IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 2526/2024

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

[redacted]

17/07/2024
DATE SIGNATURE

In the matter between:

COMEDY MOTSEPE MAKUNYANE	**FIRST APPLICANT**
BONGINKOSI ALEX REGINALD NXUMALO	**SECOND APPLICANT**

AND

MASIWA TOWELL SITHOLE	**FIRST RESPONDENT**
ALLEN DUROY	**SECOND RESPONDENT**
INCREADABLE BERACHOT MINING AND TRADERS (PTY) LTD	**THIRD RESPONDENT**
MINISTER OF MINERAL RESOURCES AND ENERGY	**FOURTH RESPONDENT**
THE COMMISSIONER, COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**FIRTH RESPONDENT**

JUDGMENT

LANGA J:

Introduction and Concise Facts

[1] This application concerns the dispute over a Mining Right and company directorship. The Applicants seek an urgent interim order interdicting the First, Second and Third Respondents, ("the Respondents"), from alienating or disposing of the Third Respondent's Mining Right, any shareholding, equity, interest, or participation in the Mining Right or joint venture, or a controlling interest in the third respondent, without the written consent of the Applicants. The Applicants seek the interim relief pending the outcome of an action the Applicants intend to institute against, *inter alia*, the First, Second and Third respondents within 30 court days of the granting of the order sought. On 30 May 2024 the Respondents opposed the application.

Concise background facts

[2] It is common cause that the Third Respondent company was registered on 1 June 2012 by the First Applicant, Comedy Motsepe Makunyane ('Comedy'), Bonginkosi Alex Reginald Nxumalo ('Alex') and Abednigo Peter Mazibuko ('Peter') who were the initial directors in terms of the company's registration certificate. The company was established for the purpose of mining coal. After its incorporation, the company applied for a prospecting right from the Department of Mineral Resources and Energy in terms of section 16 of the Mineral and Petroleum Resources Development Act 28 of 2002, ('the MPRDA'). At this juncture Masiwa Towell Sithole ('Masiwa') was appointed director of the company on 8 May 2013. Shortly thereafter Peter resigned as director on 6 June 2013, apparently as he no longer had interest in the business. It is common cause that Comedy, Alex and Masiwa remained the directors of the company.

[3] On 15 May 2014 the prospecting application was granted to the company in respect of Portion 10 of Farm Graspan in terms of section 17 of the MPRDA. Subsequent to that the

company formed a partnership with Osho Mining which acquired 69% of the issued share capital while Comedy, Alex and Masiwa collectively held the remaining issued shares each with an equal share. In 2015 Osho Mining however divested from the company and its shareholding was transferred to Comedy, Alex and Masiwa.

[4] The company continued with its prospecting and also applied for a mining right for the Graspan coal project in 2017. It would appear that Comedy and Alex were removed as directors in 2017 without their knowledge, as they allege. On 3 October 2017 Allen Duroy ('Allen') was appointed as a director of the company. The Applicants Comedy and Alex also claim not to have been consulted on this appointment. Comedy and Alex also insist that they never resigned as the company directors as alleged by the Respondents.

[5] Comedy and Alex further state that they only became aware of their removal as directors of the company three years ago but were at the time not overly concerned as the Mining Right application was still pending and there was no indication that Masiwa intended disposing of the Mining Right. Meanwhile on 9 January 2024 the company obtained the Mining Right in terms of section 23(1) of the MPRDA which showed that Masiwa was the person authorized to act on behalf of the company. After the granting of the Mining Right, Comedy and Alex claim to have heard rumours that there was an attempt to amend the directorship/shareholding in the company with the records of the DMRE. The DMRE was ostensibly not prepared to get involved in the dispute and encouraged the parties to negotiate. It was only in January and February 2024 that Alex and Comedy met Masiwa to discuss their removal as directors of the company. This application was later brought by Comedy and Alex on an urgent basis apparently after becoming aware that an application had been made with the DMRE for the Ministerial consent to transfer the mining right.

[6] According to the notice of motion, the nub of this application is to obtain an interim order interdicting the First, Second and Third Respondents, ('the Respondents'), from alienating or disposing of the Third Respondent's Mining Right, any shareholding, equity, interest, or participation in the Mining Right or joint venture, or a controlling interest in the third respondent, without the written consent of the Applicants. They further want the declaratory order that they are directors and that the majority shareholders of the Third Respondent and that the Second Respondent is not a director of the Third Respondent. The application it is not only about the disposal of the Mining Right, but it also concerns their removal as directors of the Third Respondent. I will first deal with the issue of urgency first as it may be dispositive of the application.

Urgency

The Applicants' contentions

[7] The Applicants confirm that although they became aware about two or three years ago of their removal as directors of the Third Respondent, they, however, only became aware during January 2024 that the Mining Right had been granted to the Third Respondent. They subsequently only met in January 2024 and February 2024 with the First Respondent in regard to their removal as directors.

[8] The Applicants further asserted that they only became aware on 15 April 2024 of the Respondents' intention to cause the Mining Right to be transferred by obtaining the consent of the Minister as contemplated in terms of section 11(1) of the Mineral and Petroleum Resources Development Act 28 of 2002. They assert that on 18 April 2024 their attorneys attempted to send email correspondence to the First Respondent. The correspondence set out the position of the applicants and demand was made for an undertaking by 22 April 2024 *inter alia* that the obtaining of ministerial consent for the transfer of the Mining Right not be proceeded with.

[9] The email correspondence was not successfully sent and was resent on 19 April 2024 with a response required by 23 April 2024. On 30 April 2024, the Respondents' attorneys responded to the correspondence from the applicants' attorneys and stated *inter alia* that the Respondents will be advised to make the undertaking. However, the Applicants interpreted this communication to mean that an undertaking had been made by the Second and Third Respondent that, pending the outcome of an action, they undertake not to alienate or dispose of the contested mining right until the envisaged action to be instituted on or before 20 June 2024 is finalised. The Applicants acting of the basis of their misunderstanding of the letter, accepted the 'undertaking' by the Applicants on 30 May 2024. The Respondents however disagreed on the purported undertaking on 30 May 2024. The Applicants then alleged that the Respondents reneged on their undertaking.

[10] I must pause here to state that a closer scrutiny of the letter dated 30 April 2024, it is clear that no undertaking not to proceed with obtaining ministerial consent for the transfer of the Mining Right was made. The Respondents' attorneys clearly state that the Respondents will be advised to make the undertaking which was never made. The Applicants obviously misunderstood the letter in question and their claim that the Respondents reneged on their undertaking is specious.

[11] Nevertheless on 3 May 2024, the Applicants' attorneys responded to the correspondence of 30 April 2024 from the Respondents' attorneys. In this correspondence the Applicants' attorneys sought proof of the removal of the Applicants as directors of the Third Respondent. The Respondents' attorneys did not respond to this letter.

[12] Subsequent to these exchanges the application was issued on 24 May 2024 to be heard on 4 June 2024. It was served per email on 25 May 2024 and on 30 May 2024 the Respondents delivered their answering affidavit.

[13] The Applicants in essence aver that the Respondents evidently intend to obtain Ministerial consent for the transfer of the Mining Right. In support of urgency the Applicants claim that if the application is heard in the ordinary course the Mining Right in question would have been transferred by then. They argued that it is therefore evident that the Applicants cannot obtain substantial redress in the ordinary course

The Respondents' contentions

[14] The Respondents contended that urgency has not been established and that what the Applicants are relying on is self-created urgency. The Respondents argued that the trigger of the application is found in paras 60 and 61 of the Applicants' founding affidavit where they allege that on 15 April 2024, they received confidential information from a DMRE official about a Ministerial application having been made by the Respondents for the transfer of the Mining Right. Despite having been so alerted of the transfer of the Mining Right in April 2024, they only brought this application on 30 May 2024.

Evaluation

[15] It is clear from the Applicants' founding affidavit that this application was triggered by the information apparently received by the Applicants from an unnamed source that an application had been made for the Ministerial consent in respect of the Mining Right. The Applicants appear to have then suspected that the Respondents were planning to dispose of the Mining Right as this can only be done with the Ministerial consent. I say suspected because the Applicants could not produce any proof that the said Ministerial consent had been applied for.

[16] This much is clear from their founding papers where in paras 60 and 61 they state the following:

> *'On or about 14 April 2024 Alex and I received confidential notification from an employee of the DMRE that an application had been made for Ministerial consent in respect of the Mining Right. We had not been informed by Mr Masiwa of any such application and certainly never consented to it.*
>
> *The Mining Right represents a significant asset of the company. Alex and I would only consider consenting to its transfer after a thorough evaluation ensuring that such a transfer is commercially justifiable and that our interests are adequately protected.'*

[17] It is clear from paragraph 60 that the Applicants' fear was that the Mining Right was about to be alienated by the Respondents. This is the main reason the application was brought on an urgent basis. On the basis of this information, they want to stop the Respondents from disposing the Mining Right pending the court action they intend instituting against the Respondents for a declaratory order. They want the declaratory order stating *inter alia* that they are directors and that the majority shareholders of the Third Respondent and that the Second Respondent is not a director of the Third Respondent. It is thus clear from the notice of motion that it is not only the disposal of the Mining Right they seek to stop, but they also want to challenge their removal as directors of the Third Respondent.

[18] Regarding the alleged alienation of the Mining Right, the Applicants have a serious challenge to deal with. As they state in para 60 of the founding papers, the fear that the Mining Right is about to be disposed of ostensibly originates from a source they cannot

name or may not name. The Applicants asserted that the information is from an official of the DMRE and is confidential. their application is based on a rumour and hearsay as there is no proof of the alleged application for a Ministerial consent.

[19] In effect and based on their own facts, it is evident that the Applicants' case is predicated on unconfirmed and uncorroborated hearsay from an unknown source. It is on the basis of such information that they hauled the Respondents to court on an extremely urgent basis. However, what is further baffling is that having received such information, the Applicants apparently made no attempt to verify the information with the DMRE which would have been the simplest thing to do. When asked why they did not, as the directors of the company, (as they allege), obtain official confirmation of the application for Ministerial consent from the DMRE, no plausible explanation could be offered.

[20] In the final analysis it is obvious that despite having had the opportunity to obtain such confirmation, the Applicants rushed to court on an urgent basis on the basis of a rumour. They are in essence asking the court to act on the basis of the unconfirmed rumour, hearsay and conjecture. In my view the Applicants failed to establish a proper basis for the application and on this basis alone the application stands to be struck off.

[21] The second reason advanced for the granting of the urgent application is that they want to obtain a declaratory order that they are the directors of the company and that the Second Respondent is not. It is however clear from their papers that the Applicants were aware that there was an issue with the directorship long before the launch of this application. In paragraph 48 of the founding affidavit the Applicants asserted that they became aware of their removal as directors of the company two or three years ago. This is confirmation that they did not attend to this issue for three years. They further state in paragraph 49 that their reason for not dealing with this issue three years ago is that they

were not overly worried about it as the Mining Right was still pending and there was no indication that Masiwa intended disposing of the Mining Right.

[22] With due respect, the explanation proffered by the Applicants does not make any sense in the circumstances. They became aware of the issue with the directorship three years ago and decided to do nothing about it. When they decide to deal with it, they do it by way of an urgent application. This is not permissible as there is no reasonable explanation advanced why they did not deal with the matter then. The Applicants' attempt to rely on the negotiations which took place between the parties between 15 March 2024 and the launching of the application does not aid them. The averment that the correspondence dated 30 April 2024 from the Respondents' attorneys constitutes a without prejudice communication is also erroneous as stated in the preceding paragraphs. Further, the Respondents did not make any undertaking contrary to what is alleged by the Respondent.

[23] It is trite that if there has been some delay in instituting the proceedings, an Applicant has to fully explain the reasons for the delay and why despite the delay, he claims that he cannot be afforded substantial redress at a hearing in due course. *East Rock Training 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[24] In the present case, the Applicants have failed to bring any cogent and admissible evidence that the Mining Right was about to be disposed of. There is no shred of evidence to back this averment. Their case is grounded on hearsay and rumour. In *Mogalakwena Municipality v Provincial Executive Council, Limpopo and Others* 2016 (4) SA 99 (GP) the court stated that where the applicant failed to establish prejudice, the application cannot be urgent. In this matter the applicants have not only failed to establish prejudice, they

have failed to establish the complaint of which their case is based. On the facts of this case no transfer of the Mining Right has been proved. It has also not been established that it may happen. On this aspect alone the application cannot be urgent.

[25] Concerning the issue of the challenge of the company's directorship, which is also brought to court on an urgent basis, the Applicants have also failed to explain the delay in asserting their rights. They failed to give a reasonable explanation for the delay of three years. In fact, as stated elsewhere in the judgment, they were not concerned about this for three years. There is no doubt that this is self-created urgency. In addition, they have also failed to establish that they will not be afforded substantial redress in due course. As there is no evidence that the Mining Right is in the process of being disposed of, I am satisfied that the Applicants will be afforded substantial redress if the matter were to be dealt with in the normal course in terms of the rules. The fact that the Applicants wants to have the matter resolved urgently does not render the matter urgent.

[26] In conclusion, I find that the urgency relied on by the Applicants, if any, is self-created. The Applicants have not shown that they will not be afforded substantial redress at a hearing in due course if the matter is not heard on an urgent basis. I am accordingly not satisfied that it has been demonstrated that the matter is sufficiently urgent to be enrolled and heard on an urgent basis. It accordingly has to be struck off the urgent roll.

[27] Concerning the costs, the general rule is that the costs must follow the result. I find no reason in this case to deviate from this rule and costs should therefore be granted in favour of the Respondents.

Order

[27] I accordingly make the following order:

1. The application is struck from the roll due to lack of urgency;

2. The Applicants are ordered to pay the costs of the application.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants:	Advocate L Hollander
For the Respondent:	Ms Y Omar
Date heard:	4 June 2024
Date delivered:	17 July 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 17 July 2024 at 12h00.