REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 09023/2019

APPEAL CASE NUMBER: A5022/2019

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.

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SIGNATURE DATE

In the matter between

TRANSASIA MINERALS (PTY) LTD **First Appellant**

11 MILES INVESTMENTS (PTY) LTD **Second Appellant**

PHEZUKOMKHONO COMMUNITY PROPERTY ASSOCIATION **Third Appellant**

and

UMSOBOMVU COAL (PTY) LTD **First Respondent**

MINISTER OF POLICE **Second Respondent**

PHILLIP LEVINSOHN, NO **Third Respondent**

SUMMARY

[1] This matter involves an automatic appeal brought in terms of section 18 of the Superior Courts Act 10 of 2013. The section pertains to the suspension of a decision pending an appeal against it. Two decisions, both delivered by Modiba J, were necessary to consider by the Court of Appeal. The first decision (March 2019) was an order in favour of the first respondent ("the respondent") whereby an arbitral award was made an order of court. The second decision (June 2019) was an order refusing the first and second appellants' ("the appellants") application for leave to appeal the first decision as well as declaring that the suspension on the March 2019 decision, pending any appeal the appellants may bring to the SCA, be lifted.

[2] The respondent had sold prospecting rights to the appellants in June 2010. The sale agreement provided for the respondent to convert the prospecting rights into mining rights – the sale therefore became one of mining rights. However, due to alleged breach and repudiation of the sale agreement by the appellants, the respondent cancelled the sale agreement. The respondent consequently demanded that the appellants vacate the properties but they refused and instituted an application against the respondent for a declaration that the sale agreement was not lawfully cancelled by the respondent. This application has not yet progressed beyond the founding papers.

[3] In the interim, the respondent sought access to the properties because, as the registered holder of the mining rights in question, it was still required to comply with certain statutory obligations or risk losing the mining rights altogether. Hence arbitration was commenced between the parties. The arbitral award directed the first appellant to grant the respondent access to all the immovable properties which comprise the said mining right. This access was expressly limited to a period of 48 hours.

[4] It is this award that the respondent sought to make an order of Court. The appellants filed a counter application for an urgent stay and review of the arbitral award. In the March 2019 decision, the learned Judge found both applications to be urgent. She concluded that the arbitrator committed no irregularity because he derived his jurisdiction to make an interim award from three sources – clause 11 of the parties' written sale agreement; rule 7 of the Arbitration Foundation of South Africa (AFSA) Expedited Rules; and the terms of the arbitration dispute.

[5] Following the March 2019 decision, the respondent filed an application asking that it be directed that the March 2019 decision would not be suspended pending the finalisation of applications for leave to appeal, appeal petitions, applications for reconsideration by the Judge President of the SCA and/or appeals instituted by the appellants against the judgment. The respondent based the application on sections 18(1) and (3) of the Superior Courts Act. The relief was so granted by Modiba J in June 2019.

[6] On appeal, the Full Bench had to consider whether the March 2019 decision, making the arbitral award an order of court, was final or interlocutory. This was necessary because if the March 2019 decision was final, then only would its operation and execution be automatically suspended pending an appeal. Should the losing party launch an appeal, it would then be the duty of the winning party to apply to court, in terms of section 18(3), and it would have to show the existence of *"exceptional circumstances"*; and in addition, on a balance of probabilities, that it will suffer irreparable harm if the automatic suspension were not lifted. Further, it would have to show that the losing party (who would be the party appealing) will not suffer irreparable harm if the court orders the lifting of the automatic suspension.

[7] However, should the March 2019 decision be an interlocutory order, the judgment and order would not be automatically suspended even if the losing party appealed. The losing party would have to apply to court and show the existence of exceptional circumstances, and in addition prove, on a balance of probabilities, that it would suffer irreparable harm if the court did not suspend the operation and execution of the decision, and that the winner would not suffer irreparable harm if the court were to suspend the operation and execution of the decision.

[8] The Full Bench found that there could be little doubt that the award of the arbitrator was in the nature of an interlocutory award and the parties had understood it as such. The court held that the 48 hour access award would have no effect at all on the main arbitration and that further, there was no part of the relief ultimately claimed that could be impacted by the 48 hours access.

[9] The court held that South African courts have no difficulty making interim arbitral awards orders of court without changing the intrinsic characteristic of the arbitral award, particularly without changing the interlocutory feature of the award. Ultimately the court found that the respondent had, operating in its favour, a decision which was interlocutory and did not have the effect of a final judgment. The operation and execution of this decision was, therefore, not suspended under section 18(1) of the Act.

[10] Hence the court found that the respondent should not have applied for relief under that section. Had the appellants wished to suspend the operation and execution of the March 2019 decision, it was up to them to have applied for relief under section 18(3) of the Act. It was up to the appellants to have shown the existence of *“exceptional circumstances”* as envisaged in section 18 (1) of Act, and it was up to them to have proved on a balance of probabilities that they would suffer irreparable harm if the court did not suspend the operation of the March 2019 decision; and it was up to them to show that the respondent would not suffer irreparable harm if the March 2019 decision was suspended (with the effect that the respondent could not access the sites for 48 hours).

[11] The court declared the March 2019 decision to be an interlocutory order which therefore did not have the effect of a final judgment. Therefore, the order was not suspended pending applications for leave to appeal, or appeals, against it. Further, the court set aside the June 2019 order and substituted it with an order declaring that the application to declare the operation and execution of the March 2019 decision not suspended, pending any appeals against it, be dismissed. The court also dismissed the appeal with costs.