the Heads of Argument and chronology table that the said documents be part of the record of the appeal, inasmuch as they were critical, in our humble submission, for purposes of the proper ventilation and adjudication of the appeal. It was thus advised by Counsel that for purposes of finalisation of the Heads of Argument, Practice Note, chronology table and certificate, a request should be made to the transcribers to prepare a supplementary volume of the record of the appeal. That was outright attended to by my office and included a request to the Court *a quo* to provide us with the final written judgment and order pursuant to the hearing of 29 April 2011 which involved a reconsideration of paragraph 4 of the order of 24 February 2011 and/or 1 March 2011 above.'

Those averments raise more questions than they answer. There is no attempt to relate them to a coherent time-frame or to fully enlighten the court as to the relevance and materiality of those documents or why the heads of argument could not have been filed in their absence. Moreover, as Rhodium, in its opposition to the application for condonation, makes plain:

'13.9. The absence of the submissions and, in addition, the *"final written judgment and order pursuant to the hearing of 29 April 2011"* from the appeal has no bearing on the outcome of this appeal in terms of the Appellant's notice of appeal. The final order granted by the court *a quo* dealt exclusively with an issue as between the first and second respondents about the north-south divide of the properties. The grounds of appeal raised by the Appellant in terms of its notice of appeal all pertain to the judgment of the court *a quo* dated 24 February 2011.'

I should perhaps add that none of those documents were referred to in argument before us. The suspicion thus remains that the explanation advanced by Dengetenge is disingenuous and contrived. But even were it to be accepted, the explanation proffered is woefully inadequate. It falls far short of explaining the deathly silence by Dengetenge

upon its learning that the appeal had lapsed or why it took some six months to launch the application for condonation. I would thus find it impossible to hold that the delay in bringing this application has been explained in a manner which is even remotely satisfactory.

[14] I now turn to the respondents' interest in the finality of the judgment of the court below. Both Southern Sphere and Rhodium state that once the appeal had lapsed the prospecting rights granted by the Minister to each of them became effective. Southern Sphere commenced prospecting operations on the properties during March 2012, which, so it contends, it was obliged to do in terms of section 19(2)*(b)* of the MPRDA. And as at July 2012 had incurred direct prospecting costs on the project of approximately R6 million. Rhodium states that it has already expended in the region of R1, 2 million and its forecasted cost for the compilation of its environmental impact assessment is R1,928 million. As it puts it: 'While not all of this cost has actually been incurred yet, the process has been commissioned and a portion thereof has been incurred and the balance thereof will have to be settled soon so as to comply with the requirements set out in the above mentioned letter of acceptance of Rhodium's mining right application.' Those amounts, according to the respondents, would be placed at risk if Dengetenge is given the opportunity to re-instate the lapsed appeal. Most of those costs according to both respondents had been incurred by them when they believed that they had legal certainty in consequence of the appeal having lapsed and there was no indication by Dengetenge that it intended seeking its re-instatement. Furthermore, according to Southern Sphere, it has

'sold shares to investors in order to fund the prospecting operations. These shares were sold to both local and international investors on the premise that the Appeal had lapsed. Shares were also sold to the local communities residing on the properties representing some 32 000 people who have very high expectations of being involved in the project's success. It has taken the First Respondent many years to establish a strong working relationship with the local communities, and the damage that would be caused to community relations if the project was now placed on hold or otherwise delayed could well be irreversible'.

None of those allegations are disputed by Dengetenge. Nor, it seems to me, could they be. It must accordingly be accepted that both respondents have been severely prejudiced by Dengetenge's delay in prosecuting the appeal.

[15] Given the flagrant breach that one encounters here coupled with the failure to advance an acceptable explanation therefor, as also the very evident prejudice to the respondents, we may well have been entitled to refuse the indulgence of condonation irrespective of the merits of the appeal (*Blumenthal & another v Thomson NO & another* 1994 (2) SA 118 (A) at 121I). But, faced with some explanation, albeit one that appeared inadequate and perhaps even lacking in candour, counsel was directed to address the merits of the appeal so as to enable us to assess the Dengetenge's prospects of success and to weigh that together with the other factors.

[16] At the commencement of the argument before the high court counsel who then represented Dengetenge, placed the following on record:

'[COUNSEL] ADDRESSES COURT: As the court pleases, My Lord. My Lord, the seventh respondent concedes that in so far as the relief is sought by the applicant in its notice of motion and by the fifth respondent in its counter application to review and set aside the decision to grant it a prospecting right … [intervened]

COURT: Grant whom a prospecting right?

[COUNSEL]: The seventh respondent My Lord.

COURT: Yes?

[COUNSEL]: It concedes that the grant of that right was unlawful.

COURT: That is quite an important concession.

[COUNSEL]: It is indeed My Lord.

COURT: So I had better make a careful note of it. Concedes that the grant … [indistinct]. You concede … [intervened

[COUNSEL]: My Lord, in the … [intervened]

COURT: Excuse me. I want to just make sure that I have got it right. You concede that the grant of a prospecting right to the seventh respondent was unlawful?

[COUNSEL]: That is correct.

COURT: Seventh respondent is Dengetenge. Can we call it Dengetenge?

[COUNSEL]: As the court pleases, My Lord.

COURT: To make it easier for me. Yes?

[COUNSEL]: My Lord, as obviously will appear from my argument when I address Your Lordship, the basis of that concession is that the grant was in the face of an interdict.

. . .

[COUNSEL]: My Lord, where that leaves the seventh respondent, where that leaves Dengetenge, is that what we will be addressing Your Lordship on, is purely what the appropriate relief should be following, on consequent upon concession. In other words, what is a just and equitable remedy following the setting aside of the right to it. And that is my submissions to Your Lordship will be based on that. Obviously My Lord, I will make submissions on the rights that Southern Sphere the applicant has and the rights that Rhodium has as well. But in so far as Dengetenge goes My Lord, my submissions will be limited to what is the just and equitable remedy in the circumstances.

COURT: Thank you.'

[17] In the light of what occurred before the high court there can be no doubt that Dengetenge's counsel abandoned its opposition to the application (*Kannenberg v Gird* 1966 (4) SA 173 (C) at 181-183). That being so, Dengetenge cannot, on appeal, seek to advance a case that was specifically abandoned before the court below (*Wolfowitz & Wolfowitz v Fresh Meat Supply Co Ltd* 1908 TS 506 at 512; *Gcayiya v Minister of Police* 1973 (1) SA 130 at 135F-G). But, says counsel who argued the matter for Dengetenge in this court, notwithstanding its having eschewed in clear and unequivocal terms its opposition to the application in the court below, the high court was obliged to *mero motu* go behind counsel's submission to determine whether it was correctly made. In my view, such a proposition, for which one finds no support in our law, merely has to be stated to be rejected. But even if there was such an obligation on the high court, I can hardly see how it could have come to any other conclusion but that the grant of a prospecting right to Dengetenge in the face of an interdict which specifically prohibited that was unlawful. A further string to counsel's bow was that even though the Minister and State functionaries (who had been cited as respondents in that case) had chosen, in their wisdom, not to oppose the grant of the interdict, they were free to simply disregard that order of court. Once again I cannot agree. For, as Froneman J observed in *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229 B-C:

'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714).'

Moreover, it bears re-iterating that respect for the authority of the courts, which is foundational to the rule of law, often serves as the bulwark against anarchy and chaos.

[18] Individually weighed - on each of the three factors the scales are tipped against condoning the default and reviving the appeal. Cumulatively - they are decisive against it. The superficial manner in which the application was prepared and the lack of attention to matters which obviously called for an explanation, taken together with the undoubted prejudice that the respondents have shown and the non-existent prospects of success on appeal renders it impossible to justify the grant of condonation.

[19] In the result:

(a) The application for condonation is dismissed with costs.

(b) The applicant for condonation is ordered to pay the costs incurred by the respondents in opposing the lapsed appeal.

(c) In both instances (a) and (b) the costs shall include the costs of two counsel.

_____

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	D B Ntsebeza SC (with him G Shakoane and L Mashapa) Instructed by: Denga Incorporated, Johannesburg Phatshoane Henney Attorneys, Bloemfontein
For First Respondent:	G Kairinos Instructed by: Badal Attorneys, Rosebank Honey Attorneys, Bloemfontein
For Second Respondent:	G L Grobler SC (with him J L Gildenhuys (Ms)) Instructed by: Edward Nathan Sonnenbergs, Johannesburg McIntyre & Van der Post, Bloemfontein