THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 296/08

In the matter between:

M L JOUBERT	**FIRST APPELLANT**
M L JOUBERT N.O.	**SECOND APPELLANT**
(In her capacity as trustee of Sanwild Wildlife Trust)	
A H GROBLER N.O.	**THIRD APPELLANT**
(In his capacity as trustee of Sanwild Wildlife Trust)	
R SAVORY N.O.	**FOURTH APPELLANT**
(In her capacity as trustee of Sanwild Wildlife Trust)	
THE MURRAY FOUNDATION CONSERVATION HOLDINGS (PTY) LTD	**FIFTH APPELLANT**
v	
MARANDA MINING COMPANY (PTY) LTD	**RESPONDENT**

Neutral citation: *Joubert v Maranda Mining Company* (296/2008) [2009] ZASCA 68 (29 May 2009).

Coram: Nugent, Van Heerden, Mlambo JJA, Kroon et Leach AJJA

Heard: 11 May 2009

Delivered: 29 May 2009

Summary: Right of access to land in terms of Mineral and Petroleum Resources Development Act 28 of 2002 – unreasonable refusal by land owner and occupier to allow mining permit holder access to land – held that when permit holder has complied with all requirements in terms of the Act it has a right to enter the land to exercise its rights.

ORDER

On appeal from: High Court, Pretoria (Claassen J sitting as court of first instance).

The following order is made:

'The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.'

JUDGMENT

MLAMBO JA (Nugent, Van Heerden JJA, Kroon, Leach AJJA concurring)

[1] On 11 April 2008 the North Gauteng High Court (Claassen J) granted the respondent final relief on an urgent basis, inter alia interdicting and restraining the appellants from refusing the respondent access to a piece of land described in the relevant title deed as the remaining portion of portion 7 of the farm Leydsdorp Township 779, Registration Division LT, Northern Province (now Limpopo), size 2604,0827 hectares (the land). This appeal is against the order and judgment of the court a quo with the leave of that court.

[2] The matter revolves around a goldmine on the land that was originally worked in the 1890s, after which all mining activities ceased. However, mineral sampling reports conducted subsequently indicate that the land remains mineral-rich. The title deed records that, subject to certain conditions, the mineral rights

on the land vested in the State. In any event, when the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) came into effect on 1 May 2004 the State became the custodian of all minerals in the whole of the Republic of South Africa.[1] The portion on which the mineral rights are found cover 0,03 per cent or 1.5 hectares of the land. For convenience I refer to this portion of the land as the mineral rights area.

[3] The respondent acquired the mineral rights in February 2005 from Dynamic Mineral Development (Pty) Ltd whose predecessor in title had acquired them in 2002 from the Department of Minerals and Energy (DME) representing the State. At the time the respondent acquired the mineral rights, Come Lucky (Pty) Ltd (Come Lucky) was the owner of the land. The deed of transfer in terms of which the DME alienated the mineral rights defined these as certain 20 unnumbered base mineral claims.

[4] Come Lucky did not participate in the proceedings in the court a quo even though it was cited as the first respondent. It also does not feature in this appeal, having sold the land in the interim to the fifth appellant who took transfer in February 2008. The first to fourth appellants are the trustees of Sanwild Wildlife Trust (Sanwild). Sanwild conducts a wildlife sanctuary as well as eco-tourism operations on the land and appears to have occupied the land since about September 2006. It has a 26 per cent shareholding in the fifth appellant.

[5] On acquisition of the mineral rights the respondent applied to the Minister of Minerals and Energy (the Minister) in April 2005 for a prospecting right[2] and a mining permit.[3] On the acceptance of the application for a mining permit by the regional manager of the DME, the respondent lodged an environmental management plan in July 2005. In June 2005 the respondent notified Come

[1] In terms of s 3(1) which provides: 'Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.'
[2] Section 16(1).
[3] Section 27(2).

Lucky, as owner of the land, and its attorneys that it had made the applications and invited the latter to lodge objections, if any, against the grant thereof. This notification mentioned that the respondent intended to opencast a section of the mineral rights area and also referred to its obligation to compensate Come Lucky. In this regard it offered a once-off payment of R 5 000 per hectare.

[6] Come Lucky lodged an objection[4] against the applications alleging inter alia that:

'The proposed mining operations will undoubtedly have a deleterious impact on the eco-tourist and environmentally orientated activities of our client and the nature of its business. Without in any way limiting the effects of the proposed mining activities, the deleterious impact and ecologically degrading result include, but are not limited to *inter alia*,

1. the disturbance of game and game breeding operations arising from the noise and blasting associated with the mining operation;
2. the cancellation of safaris as a result of the noise and disturbance of drilling and mining operations; and
3. the general degradation and pollution of the environment arising from the open cast mining operations.'

The Minister, however, granted the respondent the mining permit on 21 September 2006 and approved the environmental management plan on 19 December 2006. These decisions were never challenged by Come Lucky.

[7] Having been granted the mining permit and with its environmental management plan approved, the respondent informed Come Lucky in March 2007 of these developments. The respondent also informed Come Lucky that it intended to exploit its mining rights in terms of the permit and consequently raised the issue of access to the land as well as compensation. This approach elicited no favourable response, save that Come Lucky's attorneys requested

[4] Per letter from attorneys Andrew Miller & Associates dated 29 June 2005.

copies of the applications for prospecting and mining permits and ultimately indicated that they had instructions to oppose any application that may be brought in the high court. The respondent thereafter notified the regional manager of DME that it was being denied access to the land. This prompted the regional manager to write to Come Lucky recording the respondent's complaint and warning the former that steps could be taken against it in terms of the Act regarding its refusal to allow the respondent access to the land. The letter (dated 11 July 2007) also invited Come Lucky to make representations in respect of the respondent's complaint and invited it to show cause why the respondent should not be allowed access to the land. This also evoked no response from Come Lucky, whereupon the respondent notified the latter that it intended to enter the land with immediate effect to exercise its mining rights.

[8] In October and November 2007 the respondent attempted to gain access to the land but was prevented from doing so by a representative of the appellants. On the latter occasion the respondent was informed that it should contact the first appellant who, on being so contacted, informed the respondent that under no circumstances would it be granted access to the land.

[9] A few days later the respondent removed a lock at a gate some seven kilometres from the mineral rights area and replaced it with another lock. This was another attempt by it to gain access to the land. On the same day a representative of Sanwild informed the respondent that Sanwild had been in occupation of the land since September 2006. On being appraised of Sanwild's occupation, the respondent's attorneys initiated a meeting with the appellants' attorneys to discuss the respondent's need for access to the mining rights area, as well as the issue of compensation. It was agreed at the conclusion of that meeting that the appellants' attorneys would revert to the respondent's attorneys with an indication of the appellants' attitude to the respondent's request for access. This did not materialise and the respondent launched its application in the court a quo seeking inter alia the following relief:

(a) Interdicting and restraining Come Lucky and the appellants (then first to fifth respondents) from refusing the respondent (then applicant) access to the land; and

(b) authorising the respondent to enter onto the land together with its employees and to bring onto the land any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure which may be required for purposes of mining on the property as defined in the mining permit.

[10] The court found:

'Dit is duidelik dat die applikant het 'n duidelike reg. "A clear right" soos die geykte uitdrukking bestaan, en sy permit se geldigheid is nog nie aangeveg nie . . .'

and further:

'In al die omstandighede is ek tevrede dat die applikant 'n reg uitgemaak het vir die regshulp wat hy vra.'

[11] The crisp issue therefore in this appeal is whether the court a quo was correct in finding that the respondent had established a clear right to access. The case made out on appeal is that the respondent has not established this. Simply put, the argument before us was that the respondent sought access to the entire parcel of land from a gate envisaging a seven kilometre route to the mineral rights area. In this regard it was submitted that a clear restriction, apparent from the respondent's environmental management plan, was that the respondent's access to the mineral rights area was to be on a route of no longer than 1.5 km. It was submitted that access to the land over a seven kilometres route would be tantamount to the commission of an offence within the contemplation of the Act. This, I understood, was the appellants' main argument. I propose to deal with it before I consider the other submissions advanced.

[12] Perhaps it is prudent briefly to consider the scheme of the Act relevant to the issue before us. It is apparent from s 27(5)(b) that, once an application for a mining permit is accepted by the regional manager, the latter must notify the applicant for the permit to submit an environmental management plan and to consult with the owner of the land or occupier or any other affected parties, and submit the results of this consultation to him within 30 days. This envisages consultation after the lodging of an application for and before the grant of a mining permit. Furthermore, in terms of s 5(4)(c), once the permit is granted no mining activities may be commenced by the permit holder unless it has notified and consulted with the owner or occupier of the land in question. In *Meepo v Kotze & others* 2008 (1) SA 104 (NC) at 114D-E, the view was expressed that the legislature provided for due consultations between a landowner and the holder of or applicant for a permit in order to alleviate possible serious inroads being made on the property right of the landowner. Consultation is the means whereby a landowner is apprised of the impact that prospecting (or, I would add, mining) activities may have on his land. I am in respectful agreement in this regard with this view, even though that case was concerned with access in relation to a prospecting right.

[13] Furthermore s 27(7)(a) provides:

‘(7) The holder of a mining permit–

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

. . .’

Clearly in terms of this section the holder of a mining permit has a right to enter the land in respect of which the mining rights have been granted for purposes of exploiting its rights. The right to enter the land solidifies, in my view, once the mining permit holder has complied with the provisions regarding notification and

consultation with the owner of the land, or occupier and/or other parties affected by the permit.

[14] In the present case there is no dispute that the respondent had complied with all the requirements set out in s 27(1)-(5)[5] before the grant of a mining permit and in s 5(4)[6] after the grant of the permit.

[15] The appellants' submission that the respondent has not established a clear right to access must be viewed in the context of the case made out in the papers by the respondent (*Director of Hospital Services v Mistry* 1979 (1) SA 626(A) at 635H).[7] Scrutiny of the notice of motion, as well as the founding affidavit, reveals that the respondent did not seek access to the entire land and neither did it seek access encompassing a seven kilometre route. What it sought

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[5] Section 27(1)-(5): '(1) A mining permit may only be issued if –
(a) the mineral in question can be mined optimally within a period of two years; and
(b) the mining area in question does not exceed 1,5 hectares in extent.
(2) Any person who wishes to apply to the Minister for a mining permit must lodge the application –
(a) at the office of the Regional Manager in whose region the land is situated;
(b) in the prescribed manner; and
(c) together with the prescribed non-refundable application fee.
(3) The Regional Manager must accept an application for a mining permit if –
(a) the requirements contemplated in subsection (2) are met;
(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.
(4) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of the receipt of the application and return the application to the applicant.
(5) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing –
(a) to submit an environmental management plan; and
(b) to notify in writing and consult with the land owner and lawful occupier and any other affected parties and submit the result of the said consultation within 30 days from the date of the notice.'

[6] Section 5(4): 'No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –
(a) an approved environmental management programme or approved environmental management plan, as the case may be:
(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and
(c) Notifying and consulting with the land owner or lawful occupier of the land in question.'

[7] 'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit to which a judge will look to determine what the complaint is.'

was access in principle to the mineral rights area. This much is also clear from correspondence exchanged between the parties and their respective attorneys. This is what the court a quo decided and this cannot be criticized on any basis. Strictly speaking the appeal is susceptible to be dismissed on this basis alone.

[16] However, counsel for the appellants also submitted in the alternative that the impasse created by the appellants' blanket refusal to allow the respondent access to the land, meant that the regional manager had to initiate the process aimed at the expropriation of the land as envisaged in s 54(5). The implication of this submission is that the jurisdiction of the high court and this court to resolve that impasse is not countenanced by the Act. That there is no merit to this submission is borne out by the fact that it was made without much conviction, and rightly so. No provision in the Act could be pointed out in support of this line of reasoning. Furthermore, it would be absurd for the Act to permit an unreasonable refusal for access based on a clear objective to frustrate the legitimate endeavours of a permit holder.

[17] Furthermore, it is clear that expropriation is an option that may be adopted by the regional manager to advance the objects of the Act in s 2(d), (e), (f), (g) and (h).[8] Here the appellants simply, and in an unreasonable fashion, refused to allow the respondent access to the land and as a result it is unclear on what conceivable basis the regional manager could be expected to initiate an expropriation process. No basis for expropriation based on this provision was

[8] 'The objects of this Act are to –

. . .

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

(f) promote employment and advance the social and economic welfare of all South Africans;

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

(h) give effect to s 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

. . .'

advanced by the appellants' counsel. The submission is in my view clearly misconceived.

[18] Finally, whilst this is strictly speaking unnecessary but because the appellants' counsel invited us to do so, I consider the appellants' argument that, properly considered, the environmental management plan and its accompanying documentation did not envisage the construction of a new road. This submission is reliant on certain portions of a form completed by the respondent when it submitted the environmental management plan for approval. In this regard the appellants' counsel submitted that by ticking the 'no' option in respect of the question: 'would it be necessary to construct roads to access the proposed operations' in portion C2.14 of the form, that must mean that no new roads were to be constructed.

[19] However, one cannot consider just that one part of the form in isolation. It is one of a number of questions relating to access roads. In this regard the indication in C2.15 that the access road will not be longer than 1.5 km, in C2.16 that 'no trees would be uprooted when constructing access roads', as well as the indication in C2.17 that 'foreign material like crushed stone, limestone or any material other than the naturally occurring top soil would be placed on the road surface' show clearly that the 'no' tick in C2.14 (ostensibly indicating that no new roads would be constructed), is simply a mistake as pointed out by the respondent's counsel. I cannot also fathom a situation where the permit holder can be regarded bound by a clearly mistaken tick on the form. I am of the view that, when all the questions and answers are considered in that portion of the form, it is clear that the construction of a new road was envisaged when the environmental management plan was submitted.

[20] Furthermore, there is no indication on the papers that there are any existing roads from any public road to the mineral rights area. This can only mean that the Minister and officials of the DME, when granting the permit, and

approving the environmental management plan, were alive to that fact. Therefore, when the permit was granted and the environmental management plan approved, the respondent was also granted the right to construct a new road to the mineral rights area. In the absence of any access road to the mineral rights area, it remains a mystery how, in the appellants' mind, the respondent is to exploit its mining rights. In the final analysis it remains for us to clarify that the relief granted by the court a quo does not authorise or permit the respondent to contravene any of the provisions of the Act or commit an offence.

[21] The appeal must therefore fail. The following order is made:

'The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.'

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D MLAMBO

JUDGE OF APPEAL

APPEARANCES:

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