THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1098/2015 & 206/2016

In the matter between:

SAAMWERK SOUTWERKE (PTY) LTD **APPELLANT**

and

MINISTER OF MINERAL RESOURCES **FIRST RESPONDENT**

SA SOUTWERKE (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Saamwerk Soutwerke (Pty) Ltd v Minister of Mineral Resources* (1098/2015 & 206/2016) [2017] ZASCA 56 (19 May 2017)

Coram: Leach, Theron and Van der Merwe JJA and Fourie and Nicholls AJJA

Heard: 14 March 2017

Delivered: 19 May 2017

Summary: Delict: claim for damages consisting of pure economic loss: claim against first respondent based on negligent administrative omissions: omissions not wrongful: claim correctly dismissed: claim against second respondent based on fraud: circumstances justified overturning of trial court's findings of credibility: fraud established on balance of probabilities: second respondent declared liable.
Practice: test for receiving further evidence on appeal: no reasonably sufficient explanation for failure to present evidence in trial court: proposed evidence disputed on substantial grounds and not weighty or material.
Prescription: previous proceedings not a step in the enforcement of payment of the same debt: part of claim for payment of damages arising from continuous wrong prescribed.

ORDER

On appeal from Northern Cape Division of the High Court, Kimberley (Lever AJ sitting as court of first instance):

1 The application to receive further evidence is dismissed with costs, including the costs of two counsel.

2 The appeal in respect of the claim against the first respondent is dismissed with costs, including the costs of two counsel.

3 The appeal in respect of the claim against the second respondent is upheld with costs, including the costs of two counsel.

4 The order of the court a quo is set aside and replaced with the following:

'(i) The claim against the first defendant is dismissed with costs, including the costs of two counsel.

(ii) It is declared that the second defendant is liable to the plaintiff for payment of such damages as the plaintiff may prove that it suffered as a result of being unable to mine salt at Vrysoutpan during the period 6 September 2008 to 25 June 2011.

(iii) The second defendant is directed to pay the plaintiff's costs in respect of the claim against it, including the costs of two counsel.'

JUDGMENT

Van der Merwe JA (Leach and Theron JJA and Fourie and Nicholls AJJA concurring):

[1] 'Salt is the only rock directly consumed by man. It corrodes but preserves, desiccates but is wrested from the water. It has fascinated man for thousands of years not only as a substance he prized and was willing to labour to obtain, but also as a generator of poetic and mythic meaning. The contradictions it embodies only intensify its power and its links with experience of the sacred' – (M Visser: *Much Depends on Dinner: The*

Extraordinary History and Mythology, Allure and Obsessions, Perils and Taboos, of an Ordinary Meal (1986), New York). The desire to obtain salt is illustrated by this appeal, which concerns the right to mine salt on the property known as Portion 146, a portion of Portion 58 of the farm Kalahari-Wes no 251 (Vrysoutpan).

[2] During April 2004, the power to grant this right vested in the regional director of the then Department of Minerals and Energy in Kimberley (the regional director), in terms of s 9(1) of the Minerals Act 50 of 1991 (the Minerals Act). The Minerals Act was repealed by the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), with effect from 1 May 2004. In terms of s 23(1) of the MPRDA the power to grant this right vested in the first respondent, the Minister of Mineral Resources, previously the Minister of Minerals and Energy (the Minister). Over the years the department responsible for the administration of the Minerals Act and the MPRDA had various names. For convenience I refer to it as the Department.

[3] On 7 June 2011, the Minister notarially executed a mining right in terms of s 23(1) of the MPRDA in favour of the appellant, Saamwerk Soutwerke (Pty) Ltd (Saamwerk), to mine salt on Vrysoutpan. On that date, however, the second respondent, SA Soutwerke (Pty) Ltd (SA Soutwerke), had been in possession of Vrysoutpan for many years. SA Soutwerke vacated Vrysoutpan on 25 June 2011. Saamwerk maintained that it had been prevented from mining salt on Vrysoutpan for the period of 1 January 2007 to 25 June 2011 by the unlawful conduct of the Department and SA Soutwerke. It consequently sued the Minister and SA Soutwerke in delict for damages consisting of alleged loss of profit suffered over the said period. The court a quo (Lever AJ in the Northern Cape Division of the High Court, Kimberley) ordered that the issues in respect of the quantum of damages stand over for later determination. At the conclusion of the trial, it dismissed Saamwerk's claims. It granted leave to Saamwerk to appeal to this court against the dismissal of the claim against the Minister. This court subsequently granted leave to Saamwerk to appeal against the dismissal of the claim against SA Soutwerke.

[4] Saamwerk's case was that it had been prevented from mining at Vrysoutpan by SA Soutwerke's reliance on a forged mining permit. In respect of the Minister, it relied on the refusal or failure of the Department to issue its mining right by December 2006 and to prevent SA Soutwerke from mining at Vrysoutpan. The central issues in the appeal are whether Saamwerk proved fraud on the part of SA Soutwerke and wrongfulness on the part of the Department. The issues must be considered in light of the following background.

Background

[5] SA Soutwerke extracted salt from Vrysoutpan for many years. Despite the fact that its authority to do so had lapsed on 27 October 1992, it was only on 3 November 2000 that SA Soutwerke applied to the Department for a mining permit in respect of Vrysoutpan in terms of s 9(1) of the Minerals Act. Since the State was the owner of Vrysoutpan and the holder of the mineral rights in respect thereof, the consent of the Minister in terms of s 9(2) of the Minerals Act was a prerequisite for the issue of the mining permit. The application for consent in terms of s 9(2) was approved on 19 August 2002. The regional director was authorised to sign the written agreement with SA Soutwerke in terms of which the consent would be granted. The agreement had already been signed by the managing director of SA Soutwerke on 7 December 2001. Per letter dated 15 January 2003, the Department informed SA Soutwerke that the mining permit would be issued for a period of five years, subject to compliance by SA Soutwerke with specified requirements. This was repeated by the Department in letters dated 13 June 2003 and 19 November 2003. These requirements were met by 22 December 2003. SA Soutwerke therefore expected that a five year permit would be issued to it.

[6] On 28 April 2004 the documentation pertaining to SA Soutwerke's application served before the regional director for approval and signature. The regional director did not accept the recommendation that the mining permit be issued for a five year period. He decided to grant it only for a period of one year. The regional director then signed and issued mining permit MP169/2003 which authorised SA Soutwerke to mine salt at Vrysoutpan until 27 April 2005.

The regional director also signed the aforesaid agreement that constituted the consent of the Minister in terms of s 9(2) of the Minerals Act (the s 9(2) consent). In addition, he signed a standard covering letter that, inter alia, stated that MP169/2003 and the s 9(2) consent were attached thereto. In terms of the practice of the Department and the contents of the standard covering letter, the original MP169/2003 and s 9(2) consent were to be attached thereto.

[7] On 22 August 2005, after the expiry of MP169/2003, Saamwerk lodged an application in terms of s 22 of the MPRDA for a mining right in respect of Vrysoutpan. By letter dated 27 September 2006, the Department notified Saamwerk that its application had been granted on condition that a revised social and labour plan be submitted. A draft of the mining right accompanied the letter. It had to be executed before a notary public.

[8] Saamwerk submitted a second revised social and labour plan on 6 December 2006. The Department did not raise any objection to this plan nor did it at any stage prior to the execution of the mining right rely on a deficiency in the plan as a reason for not executing the mining right. It is probable that Saamwerk would have been able to correct any such deficiency expeditiously. Had the mining right been executed within a reasonable time as required by s 6 of the MPRDA, so Saamwerk contended, it would have been able to commence mining on Vrysoutpan by 1 January 2007.

[9] By that date, however, a storm had erupted over Vrysoutpan. On 16 August 2006, Duncan & Rothman, SA Soutwerke's attorneys in Kimberley, wrote to the Department to object to the execution of a mining right in respect of Vrysoutpan. The attorneys stated that SA Soutwerke was the holder of mining permit MP169/2004, dated 28 April 2004. A copy of MP169/2004 was attached to the letter. In terms thereof, SA Soutwerke was authorised to mine salt at Vrysoutpan for an indefinite period, as it contained no expiry date. This was followed by a letter by Duncan & Rothman to the Department dated 1 September 2006 in which it was contended that SA Soutwerke was the lawful holder of a valid mining permit, to wit MP169/2004. According to SA

Soutwerke it held an old order mining right in terms of the transitional provisions of the MPRDA, which remained in force for a period of five years, and the mining right in respect of Vrysoutpan had been erroneously granted to Saamwerk. It demanded that the latter's mining right be suspended with immediate effect, failing which legal action would be taken.

[10] On 6 December 2006, the regional manager of the Department in Kimberley designated in terms of the MPRDA (then Mr Mndaweni) met with representatives of SA Soutwerke. They discussed the contents of the letter of 1 September 2006. By then Mr Mndaweni had found a copy of MP169/2003 in the mineral laws file of the Department pertaining to SA Soutwerke's application. The mineral laws file did not contain a copy of MP169/2004. Mr Mndaweni told the representatives of SA Soutwerke that the Department had no record of MP169/2004 and that MP169/2003 had already expired. He handed a copy of MP169/2003 to them. They, in turn, showed him a copy of MP169/2004. Mr Mndaweni indicated that he thought that MP169/2004 was not authentic. He based that view on discrepancies in respect of the date stamps, the absence of an expiry date and that it was not recorded in the permit register of the Department. The permit register for 2004 ended on number 146/2004.

[11] Mr Mndaweni approached the Chief Director of the Department in Pretoria, to have the matter investigated. The Chief Director instructed the Deputy Director of Legal Compliance of the Department, Mr Guthrie, to investigate. On 1 March 2007, Mr Mndaweni provided Mr Guthrie with copies of MP169/2003 and MP169/2004. Mr Guthrie called upon SA Soutwerke to produce the original MP169/2004. SA Soutwerke produced the original at a meeting with Mr Guthrie and Mr Mndaweni on 13 March 2007. Mr Guthrie stated that on face value, MP169/2004 was invalid, for want of an expiry date. SA Soutwerke maintained that MP169/2004 was valid and that the absence of an expiry date meant that the mining permit had been granted in perpetuity.

[12] Mr Guthrie completed his investigation and submitted a report to the Chief Director. He advised that MP169/2004 was invalid, that MP169/2003

had expired and that SA Soutwerke had no existing right in respect of Vrysoutpan.

[13] On 22 March 2007, however, Saamwerk launched an application under case no 292/07 (case 292/07) in the Northern Cape Division, Kimberley. Saamwerk claimed, in essence, an order:

(i) declaring that it was entitled to a mining right in respect of Vrysoutpan;

(ii) obliging the Minister to execute the mining right; and

(iii) declaring that MP169/2004 was invalid.

It also claimed interdictory relief against SA Soutwerke based on (iii) above. SA Soutwerke strenuously defended the application. The Department's initial reaction to case 292/07 was inconsistent. It gave notice of intention to defend, then withdrew it, but reinstated it on 15 August 2007.

[14] On 5 June 2009 the application was referred for oral evidence. During September 2009 the officials of the Department involved in the matter held a meeting and discussed it. These officials included Mr Mndaweni and Mr Swart, who succeeded him as the regional manager in Kimberley during February 2009. They debated the validity of MP169/2004 and although they held divergent views, they resolved that the Department withdraw its opposition of the application. The Department formally withdrew its opposition of the application on 18 September 2009. When the matter came before the court on 22 September 2009, the judge was dissatisfied that the Department would not participate in the hearing. The Department then re-entered its appearance in the matter, not to oppose the relief sought by Saamwerk, but to assist the court with the investigation of the facts. Both Saamwerk and SA Soutwerke were of the view that this was a good idea.

[15] Lacock J heard evidence from 12 to 16 October 2009 and on 10 December 2009 gave judgment in favour of Saamwerk. On 15 December 2009, before the mining right to Saamwerk could be executed, SA Soutwerke filed an application for leave to appeal. This application suspended the order of Lacock J. The parties agreed that pending the appeal no mining would take place at Vrysoutpan. Case 292/07 was eventually decided in favour of

Saamwerk in this court on 1 June 2011. The judgment of this court is reported as *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd & others* [2011] ZASCA 109; [2011] 4 All SA 168 (SCA). As I have said, the mining right was executed on 7 June 2011.

The case against SA Soutwerke

[16] It is convenient to firstly deal with Saamwerk's case against SA Soutwerke. It is clear from what I have said that, after 27 April 2005, SA Soutwerke had no right to mine salt or to remain on Vrysoutpan. Yet it stopped mining on Vrysoutpan only after judgment was handed down in case 292/07 on 10 December 2009 and vacated Vrysoutpan only on 25 June 2011. Saamwerk restricted its case to allegations that SA Soutwerke was complicit in forging MP169/2004 and relied thereon with the knowledge that it had been forged. An important question in this regard is whether SA Soutwerke ever received MP169/2003. I therefore turn to the evidence relevant to this question.

[17] Mr Danie van Zyl testified that he was an accountant employed by SA Soutwerke until 31 May 2004. He was involved in complying with the requirements of the application for the mining permit in respect of Vrysoutpan and was interested in the outcome thereof. During the last month of his employment, he became aware that the mining permit had been granted, but only for a period of one year. He never saw the mining permit, but thought that he was informed of the grant and the duration thereof by either Mr Altus van den Heever, SA Soutwerke's attorney in Upington, or Mr Andre Blaauw, the managing director of SA Soutwerke. Mr Van Zyl further testified that after he had left SA Soutwerke he had read an article in the Rapport newspaper about it having a forged mine permit. He consequently telephoned his friend, Mr Piet Prins. Mr Prins was the operational manager of the salt processing plant of the Blaauw group of companies (Blaauw Group) in Upington, to which SA Soutwerke belonged, as well as the overhead manager of the salt mining operations of the group. The article was probably the one that appeared in the Rapport on 21 February 2010. Mr Van Zyl stated that he asked Mr Prins about the article. According to him Mr Prins said that he had told Ms Elizma Fourie

(an accountant employed in the Blaauw Group) that there was a mining permit and that when she produced it, it was established that the mining permit was not valid and that Ms Fourie had never applied for it to be converted.

[18] Mr Corne Zondagh was employed by SA Soutwerke as the manager of the salt mining operation at Vrysoutpan. He reported to Mr Prins. He testified that although his employment contract was signed on 6 October 2006 and stated that his employment would commence on 9 October 2006, he in fact commenced working at Vrysoutpan during August 2006. He said that shortly thereafter, Mr Jalie du Toit of Saamwerk arrived at Vrysoutpan. Mr Du Toit claimed that SA Soutwerke had no valid mining permit to mine at Vrysoutpan and that Saamwerk was the lawful holder of the right to mine there. It is common cause that Mr Du Toit visited Vrysoutpan on or about 30 August 2006. Mr Zondagh conveyed what had happened to Mr Prins, who said that Mr Zondagh should tell Mr Du Toit to leave Vrysoutpan. Mr Zondagh did so. As a result of this incident, Mr Zondagh asked Mr Prins for the mining permit in respect of Vrysoutpan. Mr Prins subsequently handed a one page document to him at Vrysoutpan. Mr Zondagh identified that document as the first page of MP169/2003. He noticed that according to this document it had already expired during 2005. He asked Mr Prins about this, but Mr Prins said that an application for a new permit had been submitted and that the existing permit remained valid until the finalisation of that application. Mr Zondagh testified that he kept the document in his office at his house at Vrysoutpan. At a later stage his housekeeper, Ms Hester Pienaar, reported to him that the station commander of the police station at Noenieput had taken the document. During 2008 he was given a framed colour version of MP169/2004, for display at Vrysoutpan. This was handed to him by Mr Bertus Louw, the administrative manager of the Blaauw Group.

[19] At the time the station commander of the Noenieput police station was Warrant Officer P R de Wet Botha, better known as ‘Rooies’. He had been stationed at Noenieput for 33 years. He testified that during 2007 he received an affidavit of a Mr G J Hendriksz, in terms of which a charge of illegal mining at Blaauwpan was laid. A company within the Blaauw Group operated a salt

mine at Blaauwpan. Mr Hendriksz was an investigator appointed by Saamwerk. Warrant Officer Botha opened a police docket and drove to Blaauwpan to investigate the complaint laid by Mr Hendriksz. There he met a worker by the name of Mr Stoffel Gooi. He enquired about the mining permit in respect of Blaauwpan. Mr Gooi referred him to Mr Zondagh at Vrysoutpan. He proceeded to Vrysoutpan.

[20] In his evidence Warrant Officer Botha gave a clear description of the place that he went to at Vrysoutpan. This was the part of the house of Mr Zondagh that was used as his office. Mr Zondagh was not there, so he spoke to Ms Pienaar, whom he assumed to be Mr Zondagh's secretary. He asked for the mining permit. Ms Pienaar told him to wait and shortly thereafter appeared with a one page document which she handed to him. He drove a short distance and stopped to examine the document. It was a mining permit in respect of Vrysoutpan. The expiry date at the foot of the page indicated that the permit had expired during 2005. He said that he was 100% certain hereof. He also identified the document as the first page of MP169/2003. He assumed that the permit also pertained to Blaauwpan. He testified that the document thus constituted evidence of illegal mining at Blaauwpan. He therefore continued with the investigation of the complaint. He testified that but for the document obtained at Vrysoutpan, he would have closed the docket. Instead he arranged for photographs to be taken of the mining operations at Blaauwpan. He took a witness statement from a worker, who confirmed that mining took place at Blaauwpan. He drove to Upington ─ a distance of approximately 170 kilometres from Noenieput ─ and obtained a so-called warning statement from Mr Blaauw. He then took the docket to Colonel Van Wyk of the SAPS in Upington. Colonel Van Wyk instructed him to take the docket to the senior state prosecutor in Upington for decision. He did so, but never saw the docket again, as it mysteriously disappeared whilst at the magistrate's court in Upington.

[21] I now turn to the evidence adduced in rebuttal. Ms Pienaar confirmed that she worked for Mr Zondagh at his house at Vrysoutpan from 2006 to 2010. She denied the evidence of Warrant Officer Botha and Mr Zondagh that

she handed a mining permit to Warrant Officer Botha. She said that nothing of the sort happened. Mr Prins confirmed that Mr Zondagh telephoned him about the visit of Mr Du Toit and that he instructed Mr Zondagh to tell Mr Du Toit to leave Vrysoutpan. Mr Prins accepted that this could have taken place on 30 August 2006. However, Mr Prins flatly denied every other piece of evidence concerning him given by Mr Zondagh. He said that he had never spoken to Mr Zondagh about the mining permit, and simply denied the evidence of Mr Van Zyl in respect of the conversation between them.

[22] Ms Roelien Oosthuizen worked in the environmental section of the Department in Kimberley. She testified that during 2004 the practice of the Department was to open two files in respect of an application for a mining permit. One file contained mining authorisations and related documents (the mineral laws file). The other contained the environmental management programme in respect of the envisaged mining and related documentation (the rehabilitation file). In the period before 1 May 2004, Ms Oosthuizen telephonically communicated with Mr Van den Heever and his secretary, Ms Rista Boshoff. This had to do with an undertaking that had to be signed by SA Soutwerke. The undertaking was a prerequisite for the approval of the environmental management programme which, in turn, was a prerequisite for the issue of the mining permit. As a result of arrangements made between the three of them, the original undertaking was posted to the Department. Ms Oosthuizen testified that, after 1 May 2004, she had received enquiries from Ms Boshoff, who indicated that the mining permit had not yet been received. After one of these enquiries Ms Oosthuizen went to the section where the files were kept. She took out the SA Soutwerke mineral laws file. She found a bundle of documents consisting of four pages on top of the documents in the file. In terms of the practice of the Department, she regarded the bundle as copies of the originals that had been sent to SA Soutwerke. The first two pages consisted of a copy of a standard covering letter to an applicant. The other two pages consisted of a copy of a mining permit. The covering letter referred to MP169/2003. Ms Oosthuizen was, however, unable to say what permit was part of the bundle of documents. Ms Oosthuizen testified that she made photostat copies of the four pages. The photostat machine caused a

vertical light printed section on each page. She returned the bundle of documents to the mineral laws file. She wrote the words ‘Attention: Rista’, as well as the fax number that Ms Boshoff provided, on the first page of the copy of the covering letter, and faxed the four pages to the given fax number.

[23] Ms Oosthuizen testified that she thereafter filed the photostat copies that she had made in the rehabilitation file. These documents were subsequently found in the rehabilitation file and introduced in the court a quo, as exhibit C14. The first page of C14 (the covering letter) referred to MP169/2003, but the third page of C14 was a copy of the first page of MP169/2004. Ms Oosthuizen could not explain why only a copy of MP169/2003 was subsequently found on the mineral laws file. She testified that the post register of the Department reflected that a document had been sent by registered post to Duncan & Rothman on 19 May 2004.

[24] Ms Boshoff confirmed in evidence that she had contact with Ms Oosthuizen in respect of SA Soutwerke’s application for a mining permit. In this regard she referred to her contemporaneous file notes. She made notes of various telephonic conversations with the Department up to and including 23 April 2004. The next note was made on 20 May 2004. It read that Ms Boshoff had called Ms Oosthuizen; that according to Ms Oosthuizen the permit had been signed and issued a considerable time ago; and that they had sent it per registered post to the address as on the application for the mining permit.[1] The application was sent to the Department under cover of a letter of Duncan & Rothman, but the address on the application was that of SA Soutwerke, Private Bag X6009, Upington. According to a further note, Ms Oosthuizen returned a call on 14 June 2014 and said that the permit had been sent to Duncan & Rothman and that she would fax papers to the attorneys before 13h00 on the same day. On 14 June 2014 Ms Boshoff received a four page faxed document. In accordance with her practice, Ms Boshoff punched a single hole through the top left-hand side of the pages. She handed them to

[1] ‘Volgens haar is die permit al ‘n geruime tyd terug onderteken en uitgereik. Hulle het dit per geregistreerde pos gestuur na die adres soos op die Aansoek.’

Mr Van den Heever. Ms Boshoff had no independent recollection of the contents of the faxed pages.

[25] Mr Altus van den Heever testified that he practised as an attorney under the name Wessels & Smith in Upington. He acted for the Blaauw Group and SA Soutwerke since 1997. He was involved in the application for the mining permit in respect of Vrysoutpan. Both he and SA Soutwerke were aware thereof that the MPRDA would commence on 1 May 2004. He testified that his client placed considerable pressure on him to procure the permit. During April 2004 he and Ms Boshoff contacted the Department virtually on a daily basis. This contact was mainly with Ms Oosthuizen, as the last outstanding matter was the original undertaking required for the environmental management programme. This was posted to the Department on 23 April 2004. This was also the date of the last contact that his office had with the Department prior to 28 April 2004.

[26] Mr Van den Heever said that he had received a telephone call from Ms Oosthuizen on 28 April 2004. She told him that the mining permit had been issued. Mr Van den Heever testified that he had received the fax from Ms Boshoff on 14 June 2004. He confirmed that it had included a copy of MP169/2004, even though he noticed that the covering letter made reference to MP169/2003. He only made a copy of the first two pages of the fax (the covering letter), but later sent that to Duncan & Rothman, with his letter dated 17 June 2004. He drove to the offices of SA Soutwerke and handed the fax to Mr Arrie Bester, the financial manager of the Blaauw Group. Mr Van den Heever did not keep a copy of the fax in his files. He denied the evidence of Mr Van Zyl and said that he had never spoken to him about the mining permit.

[27] Mr Van den Heever's letter to Duncan & Rothman dated 17 June 2004, to which copies of the first two pages of the fax were attached, stated that after a big struggle[2] they had ascertained that the mining permit and the s 9(2) consent had been sent to Duncan & Rothman on 28 April 2004, as appeared

[2] ''n groot gesukkel'.

from the attachment. That the documents were sent to Duncan & Rothman on 28 April 2004 was an assumption not justified by the covering letter. In the letter Duncan & Rothman was requested to urgently provide the original mining permit and s 9(2) consent per docex. Mr Van den Heever testified that in response hereto, he received, per docex, a letter from Duncan & Rothman dated 23 July 2014 as well as the original covering letter and the original MP169/2004. Notably, the s 9(2) consent was not included. He testified that except for the fact that the two pages of the original MP169/2004 were stapled together, they were in pristine condition, with no perforations and no punch holes. He had personally delivered the original covering letter and original MP169/2004 at the offices of SA Soutwerke. A date stamp on the covering letter indicated that the original documents had been received by Duncan & Rothman on 25 May 2004. Mr Van den Heever later received the original MP169/2004 from Mr Louw, for purposes of the examination thereof by Saamwerk's expert, which took place on 4 June 2008.

[28] A curious feature of the matter is that neither the fax received by Wessels & Smith on 14 June 2004, nor C14, were discovered in case 292/07. Mr Van den Heever testified that after the Minister discovered C14 in the present matter, he recalled that he had handed the fax to Mr Bester. He testified that he then searched for and found it in the files of SA Soutwerke, which led to its discovery in this matter. This document was handed in at the trial as exhibit C10. It corresponded in all respects with C14, except that the foot of each page of C10 reflected a fax machine imprint. These imprints indicated that the four pages had been received on 14 June 2004 at 10h43.

[29] Saamwerk presented the evidence of an expert examiner of questioned documents, Mr Hattingh. Initially he only compared copies of MP169/2003 and MP169/2004. Both consisted of two printed pages. The second page of each was identical. Mr Hattingh concluded that they were without doubt copies of the same document. Each contained the signature of the regional director, below the handwritten date 28 April 2004 inserted in the spaces provided for that purpose. The first page of each was a copy of a document that had been printed on an official letterhead of the Department.

However, they differed markedly in respect of the positioning of the date stamp in the block provided for that purpose, the positioning of the printing on the letterhead and the form of the printing. Notably, the following was printed at the foot of the first page of MP169/2003:

'Tensy hierdie permit opgeskort, ingetrek of opgesê word of verval, is dit geldig vir 'n tydperk wat strek vanaf die datum van uitreiking tot . . ..'

This was followed by a block containing the date stamp '2005-04-27'. None of this appeared on MP169/2004.

[30] Subsequently, on 4 June 2008, Mr Hattingh examined the original of MP169/2004. He observed that the first page thereof was printed with an inkjet printer on what appeared to be an authentic colour lithographic letterhead of the Department. The paper of the letterhead was of a different colour and thickness than the second page. The second page was printed on ordinary printing paper by means of a laser printer. Mr Hattingh observed that the first and second pages had corresponding staple or pin perforations, which indicated that they had at some stage been stapled or pinned together. However, the first page had perforations not corresponding with that on the second page, which indicated that the first page had on at least four occasions been attached to a document that was not the second page of MP169/2004. Also, perforations on the second page that did not appear on the first page, demonstrated that the second page had once been attached to a document other than the first page of MP169/2004. The second page also had two punch holes through it, whereas the first page had none.

Application to receive further evidence

[31] It is appropriate, at this stage, to consider Saamwerk's application to adduce further evidence by Mr Hattingh. The application was filed in this court on 4 February 2016, after leave to appeal against the dismissal of Saamwerk's claim against the Minister had been granted on 28 October 2015.

[32] The gist of the proposed new evidence of Mr Hattingh is the following. During January 2016 he received C10 and C14 for examination. He observed the vertical light printed portions on each page of C10. This corresponded with

the light printed portions on each of the pages of C14. (It will be recalled that Ms Oosthuizen testified that the photostat machine caused such light printed portions on the copies that she made on 14 June 2004.) The vertical light printed portion of the third page of the fax C10 (the first page of the mining permit) differed from that of the other three pages, in respect of both alignment and quality. The vertical light printed portion on the third page was positioned lower and more to the right than on the other pages. In respect of quality, the light printed portion on the third page was less affected than on the other pages. Only the lower part of the third page was affected and even there the printing was clearer than on the other pages. As a result of the misalignment and difference in quality of the light printed portion of the third page of C10, Mr Hattingh's opinion is firstly that the third page was not copied together with the other pages thereof. His second opinion is that the pages of C10 were not continuously kept as one unit. This is based on the fact that the third and fourth pages of C10 were stapled one more time than the first and second pages thereof, as well as on indentations on the first and second pages that do not occur on the third and fourth pages.

[33] In terms of s 19*(b)* and *(c)* of the Superior Courts Act 10 of 2013, this court has the power to receive further evidence or to remit the case to the court a quo for that purpose. Our courts have, however, over many years made clear that in the interest of finality and to avoid tailoring of evidence and prejudice to the other party, this power should be exercised sparingly and only in exceptional circumstances. Whilst holding that it is undesirable to lay down definite rules, the courts have laid down two basic requirements for such an application. First, there must be a reasonable explanation for the failure to present the evidence in time. Secondly, the evidence must be weighty, material and presumably to be believed. In *Colman v Dunbar* 1933 AD 141 at 162 Wessels CJ said that the evidence 'must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality'. See also *S v De Jager & another* 1965 (2) SA 612 (A) at 613A-F and *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) paras 41-43. Evidence that is disputed on substantial grounds will of course not meet the second

requirement. The Minister and SA Soutwerke opposed the application on the basis that it failed to meet both these requirements.

[34] I therefore turn to the question whether Saamwerk offered a reasonably sufficient explanation for not adducing this evidence in the court a quo. C10 was discovered by SA Soutwerke on 20 August 2013. The services of Mr Hattingh were readily available to Saamwerk. The notice and summary of his expert evidence was delivered on 23 August 2013. The trial commenced on 26 August 2013, but was postponed five days later when Saamwerk was presenting the evidence of Mr Hendriksz. The trial resumed on 5 May 2014. On that day, SA Soutwerke put its case in respect of the receipt of C10 to Mr Hendriksz. Mr Hattingh testified on 3 November 2014 and Mr Van den Heever from 3 to 6 November 2014. The evidence was concluded on 11 November 2014. Argument was heard during February 2015 and judgment was handed down on 24 April 2015. There was thus ample opportunity for Saamwerk to inspect C10 and to obtain and present the further evidence of Mr Hattingh. Even if one accepts Saamwerk's contention that the significance of C10 only became apparent during the evidence of Mr Van den Heever, approximately five months passed before judgment was delivered. During this period Saamwerk could have procured the evidence and applied to re-open its case. That the court file was with the trial judge in chambers during this period, is no excuse. Clearly the attorneys of Saamwerk could have arranged for an inspection of C10. I find that Saamwerk did not provide a reasonably sufficient explanation for the failure to adduce the further evidence in the court a quo.

[35] In opposing this application, SA Soutwerke relies on an affidavit and report of its own expert, Mr Landman. In answer to Mr Hattingh's first opinion, Mr Landman states that he found microscopic vertical white lines running through the typescript and signatures on all four pages of C14. These thin lines were caused by the photostat machine by which C14 was created. He says that it would have been impossible to reproduce these microscopic lines with such precision. Mr Landman's opinion is that this provides conclusive proof that all four pages of C14 were copied on the same machine and

therefore in all probability at the same time. In reply Mr Hattingh acknowledged the presence of these thin lines and accepted this conclusion. According to Mr Landman his conclusion is supported by the close similarity in the grain and colour of the four pages of C14. He states that the difference in the quality of the vertical light printed portion of the third page of C14 is too slight to justify any conclusion and that the misalignment thereof could have been caused by a slightly skew placement of the third page on the bed of the photostat machine. Once the four pages are properly aligned with each other, the alignment of the vertical light printed portions materially corresponds. According to SA Soutwerke, C10 was created when C14 was faxed to Wessels & Smith. It is clear that Mr Hattingh's opinion that the third page of C10 was not copied together with the other pages thereof, is disputed on substantial grounds and is open to serious question.

[36] I fail to see the relevance of Mr Hattingh's second opinion. That the third and fourth pages of C10 were stapled once more than the first and second pages thereof, does not appear to have any particular significance. Mr Hattingh's second opinion is in any event also disputed by Mr Landman on substantial grounds. He says that because of the number of staple perforations on C10 and the resultant damage to the paper, it is not possible to say with any measure of certainty that the third and fourth pages of C10 have one additional set of staple perforations. He also says that he conclusively found by microscopic investigation that the indentations that Mr Hattingh found on the first and second pages of C10, do indeed occur on the third page thereof.

[37] In sum, there is no reasonably acceptable explanation for the failure to present the new evidence in the court a quo and the evidence cannot be said to be weighty, material and to be believed. It follows that the application to receive further evidence must fail.

Analysis of the evidence

[38] It is trite that an appellate court is reluctant to upset findings of credibility and fact of a trial court. This is so mainly because the trial court had

the advantages of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial. The advantages of the trial court must, however, not be overemphasised, because that may render the appellant's right of appeal 'illusory'. The findings of the trial court in respect of credibility and fact will thus be disturbed if they are plainly wrong. See *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706, *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648 D-E and *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.

[39] There is no reason to doubt the evidence of Ms Oosthuizen and Ms Boshoff. The court a quo made no pertinent credibility findings in respect of Mr Prins and Mr Van den Heever. This court is therefore at large to determine the credibility and reliability of their evidence as far as it is possible to do so on record. The evidence of Mr Hattingh was not disputed.

[40] However, the court a quo found Mr Zondagh's evidence to be of a very poor quality and inherently unreliable. The court a quo preferred the evidence of Ms Pienaar over that of Warrant Officer Botha. It said that Ms Pienaar's evidence was more probable and more reliable. The trial court also did not accept the evidence of Mr Van Zyl. It said that Mr Van Zyl's evidence as to how he came to know that the mining permit had been granted for a period of a year 'was too vague' to be given any real evidential weight, and that his evidence in respect of his telephonic conversation with Mr Prins was improbable.

[41] It is true that Mr Zondagh confused dates and mixed up the chronology of events. However, it must be kept in mind that he testified during 2014 about events that took place during 2006 and 2007. A reading of his evidence as a whole paints a sufficiently clear picture that the chain of events he described was triggered by the visit of Mr Du Toit to Vrysoutpan. There can be no criticism of the substance, as opposed to the dates and chronology, of his evidence and it is supported by the probabilities. It is probable in the extreme that the visit of Mr Du Toit would have raised the question as to what could or

should be done to show that SA Soutwerke was entitled to mine at Vrysoutpan.

[42] The trial court criticised Warrant Officer Botha for only mentioning during cross-examination that he had first gone to Blaauwpan before he went to Vrysoutpan. But this is typical of the type of detail that may only emerge during cross-examination. This was moreover not disputed in cross-examination or in evidence. The criticism of Warrant Officer Botha on this issue was wholly unjustified.

[43] The court a quo was also troubled by the fact that Warrant Officer Botha simply assumed that the mining permit also pertained to Blaauwpan and performed 'a perfunctory investigation'. It criticised Warrant Officer Botha for not informing the Witdraai police about the mining permit that he had confiscated, after he heard that they were investigating illegal mining at Vrysoutpan. I am prepared to accept that these aspects impacted on the credibility of Warrant Officer Botha. But they mostly relate to peripheral matters and are overwhelmed by the probabilities. These are that Warrant Officer Botha would only continue with his investigation, and drive all the way to Upington with the docket, if he did in fact believe that MP169/2003 pertained also to Blaauwpan and had seen that it had expired. As Warrant Officer Botha said, because of the distances and heat in the Kalahari, no one in his right mind would undertake such an unnecessary journey. There is more than a ring of truth to that statement.

[44] To my mind, the decisive consideration is this. Mr Zondagh and Warrant Officer Botha are not highly sophisticated people. Mr Zondagh was a truck driver for the Blaauw Group before he became the manager at Vrysoutpan. It is not difficult to understand that this is why Warrant Officer Botha came to be stationed at Noenieput in the Kalahari for 33 years. Both Mr Zondagh and Warrant Officer Botha bear the hallmark of being the salt of the earth. Both testified that they had the first page of MP169/2003 in their hands. There is no room for honest mistake on their part. Counsel was constrained to argue that both had fabricated their evidence. What is more, on SA

Soutwerke's case, Mr Zondagh and Warrant Officer Botha must have conspired to put forward this fabricated version. But there was no conceivable reason for them doing so. The undisputed evidence of Warrant Officer Botha was that he did not know Mr Zondagh. Neither had anything to gain or to lose. It is clear that the court a quo had no appreciation of these critical factors.

[45] In light of what I have said, the denials of Ms Pienaar and Mr Prins cannot stand. As the court a quo recognised, Ms Pienaar's evidence was 'not without its flaws'. She denied the evidence of Warrant Officer Botha with the same firmness that she denied the objectively established facts that a framed copy of MP169/2004 hung on the wall of Mr Zondagh's office and that Warrant Officer De Koker of the Witdraai police station visited Vrysoutpan in respect of the mining permit. Apart from accepting that Mr Zondagh called him about the visit of Mr Du Toit and that that could have taken place on 30 August 2006, Mr Prins denied every other piece of evidence of Mr Zondagh and Mr Van Zyl, irrespective of whether the evidence was important or not. He did so in an unconvincing manner. It is apparent that he consciously attempted in evidence to distance himself as far as possible from the events in question. The evidence of Mr Van Zyl in respect of the telephone call to his friend after the newspaper report, cannot be a figment of his imagination. Although, as I have said, the trial court found his evidence on this issue to be improbable, it was to my mind the converse. Not only does it have the inherent ring of truth but is supported by the existence of the newspaper article relating to SA Soutwerke mining without a valid permit.

[46] I am therefore satisfied that on the totality of the evidence, Mr Prins cannot be believed. The pedantic evidence of Mr Louw that it is impossible that Mr Zondagh could have been working on Vrysoutpan before the commencement date of his employment contract, is clearly not acceptable. I agree that the evidence of Mr Van Zyl that the mining permit had been issued for a period of a year could, on its own, not carry much weight. In the light of the evidence of Mr Zondagh and Warrant Officer Botha it is, however, not without significance. Although Mr Van den Heever denied that he conveyed

this to Mr Van Zyl, Mr Blaauw, one of the persons whom Mr Van Zyl thought could have told him about the permit, did not testify.

[47] The evidence of Mr Van den Heever that he received a call from Ms Oosthuizen on 28 April 2004 when she reported that the mining permit had been issued, cannot be accepted. Ms Oosthuizen did not recall such an incident. Mr Van den Heever mentioned it only in cross-examination, when he was asked about the fact that despite the extreme pressure to obtain a mining permit, nothing happened between 23 April 2004 and 20 May 2004. When he first mentioned this, he did so tentatively. He said:

'Ek het nie 'n nota daarvan nie, maar ek wil dit onthou dat sy vir my geskakel het die 28ste en bevestig het dat die permit uitgereik is.'

and:

'Edele soos wat ek reeds vir u gesê het, ek het nie 'n nota daaroor nie, maar ek wil dit hê dat die 28ste inderdaad bevestig is aan my dat die permit uitgereik is.'

Mr Van den Heever thus conveyed that he seemed to remember or would have it that he received the call. In his later evidence, however, he inexplicably became quite certain about this. The fact is that he meticulously made notes in respect of matters far less important than the good and important news that the mining permit had at long last been issued. The absence of a note in respect of the alleged call from Ms Oosthuizen strongly indicates that it did not take place. If he did receive this call, Mr Van den Heever would have contacted SA Soutwerke without delay and would probably clearly remember doing so. Instead, he first said that he did not report this to his client and later that he would have but did not recall it. The evidence of this call is also inconsistent with Ms Boshoff's note of 20 May 2004 as well as Mr Van den Heever's own letter of 24 May 2004. In this letter to SA Soutwerke he said:

'Ons verwys na bostaande aangeleentheid en het ons op 20 Mei 2004 van die Departement verneem dat die permit reeds uitgereik is en dat dit per geregistreerde pos aan u kantore versend is.'

[48] Mr Van den Heever was the only witness who said that when the fax had been received on 14 June 2004, it contained a copy of MP169/2004. Mr

Bester, to whom he had allegedly handed the fax, did not testify. Mr Van den Heever gave no reason for specifically remembering this after all the years and I find it improbable that he could do so. It will be recalled that Mr Van den Heever did not keep a copy of the fax and only remembered it nine years later, during August 2013. In evidence, Mr Van den Heever was prone to confirm matters in absolute terms which he was in fact unable to verify, such as that SA Soutwerke never received MP169/2003 and that MP169/2004 was not forged. The danger of reconstruction in regard to this part of his evidence is so great that I have no confidence therein. We simply do not know whether copies of MP169/2003 or MP169/2004 were part of the fax received on 14 June 2004.

[49] For the same reason, I do not accept the evidence that Mr Van den Heever received the original MP169/2004 in pristine condition. One set of staple perforations and one set of punch holes, both on the second page thereof, could easily have been missed. He did not say to whom he handed the original at SA Soutwerke and could not say whether it had punch holes when he handled it for purposes of examination by Mr Hattingh. Mr Van den Heever's evidence does not bar a finding that SA Soutwerke received MP169/2003. That, after all, was the permit that was validly issued; which would according to Ms Oosthuizen have been sent with the s 9(2) consent to the address on the application; and a copy of which was kept on the mineral laws file. All of this, of course, does not mean that Mr Van den Heever was involved in or knew about the creation of MP169/2004.

[50] That Mr Prins gave a copy of the first page of MP169/2003 to Mr Zondagh shows that it is more probable than not that SA Soutwerke was in possession of the original. It is not possible or necessary to determine exactly when and how SA Soutwerke received the original of MP169/2003. Once it had been received, the second page thereof must have been used as the second page of the forged MP169/2004. This follows from the evidence of Mr Hattingh. The first and second pages of the original MP169/2004 had been created separately. The second page thereof, which was exactly the same as the copy of the second page of MP169/2003, had been separated from the

first page and had been attached to one document which was not the first page of MP169/2004. The evidence of punch holes through only the second page of MP169/2004, is telling.

[51] Thus there is no room for an 'innocent' explanation of MP169/2004 and I need not discuss the hypothetical innocent explanation raised at the trial. I agree with counsel for Saamwerk that the probabilities are overwhelming that SA Soutwerke, with assistance from within the Department, was complicit in forging MP169/2004 and that its reliance on MP169/2004 was fraudulent. It cannot be doubted that this conduct was wrongful and caused Saamwerk to be deprived of the right to mine at Vrysoutpan.

Prescription

[52] It remains to deal with SA Soutwerke's plea of prescription. The summons was served on SA Soutwerke on 6 September 2011. The debt claimed by Saamwerk is based on what should in my view be classified as a continuous wrong committed by SA Soutwerke, in contrast to a single wrongful act. SA Soutwerke continuously caused Saamwerk to be deprived of the right to mine at Vrysoutpan. Such continuous wrong gives rise to a series of debts arising from moment to moment or day to day. See *Barnett & others v Minister of Land Affairs & others* 2007 (6) SA 313 (SCA) paras 20-21. It was not suggested that the running of prescription had not commenced on 1 January 2007. Therefore, unless the running of prescription was interrupted, that part of the debt that arose prior to 6 September 2008 would have prescribed.

[53] Saamwerk contends that the running of prescription was interrupted in terms of s 15 of the Prescription Act 69 of 1969, by the service of the application in case 292/07. This contention raises the question whether case 292/07 could properly be described as a process whereby Saamwerk claimed payment of the same debt that it claimed in the present action.

[54] Saamwerk relies on the judgment in *Cape Town Municipality & another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C). In *Peter Taylor & Associates*

v Bell Estates (Pty) Ltd & another 2014 (2) SA 312 (SCA) [2013] ZASCA 94, this Court uncritically referred to *Allianz*. It summarised the facts and issue in *Allianz* in the following terms (para 8):

'That case concerned two consolidated actions, the essential relief claimed by each plaintiff being an order declaring that *Allianz* was liable to indemnify the plaintiffs in terms of an insurance policy in respect of all loss or damage suffered as a result of two storms. The issue for determination was whether service of a process whereby the creditor claimed a declaratory order that the debtor was liable to indemnify it, rather than a claim for payment of a debt, interrupted the running of prescription. Howie J stated (at 334H-I):

"1. It is sufficient for purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of a debt.

2. A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment."'

[55] Howie J reasoned that further proceedings to exact payment from the defendant pursuant to a declaratory order that the defendant was liable to indemnify the plaintiffs, would cover the elements of the plaintiffs' claim other than the issue of liability. The issue of the liability of the defendant to indemnify the plaintiffs would be *res judicata* when the declaratory order is made. Thus the cause of action in the proceedings for the declaratory order would be the same cause of action upon which the supposed further litigation would be based. The declaratory order establishing liability to indemnify would be inextricably linked to the final executable judgment, notwithstanding that the latter would require separate proceedings. Therefore the actions for the declaratory order were steps in the enforcement of the plaintiffs' right to indemnity, that is to get the defendants to implement the indemnity.

[56] In my view, Saamwerk's case does not fall within the parameters of *Allianz*. What was claimed in case 292/07 was a declaratory order that

Saamwerk was entitled to a mining right in respect of Vrysoutpan, an order obliging the Minister to execute the mining right and a declaratory order that MP169/2004 was invalid, with consequential interdictory relief. Case 292/07 was essentially aimed at obtaining the mining permit. It did not encompass any of the elements of Saamwerk's subsequent delictual action, that is, fraudulent and wrongful conduct that caused damages. None of the elements of the delictual cause of action were *res judicata* as a result of the judgment in case 292/07. The notice of motion in case 292/07 cannot, in my view, be regarded as a step in the enforcement of the delictual claim for payment of damages. I therefore conclude that the plea of partial prescription must succeed.

[57] For these reasons I conclude that SA Soutwerke is liable for such damages as Saamwerk may prove that it suffered as a result of being unable to mine salt at Vrysoutpan during the period from 6 September 2008 to 25 June 2011.

The case against the Minister

[58] It is necessary to state at the outset what Saamwerk's case against the Minister was not. It was not that the Department was complicit in forging MP169/2004, despite the fact that this must have happened. This was clearly confirmed by counsel for Saamwerk at the trial during argument on an objection by counsel for the Minister that Saamwerk had deviated from its pleadings in this regard. Departure from the pleaded case on appeal would seriously prejudice the Minister and is impermissible. Complex questions as to the vicarious liability of the Minister for dishonest conduct of an official of the Department were, for instance, not canvassed at all at the trial.

[59] The pleaded case against the Minister was that the Department wrongfully, with malicious intent and dishonestly (onregmatig, kwaadwillig, opsetlik en oneerlik), alternatively negligently, refused or failed either to execute Saamwerk's mining right by the end of December 2006 or to prevent SA Soutwerke from mining unlawfully at Vrysoutpan. Properly analysed, the conduct of the Department relied upon would constitute nothing other than

those two administrative omissions. These omissions (the omissions) are two sides of the same coin and could conveniently be taken together.

[60] Saamwerk's claim for the compensation of loss of profit is one for pure economic loss. The element of wrongfulness is therefore of particular importance. The principles applicable to wrongfulness in the context of causation of pure economic loss, are well developed. The causation of pure economic loss is not prima facie wrongful. Whether causation of pure economic loss is wrongful, depends on whether considerations of public and legal policy, consistent with the Constitution, require that a delictual claim be afforded. This involves a value judgment based on judicial evaluation of the policy considerations relevant to the particular case. An incorrect administrative act or omission causing pure economic loss is thus not per se wrongful, but dishonest or mala fide administrative conduct will generally be wrongful. See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 1, 2, 13 and 32; *Minister of Finance & others v Gore NO* 2007 (1) SA 111 (SCA) para 82 and 87-88; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 37-42; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC); [2014] ZACC 28 para 21-26. I now turn to the question whether the relevant considerations of public and legal policy in this case require that the Minister be held liable for damages resulting from the omissions.

[61] An important consideration of legal policy is that ordinarily public law wrongs attract public law remedies and not private law remedies. See *Steenkamp* paras 29-30. In the instant matter, Saamwerk had public law remedies at its disposal. It could, for instance, have instituted proceedings to review the refusal to execute the mining right in terms of s 6(2)*(g)* of the Promotion of Administrative Justice Act 3 of 2000 read with the definition of 'decision' in s 1 thereof. Importantly, Saamwerk had the public remedies that it actually enforced in case 292/07, namely a declaratory order that it was entitled to the mining right, an order obliging the Minister to execute the mining right, and an order declaring MP169/2004 to be invalid.

[62] An important linked consideration is that the law of delict provided Saamwerk with a private law remedy to recover the loss in question. As this judgment finds, SA Soutwerke is liable to make good the loss. It is Saamwerk's own doing that caused prescription to extinguish a part of the loss that could be recovered from SA Soutwerke. Thus, there is no pressing consideration of public policy which require that the law be extended to allow a private law remedy to recover the loss from the Minister.

[63] The omissions did not involve any dishonesty or bad faith. We have not been referred to any case where an incorrect administrative act or omission was found to be wrongful in the absence of dishonesty or bad faith. In *South African Post Office v De Lacy & another* 2009 (5) SA 255 (SCA), the incorrect award of a tender was found not to be wrongful as no dishonesty was involved. In *Gore* the dishonesty involved in the fraudulent award of a tender constituted a decisive consideration on which the finding of wrongfulness was based. I do not say that an incorrect administrative act or omission will never be wrongful in the absence of dishonesty or mala fides. However, dishonesty or mala fides in respect of administrative conduct is a weighty consideration of public policy in favour of a finding of wrongfulness, which consideration is absent in the present matter.

[64] Public and legal policy sometimes require that the plaintiff be compensated for pure economic loss only in the event of an intentional wrong. See *Media 24 Ltd & others v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA) para 12; *Roux v Hattingh* [2012] ZASCA 132; 2012 (6) SA 428 (SCA) para 38-40; *Country Cloud* paras 39-40. This cued counsel for Saamwerk to argue that the Department took a deliberate decision not to execute the mining right and that fault in the form of intent (dolus), as opposed to negligence (culpa), was present. This is not correct. Fault refers to the legal blameworthiness of wrongful conduct. In delict, fault in the form of intent is present only if the person intended to bring about the particular result that he or she caused. The person's will must have been directed at the result caused. There is no basis for finding that the Department intended to cause damages to Saamwerk by delaying the execution of the mining right. At

best for Saamwerk, the omissions were negligent, but it is not necessary to determine this distinct and separate issue.

[65] In my view the considerations that weigh most heavily against the imposition of liability on the Minister, arise from the particular facts of the matter. As I have said, the omissions occurred during the period from the end of December 2006 to 7 June 2011. Mr Mndaweni became the regional manager of the Department in Kimberley with effect from 1 February 2005. He had no personal knowledge of the issue of a mining permit to SA Soutwerke. He first became aware of MP169/2004 during August 2006. SA Soutwerke threatened the Department with litigation shortly thereafter, in September 2006. Mr Mndaweni met with SA Soutwerke during December 2006 and determined that it was seriously contended that only it had a valid right to mine salt at Vrysoutpan. He approached the Chief Director to have the tricky question of the validity of the competing claims to Vrysoutpan investigated. She instructed Mr Guthrie to conduct the investigation. During or about March 2007 Mr Guthrie concluded that MP169/2004 was invalid and that SA Soutwerke had no right to mine salt at Vrysoutpan. He reported this to the Chief Director. Given the complexities of the matter, it is rightly not contended that the investigation was not concluded expeditiously. However, more or less at the same time, Saamwerk instituted case 292/07, which was opposed by SA Soutwerke. This made Saamwerk's mining right and the validity of MP169/2004 the direct subjects of the proceedings in case 292/07.

[66] After its initial prevarication, the Department formally withdrew its opposition to Saamwerk's application before the hearing of evidence in case 292/07. No doubt the Department's initial inconsistent conduct in case 292/07 had no effect on SA Soutwerke's opposition. With the approval of Saamwerk, the Department thereafter participated in case 292/07 only to assist the court. From then on the matter remained before the courts only at the instance of SA Soutwerke. The policy of the Department was not to finalise a mining right whilst litigation was pending regarding the validity of that right. It was in my view perfectly in keeping with public and legal policy not to undermine the

legal process by determining that which the courts were called upon to decide.

[67] In my view, policy and legal considerations do not regard the omissions as unlawful conduct. In the circumstances they do not require the imposition of delictual liability on the Minister. As Saamwerk failed to prove that the omissions were wrongful, its claim against the Minister must fail.

[68] In the result the following order is issued:

1 The application to receive further evidence is dismissed with costs, including the costs of two counsel.

2 The appeal in respect of the claim against the first respondent is dismissed with costs, including the costs of two counsel.

3 The appeal in respect of the claim against the second respondent is upheld with costs, including the costs of two counsel.

4 The order of the court a quo is set aside and replaced with the following:

‘(i) The claim against the first defendant is dismissed with costs, including the costs of two counsel.

(ii) It is declared that the second defendant is liable to the plaintiff for payment of such damages as the plaintiff may prove that it suffered as a result of being unable to mine salt at Vrysoutpan during the period 6 September 2008 to 25 June 2011.

(iii) The second defendant is directed to pay the plaintiff’s costs in respect of the claim against it, including the costs of two counsel.’

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C H G van der Merwe
Judge of Appeal

Appearances

For the Appellant:	W R E Duminy SC (with him J C Tredoux) Instructed by: Haarhoffs Inc, Kimberley Honey Attorneys, Bloemfontein
For the First Respondent:	W Trengove SC (with him H J L Vorster) Instructed by: State Attorney, Kimberley State Attorney, Bloemfontein
For the Second Respondent:	S J Grobler SC (with him J L Gildenhuys) Instructed by: Wessels & Smith Inc, Upington McIntyre & Van der Post, Bloemfontein