IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No. 07/14045

Date:07/11/2008

In the matter between:

SANDVIK MINING AND CONSTRUCTION RSA (PTY) LTD Applicant

and

SOUTH AFRICAN WETLAND REHABILITATION

(ASSOCIATION INCORPORATED UNDER SECTION 21) Respondent

JUDGMENT

[1] On 31 August 2007 the applicant instituted action against 'BIODIVERSITY REHABILITATION (PTY) LIMITED registration number 2002/030615/08, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa with its agreed address for service of the Summons at c/o Brooks & Brand Attorneys, 203 Jan Smuts Avenue, Parktown North'. The same citation appeared in the

annexed particulars of claim. On 31 October 2007, Schwartzman J granted summary judgment in those proceedings in favour of the plaintiff against 'Biodiversity Rehabilitation (Pty) Ltd' for the payment of the sum of R132 982,20, interest, and costs.

[2] The applicant now seeks the variation of that order, either in terms of Rule 42(1) of the Uniform Rules of Court or the common law, 'by replacing the citation' BIODIVERSITY REHABILITATION (PTY) LTD with that of the respondent in the present proceedings, which is 'SOUTH AFRICAN WETLAND REHABILITATION (ASSOCIATION INCORPORATED UNDER SECTION 21) REGISTRATION NO. 2002/030615/08'.

[3] The applicant has furthermore prepared a draft order wherein it also seeks the rectification of the defendant's citation wherever it appears in its summons, particulars of claim, and application of summary judgment. Such relief is not sought in its notice of motion and no case in support thereof has been made out in the founding papers. This relief cannot be granted. In Govender v Hassim and Another 1994 (1) SA 304 (D&CLD), Howard JP said this at p 305G-H:

> 'In terms of Rule 28(8) the Court may grant leave to amend any pleading in an action at any stage before judgment. Once the Court has pronounced a final judgment or order in the action, it is *functus officio* and has itself no authority thereafter to grant any amendment of the pleadings. (See *Randfontein Estates ltd v Robinson* 1921 AD 515 at 519; *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F-G.) It is true that in *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (B) Hendler J contrived to amend a summons after judgment, in the exercise of authority which he apparently thought he had under a Rule of Court identical to Rule 42(1) of the Uniform Rules. Of course the Rule confers no such jurisdiction; it deals exclusively with the rescission or variation of orders or judgments.'

[See also: David Hersch Organisation (Pty) Ltd and Another v Absa Insurance Brokers (Pty) Ltd 1998 (4) SA 783 (T), at p 787C – H].

[4] The general rule is that a judgment, once given, is final, but a court may nevertheless in certain circumstances, either under the common law or under the Uniform Rules of Court, correct, alter or supplement its judgment or order.

[5] Rule 42(1) of the Uniform Rules of Court provides for the variation of an order or judgment 'erroneously sought or granted in the absence of any party affected thereby', or 'in which there is an ambiguity, or a patent error or omission', or 'granted as the result of a mistake common to the parties.'

[6] Under its common law powers a court may 'supplement' its judgment or order 'in respect of accessory or consequential matters, for example, costs or interest of the judgment debt, that the Court overlooked or inadvertently omitted to grant' or 'clarify' it 'if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the sense and substance' thereof or 'correct' a 'clerical, arithmetical, or other error' so as to give effect to its true intention without altering its intended sense or substance or it may correct, alter or supplement a costs order made where the costs have not been argued. Insofar as a court may have a general discretion to correct, alter or supplement its judgment or order in appropriate other cases, such discretionary power 'is obviously one that should be very sparingly exercised, for public policy demands that the principle

of finality in litigation should generally be preserved rather than eroded' [see: Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A), at pp 306H – 309A; Colyn v Tiger Food Industries Ltd t/a Meadow Food Mills (Cape) 2003 (6) SA 1 (SCA)].

[7] The applicant has, in my view, not made out a case for the variation of the court order, either in terms of Rule 42 or the common law.

[8] It cannot be said that the order was 'erroneously sought' by the applicant. What was sought accorded with the applicant's summons, particulars of claim, and application for summary judgment. The respondent's attorney advised the applicant's attorneys prior to the issue of summons of the correct citation of the respondent, but the applicant or its attorneys nevertheless elected to issue summons against the entity described in the summons, and to thereafter apply for summary judgment against such entity. It has not been shown that the summons, particulars of claim, and summary judgment application were not deliberately worded as they are. Instead a mere unsubstantiated allegation is made in the founding papers that '[a]s a result of a bona fide error, the Respondent was incorrectly cited as a private company rather than a section 21 company in the original summons issued on 31 August 2007.' The relief accorded to the plaintiff is precisely that which was requested.

[9] The explanation proffered by the applicant's attorney in reply that he considered the erroneous citation so insignificant that it did not warrant a formal request for an amendment before seeking the order and his submission that 'had the amendment been

applied for at the relevant time, it would have been granted there and then and that summary judgment would still have been granted immediately thereafter' do not satisfy the requirement of an order 'erroneously sought' within the meaning of the subrule. As was stated by Leveson J in First National Bank of SA Ltd v Jurgens 1993 (1) SA 245 (W), at p 247D – E:

> 'I am unable to perceive how an omission can be categorized as something erroneously sought or erroneously granted.
> I consider that the Rule only has operation where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded. Failure to mention a form of relief which would otherwise be included in the relief granted is not in my opinion such an error.'

[10] It can also not be said that the order was 'erroneously' granted or that it contains a patent error. Again the order followed the wording of the summons, particulars of claim and application for summary judgment. In its replying affidavit the averments are made that the Judge's attention was drawn to a letter from the respondent's attorneys dated 19 October 2007, wherein it is *inter alia* stated that the respondent was erroneously cited, and that the Judge was seen reading the letter by the applicant's counsel. It is, however, not suggested that the issue of the wrong citation was pertinently raised or argued before the Judge. If this happened, summary judgment would probably have been refused. The papers do not disclose that the Judge expressed himself ambiguously or committed an error in not having granted summary judgment against the respondent. There is, in my view, no basis upon which it can be said that the order does not reflect the intention of the Judge.

[11] The applicant does not allege any 'mistake common to the parties'. On the contrary, the respondent's attorneys advised the applicant's attorneys of the incorrect citation of the respondent prior to the issue of summons and again before the applicant obtained the order for summary judgment.

[12] The application is dismissed with costs.

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P.A. MEYER
JUDGE OF THE HIGH COURT

7 November 2008