

SOUTH AFRICA / JUDGMENT

Theta Mining (Pty) Ltd and Another v The Sydney on Vaal Communal Property Association and Others (1535/2017) [2018] ZANCHC 17 (9 February 2018)

[2018] ZANCHC 17

COURT

Northern Cape High Court, Kimberley

BEFORE

Lever AJ

CASE / FILE NUMBER

1535/2017

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IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)
CASE

NO: 1535/2017

DATES HEARD: 24 November 2017
27
November 2017
30
November 2017

DATE DELIVERED: 9 February 2018

In the matter between: THETA MINING (PTY)
LTD
First Applicant
LONHRO MINING SA (PTY)
LTD
Second Applicant
- and -
THE SYDNEY ON VAAL COMMUNAL
PROPERTY ASSOCIATION
First Respondent
THE GOVERNMENT OF THE
REPUBLIC OF SOUTH AFRICA
Second Respondent
THE MINISTER OF RURAL DEVELOPMENT
AND LAND

	REFORM
	Third Respondent
NORTHERN CAPE PROVINCIAL GOVERNMENT:	DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT
	Fourth Respondent
	DEPARTMENT OF PUBLIC WORKS
	Fifth Respondent
	SCARLET SUN 15 (PTY) LTD
	Sixth Respondent
	THE MINISTER OF MINERAL RESOURCES
	Seventh Respondent
	THE REGIONAL MANAGER, NORTHERN CAPE REGION OF THE DEPARTMENT OF MINERALS AND ENERGY
	Eighth Respondent
	THE REGISTRAR OF DEEDS, KIMBERLEY
	Ninth Respondent
	THE TRUSTEES FOR THE TIME BEING OF THE VAALBOS SYDNEY ON VAAL RESTITUTION COMMUNITY TRUST
	Tenth Respondent
	Coram : Lever AJ

JUDGMENT

LEVER AJ

1. This application relates to the disputed right to traverse one farm to access another. At least, this is what the Notice of Motion reveals. The main protagonists in this application are two competing diamond mining companies. Each of the respective protagonists holds a mining right to mine diamonds on one of the relevant farms. The applicants hold a right to mine diamonds on the farm Droogeveltdt. The sixth respondent holds the right to mine diamonds on the farm Than and the farm Mozib. The farms Than and Mozib border on the farm Droogeveltdt. Applicants wish to assert a disputed right to traverse the farm Than.
2. The said farms Droogeveltdt, Than and Mozib were established by state grant as a perpetual quitrent. The said quitrent was subject to certain conditions. At least one of these conditions remains in the relevant title deed of the farm Than to this day.

3. All three of these farms appear to have been part of the very early diamond diggings near the Vaal River. Then on the 1 October 1986 the farms Droogeveltdt, Mozib and the relevant part of the farm Than were

declared a national park under the relevant legislation. This created the Vaalbos National Park. The said farms were expropriated by the State. Subsequently, the said farms were transferred to the State subject to certain restrictive conditions originating from the quitrent grant. The relevant restrictive condition relates to keeping public roads open.

4. On the 20 April 2007, the Vaalbos National Park was de- proclaimed. At some point the said farms were awarded to the first respondent, the Sydney on Vaal Communal Property Association (the "CPA" or "the first respondent") under a land claim. However, the said farms are still registered in the name of the State.

5. It is the applicant's case that they, through the first applicant and/or

second applicant as a contractor, accessed the farm Droogeveltdt by traversing the farm Than. On the applicants' version, this is how they accessed the farm Droogeveltdt for many years. The period referred to by the applicants includes several years when applicants

merely held a prospecting right to search for diamonds on the relevant farm.

6. On applicants ' version, initially and for several years, they used the route marked "A-D" on a map that is annexed to the Notice of Motion to traverse the farm Than. Then at the request of the sixth respondent, they stopped using the gate at point "A" and accessed the farm at a gate located at point "B". For some considerable time, thereafter applicants traversed the farm Than over the route "B-A-D". This route is also shown on the aforementioned map.
7. Applicants maintained that this change in the route by which they traversed the farm Than was to accommodate the sixth respondent's 'security' and 'health and safety' obligations as required when running a mine. Applicant s' also asserted that for a considerable period the sixth respondent abandoned its mining right on the farm Than. That, during this period first applicant together with the first respondent jointly controlled the gate that allowed access to traverse the farm Than.
8. The opposing respondents, being the first and sixth respondents, do not seriously dispute that the applicants accessed Droogeveltdt by traversing Than on occasion. They, however, minimise this access to Droogeveltdt over Than and claim that the main access to Droogeveltdt was from the South over the farm Rooipoort. Applicants' on their part admit to accessing Droogeveltdt from Rooipoort, but applicants maintained that this was infrequent and only happened when the Vaal River was in flood and the gate to Than farm could not be accessed because of the flood.
9. I have set out this broad and general statement of the background to this matter at the outset, because there are strong indications on the papers that this matter is about much more than just the right to traverse Than farm to access Droogeveltdt farm. This emerges

from the fact that there is a history of related litigation. There is also pending and current litigation that supports this view. Also, the view that this application is about so much more than just access to Droogeveltdt via Than farm is supported by the nature of certain of the defences and/or arguments raised by, or on behalf of, the opposing respondents.

10. The first respondent had instituted an application to review the grant of the mining permit to the first applicant. I was informed by counsel for the applicants, Mr Subel SC, that this review application had

floundered for some considerable time as the first respondent herein had not filed a replying affidavit in the review application. Mr Subel then informed me that the sixth respondent tried to revive this review application by seeking to join such review application as a party. Applicants' have opposed this application to join the said review. Mr Subel contended that this application to join had also floundered as sixth respondent had failed to file a replying affidavit and a period of nine months has elapsed. Thus, the said replying affidavit was substantially out of time.

11. Mr Van Heerden for the opposing respondents informed me at the hearing hereof that sixth respondent had recently filed a replying affidavit in its application to join the said review of the applicants' mining

right. I was given no detail as to when and in what circumstances the sixth respondent filed this replying affidavit. I was also not provided with any proof that this was in fact the position.

12. The applicants' have also instituted an action to claim permanent relief in respect of their claimed right of way over the farm Than to access the farm Droogeveltdt . I was advised that this action was also opposed by the first and sixth respondents.

13. Where issues raised in this matter are more appropriately dealt with either in the said review or in the relevant action, I will leave such issues for decision in the appropriate application or action. I will only deal with such issues which are relevant to the present application.

14. With such background in place I can now turn to the actual relief sought in the present application. In the first instance the main relief sought by the applicants' is a mandament van spolie to restore its right to traverse the farm Than. Applicants' allege that the sixth respondent committed a spoliation on the 1 September 2016, by refusing to allow applicants', to traverse the farm Than to access Droogeveltdt .

15. In the alternative to the spoliation application, applicants seek an interim interdict allowing them to traverse Than farm pending the outcome of the action referred to above.

16. The basis of the applicant s' claim s is that: the route "A-D" is a proclaimed public road and that first and sixth respondents are not entitled to stop them from using such road; alternatively, the said route has been established by long usage and custom (immemorial usage); and further alternatively, the farm Droogeveltdt is landlocked and that by way of necessity they are entitled to use the said route to access the nearest and/ or most convenient public road.
17. In answer to this the first and sixth respondents have raised several defences. The same defences were raised often several times in slightly different contexts. For the sake of convenience, I am going to divide such defences into three categories to avoid repetition. I shall refer to these categories as: general defences; defences specific to the spoliation claim; and defences specific to the claim for an interim interdict.
18. Turning now to the general defences raised by the opposing respondents, these include: the applicants are before the wrong forum in that they have not exhausted the remedies available to them under the MINERAL, PETROLEUM AND RESOURCES DEVELOPMENT ACT[1] ("MPRDA"); the matter is res judicata; and the provisions of the MPRDA sterilise a subservient property from and exclude a right to traverse a mining property. In regard to the last defence set out in this paragraph the opposing respondents rely on their interpretation of s48 of the MPRDA.
19. In respect of the defences specific to the spoliation relief, the opposing respondents raised the following defences: the applicants never possessed the right to use the route concerned in a manner which would entitle them to spoliatory relief; the use of the said route had always been with the permission and cooperation of the sixth respondent; and there had been an inordinate delay in seeking spoliatory relief.
20. In relation to the defences raised specific to the interim interdict claimed by the applicants, the opposing respondents raised the following defences: the applicants had no right to mine diamonds on Droogeveltdt, consequently the applicants could not show a prima facie right though open to some doubt; applicants had failed to establish on a prima facie basis though open to some doubt that the route A-D was a proclaimed public road; applicants had failed to establish on a prima facie basis though open to some doubt that the route A-D was a public road established by immemorial usage; applicants had failed to establish on a prima facie basis though open to some doubt that it was indeed a necessity that it use the route A-D to gain access to the farm Droogeveltdt; applicants had failed to show an injury or a reasonable apprehension of an injury (this defence is raised on the basis of the opposing respondents interpretation of various sections of the MPRDA, being s5A and s48(1) and (2)); applicants had not shown that the balance of convenience favours them; and applicants have other alternative remedies (again referring to their interpretation of certain sections in the MPRDA, being s54 and s102).

21. Before dealing with the general defences raised by the opposing respondents, I believe it would be appropriate to deal with my approach to the application for spoliatory relief first. I have certain concerns with the application for spoliation. The principal concern relates to the delay in bringing the application.
22. However, in my view having regard to the history of the matter, the fact that there is a pending action relating to the right to traverse Than farm, and the numerous issues raised in the papers, I believe it will

be more appropriate to deal with this matter on the alternative relief sought by the applicants. I specifically point out that

despite my concerns I am not deciding any of the matters raised under the application for a mandament van spolie . I am merely adopting what I believe to be the more appropriate approach given the circumstances.

23. Turning now to the general defences raised by the opposing respondents. The first being that the applicants are in the wrong forum. At the outset, Mr Van Heerden on behalf of the opposing respondents, conceded that nothing in the MPRDA deals directly with traversing a neighbouring property. However, he argued that in the present circumstances s5A and s102 of the MPRDA do have application. Mr Van Heerden also advanced an argument that in essence falls under this defence, being that applicants should have approached the regulator through the office of the Regional Manager to intervene under the provisions of s54 of the MPRDA. This argument was also raised in the context of alternative remedies in the interim relief application.
24. The opposing respondents developed this argument along the following lines. The CPA (first respondent) is the beneficial owner of all the properties concerned. The State is the registered owner of such properties. Together, they exercise full rights of ownership over these properties. The argument then proceeds, the grant of a mining right on the farm Than and the farm Droogeveltdt diminishes the rights of ownership on each such farm.
25. Mr Van Heerden then submitted that the applicants wanted to traverse Than farm to mine on Droogeveltdt, that this was ancillary to mining and in circumstances where the applicants do not have a right to mine

on Than farm, the provisions of s5A of the MPRDA prohibited them from traversing Than farm. It follows from this, he submitted, that by virtue of the provisions of s5A if applicants were to traverse Than farm, it would constitute illegal mining under the said section.

26. Mr Van Heerden then argued that the applicant s ought to have approached the regulator under the provisions of s102 of the MPRDA to amend their mining right. Under this argument, applicants would have to apply to the relevant Minister to amend both its mining right in respect of the right to mine Droogeveltdt as well as to amend the

right of sixth respondent to mine on Than farm.

27. In concluding this line of argument Mr Van Heerden submitted that the applicants' ought to have applied to amend their mining right by using the provisions of s102 of the MPRDA. Therefore, it followed that they had not exhausted their remedies under the MPRDA. Consequently, that the present application was before the wrong forum.
28. On this point, it would be useful to quote the provisions of sSA of the MPRDA. Section 102 merely makes provision for the relevant Minister to amend mining or other rights granted under the provisions of the MPRDA. No value will be added by quoting the provisions of s102 of the MPRDA. Section SA of the MPRDA reads as follows:

"5A Prohibition relating to illegal act. - No person may prospect for or remove, mine, conduct technical co-operation operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without -

- (a) An environmental authorisation;
 - (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) Giving the landowner or lawful occupier of the land in question at least 21 days written notice."
29. Mr Gilbert, who appeared with Mr Subel for the applicants, submitted that on Mr Van Heerden's interpretation of this section it would mean that any truck transporting anything to do with mining and traversing

any land or even a public road to get to land over which its owners or operators had a valid mining permit, would fall foul of this section of the MPRDA and be performing an illegal act if its owners or operators did not have the relevant permits, permissions or authorisations for the land it was traversing to get to the property over which its owners or operators had a mining right. This would lead to absurd results and is an unacceptable and overbroad interpretation of s5A of the MPRDA.

30. I agree with Mr Gilbert's argument, although in the very broadest sense the example given by him may be work incidental to mining, it could never have been the intention of the legislature to give this

section such a far and unlimited reach.

31. On Mr Van Heerden's interpretation of s5A any act that can be described as 'any work incidental' to mining would be illegal unless it was authorised by an environmental authorisation together with the necessary permission or permit regardless of the nature of the incidental work and the place where it occurred.

32. What Mr Van Heerden overlooks in his interpretation of s5A is that the words ' ... any work incidental thereto ...' relates to the actions and/or conduct that precedes such phrase in that sentence. The phrase " ... on any area ..." also relates back to the prohibited conduct that precedes that phrase. In that context and the context of the MPRDA, it has nothing to do with the right to traverse a neighbouring property even if it is necessary to traverse such property in order to conduct mining operations. If after traversing the neighbouring property any of the activities described in the first part of s5A are carried out without the appropriate environmental authorisation and permit or permission, such activity would fall foul of s5A, not the traversing of the neighbouring property. To interpret s5A otherwise would potentially lead to unforeseen and absurd results.
33. In my view s5A does not apply to the right to traverse a property neighbouring the one upon which a mining permit is held. The right to traverse the neighbouring property will be controlled by the common law, contract and perhaps other directly relevant legislation. There is accordingly no merit in this argument raised by the opposing respondents.
34. Turning now to the argument raised under s54 of the MPRDA. This was originally raised by the opposing respondents in case number 1959/2016 before Mamosebo J. There, the opposing respondents' contended that the applicants' should have sought the intervention of the Regional Manager of the Department of Mineral Resources ("DMR") to intervene under the provisions of s54. This formed the basis of the main concern raised by Mamosebo J which was the underlying rationale of her judgment in case 1959/2016.
35. This is dealt with extensively by the deponent to the applicants' present founding affidavit. The applicants' attorney corresponded with the relevant Regional Manager who wrote a letter expressing the view that s54 of the MPRDA found no application in the circumstances.
36. In the answering affidavit, the opposing respondents' simply changed tack slightly and argued that the applicants' ought to have applied for an amendment of their mining right or environmental management plan.
37. In the light of Mr Van Heerden's concession that access by way of traversing a neighbour's property was not directly dealt with in the MPRDA, I think this argument is nothing more than a distraction. The right to traverse a neighbouring property is created under the common law, contract, or legislation dealing directly with that subject. It is certainly not dealt with in the MPRDA.
38. I now turn to the general defence of res judicata or issue estoppel. This relates to an earlier urgent application in which interim relief to traverse Than farm was initially granted but was discharged on the return day. The matter was brought under case number 1959/2016 and heard by my sister Mamosebo J. In this prior urgent application, applicants sought interim relief to traverse the farm Than via the route A-0 alternatively, over the route B-A- 0

pending the outcome of an action to be instituted by the applicants'. My sister Mamosebo J delivered her judgment in the said matter on the 25 November 2016.

39. On my reading of the judgment of my sister Mamosebo J, the ratio decidendi for her decision therein appears at paragraphs [23],

[24] and [28] of such judgment. In essence the reasons for Mamosebo J's decision in discharging the interim relief were: with reference to a preceding urgent application brought under case number 393/2012, this time against the CPA, to secure the right to traverse Than farm and where relief was granted, Mamosebo J questioned why the applicants' had neglected to institute action to finally determine the matter; Mamosebo J also found that applicants' had failed to utilise s54 of the MPRDA to secure the intervention of the Regional Manager to provide certainty on the right of access; Mamosebo J was

not convinced that a prima facie right had been established for the applicants' to traverse Than farm; and that the applicants' had not succeeded in establishing the requirements for an interim interdict.

40. In support of his submission that the matter was res judicata, Mr Van Heerden argued that the judgment of Mamosebo J dismissed the then application definitively. In motivating this argument he referred to the following passages in the said judgment: paragraph 8 which set out the grounds upon which the applicant sought the right to traverse Than farm; the finding that the Regional Manager ought to have been consulted as set out in paragraph 16 of such judgment; the finding that the present sixth respondent was not consulted as set out in paragraph 17 of the judgment; the finding that it was incorrect for the present applicants to say that they had uninterrupted access to traverse the road since 2009 when, on the contrary permission was sought and granted to the trust (tenth respondent herein) as distinct from the applicants' as set out in paragraph 19 of the judgment; the finding that the applicants' had been dilatory in their endeavours to bring finality to the matter referring to the 2012 application as set out in paragraph 23 of such judgment; the finding that the applicants' failed to establish a prima facie case, that the balance of convenience favours the dismissal of the application and that the applicants have an alternative remedy to approach the Regional Manager as set out in paragraph 24 of the judgment; the finding that if needs be the rezoning needs to take place as set out in paragraph 26 of the said judgment; the finding that the Environmental Plan ought to have addressed the issue of the road as set out in paragraph 27 of the said judgment; the findings that the applicant s' had not succeeded in meeting all of the requirements for a temporary interdict, the prima facie right to traverse the farm Than was unclear, the decision that if there was an omission or an oversight, the Regional Manager and all other internal remedies should have been exhausted, and the finding that the upshot is that Droogeveldt is not land locked as set out in paragraph 28 of the said

judgment.

41. Mr Van Heerden submitted that all the underlying elements for the defence of res judicata were present. He submitted that it involved the same parties, the same cause of action and the same relief. He further submitted that there had been a judicial determination of all the causes of action as well as the issues of fact and the questions of law that the applicants' put forward in the present application.
42. In response to the res judicata and issue estoppel point raised by the opposing respondents' Mr Subel argued that the judgment of Mamosebo J read properly, in its context, raised certain concerns with the case before the court at that time. Each of these concerns were dealt with comprehensively by the applicants' in the founding affidavit of the present application. In any event, Mr Subel submitted in the nature of interim relief sought urgently the court never intends to make definitive findings.
43. The view that I take of this matter, it is not necessary to deal with all of the opposing respondents' contentions on the res judicata or issue estoppel point. There are essentially only five issues that I need to deal with. Firstly, Mamosebo J indicated that there had been access to Droogeveltdt from the South over the farm Rooipoort. That on the evidence then before her this caused the applicants difficulties in establishing a right of way over Than farm by way of necessity. The second issue I need to deal with is related to the establishment of the right of way by immemorial use. The third issue to be dealt with is whether Mamosebo J made a definitive finding that Droogeveltdt was not landlocked. The fourth issue relates to her finding that the prima facie right of the applicant was unclear. The fifth issue relates to the effect of Mamosebo J's finding that the remedies provided under the MPRDA had not been pursued by the applicants.
44. In any event the issues of whether the sixth respondent had been consulted under the provisions of s25(5)(a) of the MPRDA and the issue of whether or not the farm Droogeveltdt needs to be rezoned are all issues more properly dealt with in the review application if that application can indeed be revived in the present circumstances. The reason for this is that it is sufficient for present purposes that applicants have a mining permit valid on the face of it. This aspect will be dealt with in greater detail below. Furthermore, on my reading of the judgment by Mamosebo J these issues were flagged as points of concern and I do not believe that she did or intended to make definitive rulings on these questions .
45. On the first issue, the allegation that the farm Rooipoort was traversed or could be traversed as opposed to traversing the farm Than to gain access to Droogeveltdt, this was dealt with substantively and in great

detail in the founding affidavit in this application. This was a concern raised by Mamosebo J, such concern has now been substantively

dealt with. In the circumstances this argument cannot provide a basis for a plea of res judicata or issue estoppel.

46. On the second issue, the immemorial use, Mamosebo J made no finding at all, save for the fact that it is implied in her judgment that on the evidence before her at that time did not persuade her that the applicants' had a prima facie right to traverse the farm Than on that ground. This is not a bar to me considering whether the evidence before me meets the test set out in Webster v Mitchell[2] to determine whether a prima facie right has been established for interim relief.
47. On the third issue, the issue of whether Mamosebo J made a definitive finding that Droogeveltdt was not landlocked, I need to look at what Mamosebo J actually said and place it in its proper context. The relevant passage of the said judgment reads as follows:

"[28] Regard being had to the oral submissions and all the supporting documentation, I therefore find that the applicants have not succeeded in meeting all the requirements for a temporary interdict. Not only did they fail to show that they did not have alternative remedies, apart from seeking an interdict, but also the prima facie right to traverse the Than farm is unclear. Their application stands to fail for the stated reasons. The Environmental Authorisation ought

to have specified the road to be utilised by the applicants. If there was an omission or oversight, the Regional Manager and all other internal remedies should have been exhausted. The upshot of what has gone before is that Drooge Veldt is not landlocked. "[3] (my emphasis)

48. Placing the underlined sentence in the context of the quoted passage and in the context of the judgment as a whole, in my respectful opinion, Mamosebo J was saying no more than on the evidence before her, the

right of way over the farm Than to access the farm Droogeveltdt due to necessity had not been established. Indeed, Mamosebo J was not required to go further than that.

49. On the opposing respondents' version and that of the applicants', raised in the alternative, the farm Droogeveltdt has no direct access to a public road. For the opposing respondents to argue otherwise, they would have to accept that the route A-D -C and beyond on the map attached to the Notice of Motion is indeed a proclaimed or other

public road. This they cannot do without conceding applicant s' right to the interim relief which they claim. In fact, the opposing

respondents have made no claim that the said road following such route, or any portion of it, is a public road. On this issue and in these circumstances, the opposing respondents', cannot rely on a plea of res judicata or issue estoppel.

50. On the fourth issue, being the finding by Mamosebo J that the applicants' prima facie right to traverse the farm Than is unclear. This is not a bar to me considering whether the evidence before me meets the test set out in Webster v Mitchell[4] to establish a prima facie right.

51. In respect of the fifth issue, being that the applicants had not pursued the remedies provided for under the MPRDA. Again, the applicants' in their present founding affidavit have dealt with the concerns raised by Mamosebo J in detail and have shown that it has corresponded with the Regional Manager of the DMR. The said Regional Manager in correspondence annexed to the papers held the view that s54 of the MPRDA did not apply in this case. By its very nature this issue cannot form the basis of a plea of res judicata or issue estoppel.
52. On the view I take of the matter, these would be the issues which I would have to deal with in any judgment I make in the present application. For the reasons set out above, none of them can form the basis for a plea of res judicata or issue estoppel.
53. Under the general defences raised by the opposing respondent, I must still deal with the argument made by Mr Van Heerden, being that when sixth respondent was granted a mining permit, the fact that such permit was granted to it, sterilised Than farm of any public road or right of way over such farm .
54. Mr Van Heerden commenced this argument by pointing out that the provisions of s48 of the MPRDA provide:

"48 Restriction or prohibition of prospecting and mining on certain land -

- (1) Subject to s48 of the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003), and subsection (2), no reconnaissance permission, prospecting right, mining right may be granted or mining permit be issued in respect of -
- (a) land comprising a residential area;
 - (b) any public road, railway or cemetery;
 - (c) any land being used for public or government purposes or reserved in terms of any other law; or
 - (d) areas identified by the Minister by notice in the Gazette in terms of section 49.
- (2) A reconnaissance permission, prospecting right, mining right or mining permit may be issued in respect of the land contemplated in subsection (1) if the Minister is satisfied that -
- (a) having regard to the sustainable development of the mineral resources involved and the national interest, it is desirable to issue it;
 - (b) the reconnaissance, prospecting or mining will take place within the framework of national environmental management policies, norms and standards; and
 - (c) the granting of such rights or permits will not detrimentally affect the interests of any holder of a prospecting right or mining

right."

55. Mr Van Heerden then argued that in granting the sixth respondent its mining right on Than farm, the Minister must have been aware of the roads traversing Than farm. In nonetheless granting the sixth respondent a mining right in respect of Than farm in those circumstances, the Minister must have exercised his prerogative powers under s48(2). The effect of the Minister granting the sixth respondent a mining permit in these circumstances Mr Van Heerden argued was that it sterilised Than farm of any rights associated with a public road or right of way.
56. In my view, there are at least two things wrong with this argument aside from the fact that it employs circular reasoning and reaches the wrong conclusion. Firstly, s48(2) contemplates a special application being placed before the Minister to enable mining on any public road. It has never been the opposing respondents' case that such special application was placed before the Minister for consideration at any time before or after it had acquired its mining right. Secondly, the terms of s48(1) do not lend themselves to the interpretation posited by Mr Van Heerden. A public road is dealt with
- in the same provision that deals with railways and cemeteries.
57. The social mores of nearly every ethnic community in our society would not easily tolerate the desecration of a cemetery for mining purposes. A railway line represents an enormous public capital expense which the State could and would not jeopardise without careful consideration of where the public interest lay as contemplated in s48(2) of the MPRDA. In placing a 'public road' in this subsection of the MPRDA shows that the legislature regarded public roads, the right to access and traverse them, in the same light as railway lines and the preservation of cemeteries. Consequently, in my view if a mining permit or right is granted with nothing more, public roads traversing the relevant land, as would be the case with cemeteries and railway lines, are simply excluded from the area that may be mined on the relevant property. Accordingly, there is no merit in this argument.
58. Mr Van Heerden raised a further argument, which can be classified under general defences of the opposing respondents'. This argument can be dealt with very briefly. Mr Van Heerden submitted that the sixth respondent cannot grant the applicants a right of way because to do so would violate the provisions of s11 of the MPRDA. His argument was that a right to traverse a mining right would constitute an interest in such mining right. That such interest cannot be transferred without the approval of the Minister as contemplated in s11 of the MPRDA. He then submitted for the same reason, that this court cannot grant the applicants a right of way.
59. In my view affirming a mere right of way, on whatever basis, over a property in respect of which a mining permit or right has been granted, does not confer an interest in the said mining operation in the sense contemplated by s11 of the MPRDA. Without deciding the issue, this argument may have had some merit if the applicants were

seeking to register a servitude in respect of the relevant property. However, the applicants do not seek such a servitude.

60. Further, in the circumstances of this case, this court will not be granting a right even if it gives the applicant s' interim relief. At best, this court will merely be affirming a pre-existing right, though open to some doubt, pending the outcome of the action that has already been instituted. In the circumstances of this case, such

pre-existing right either came into existence under the common law or statute and the restriction in the title deed of the farm Than merely preserves those rights. Accordingly, the argument that the sixth respondent and this court cannot grant the applicants a right of way due to the provisions of s11 of the MPRDA stands to be rejected.

61. In the final argument that I need to deal with under the general defences raised by the opposing respondents', Mr Van Heerden submitted that the establishment of the Vaalbos National Park by incorporating the farms Droogeveldt, Mozib and Than into such park, sterilised Than farm of any public road or right to traverse it.
62. This argument can also be dealt with very briefly. Firstly, there is nothing in the legislation applicable to establishing a National Park that would support the notion that a public road or right of way over

the relevant land would be removed from land incorporated into such park. Mr Van Heerden was also unable to refer me to any provision in the relevant legislation that would support his argument. Secondly, the latest title deed for the farm Than by which the State acquired title to such farm after it was expropriated for purposes of the National Park, included the restriction contained in the original quitrent grant protecting access to public roads then existing or coming into existence in the future. If there was merit in Mr Van Heerden's argument this restrictive condition would have been removed from the title deed by the State.

63. Further, annexed to the papers was a map of the roads traversing the Vaalbos National Park, which appears to have been created for use by visitors to the Vaalbos National Park. It appears that this map is

not drawn to scale. There is also a map drawn by a surveyor, which is drawn to scale. If I orientate these maps so that North as indicated on each respective map faces in the same direction, then it indeed appears that the road that corresponds to the route A- D indeed existed and was in use when the farms were incorporated into the Vaalbos National Park. In the circumstances, and for these reasons, I cannot uphold this argument.

64. Turning now to the requirements for an interim interdict. The requirements for an interim interdict have been restated by Myburgh J, citing the well-known case of *Setlogelo v Setlogelo*, in the matter of *Steel & Engineering Industries Federation & Others v NUMSA* (2) [5], as:

"(a) a prima facie right;

- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
 - (c) that the balance of convenience favours the granting of an interim interdict;
 - (d) that the applicant has no other satisfactory remedy."
65. Over the course of time the term *prima facie* right, in the context of interim relief, has been defined to mean a right that need not be established on the probabilities but can be *prima facie* established though open to some doubt. How this is established and tested is dealt with by Clayden J in the case of *Webster v Mitchell*[6], the relevant passages in that case read as follows:
- "...the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is '*prima facie* established though open to some doubt' that is enough."
- "The use of the phrase '*prima facie* established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of weighing up of the probabilities of conflicting versions is required . The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."
66. The first defence raised by the opposing respondents', to oppose the interim relief is that the applicant s' do not have a legitimate mining right in respect of mining diamonds on the farm Droogeveltdt. Consequently, Mr Van Heerden argued that the applicants', cannot show a *prima facie* right to traverse Than farm to get to the farm Droogeveltdt .
67. Subject to the other requirements of an interim interdict, the applicants need only show that they have some business on the farm Droogeveltdt in order to establish that they have a *prima facie* right to traverse the farm Than to conduct such business on the farm Droogeveltdt.
68. It is not contested by the opposing respondents that the first applicant has a mining right in respect of the farm Droogeveltdt. It is not contested by the opposing respondents' that such mining right was issued under the auspices of the Minister concerned. It is also not contested that the Environmental Management Plan (EMP) has been

approved. The opposing respondents', contend that the mining right was wrongly granted and that the EMP ought not to have been approved. These are issues for the review if it ever proceeds.

69. The reason for this is that the grant of a mining right and the approval of the EMP are administrative acts. Administrative acts, even if they are unlawful remain in place until they are set aside by way of a review. This has been authoritatively stated by the SCA in the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[7]. The relevant passage reads as follows:

"For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid from the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from that conclusion that the Administrator acted unlawfully. Is the permission that was granted by the administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that this belief was correct? In our view, it is not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all the administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."[8]

70. In the result the defence that the applicants' mining right is not valid, even if such contention is correct, can never be a bar to this court granting the interim relief sought by the applicants'. If the review had been properly pursued, and if successful, this conclusion may well not have been reached.
71. The applicants' have put forward three alternatives as the basis upon which they claim a right of way over the farm Than. The first being that the road that traverses the route A-D is a proclaimed public road. The second is that it is a public road established by immemorial use. The third is that the farm Droogeveldt has no direct

access to a public road and the route over Than farm is a route of necessity. The applicant only needs to establish one of these

alternative claims on the basis that it is *prima facie* established though open to some doubt as set out above.

72. Without making any finding on the proclaimed public road claim, I intend to focus on the other two alternative claims.

73. On the issue of the public road being established by immemorial usage, the applicants' put forward the evidence of Mr Coetzee. The opposing respondents ' put forward the evidence of Mr Swartz. The evidence of Mr Swartz amounts to a bare denial of Mr Coetzee's evidence. Indeed, Mr Van Heerden for the opposing respondents', conceded that there was no basis for Mr Swartz to contend that Mr Coetzee's evidence was 'pure speculation'.
74. Mr Van Heerden in order to raise doubt on the historic existence of the route A-D also referred to a diagram drawn, it seems by the Surveyor-General, which did not disclose the existence of a road corresponding to the route A-D. On closer examination of this diagram it was a document annexed to the title deed at one time and reflected the position as it existed in 1881. A lot could have happened since
1881. Indeed, the available evidence does show that a lot has happened since 1881. There is the preservation of the restrictive condition in the 1989 title deed to Than farm in favour of the State. There is the evidence of the road corresponding to route A- D in the public roads used to access and traverse Than farm when it formed part of the Vaalbos National Park. There is also the evidence of Mr Coetzee which was not appropriately challenged, aside from bare and unsubstantiated denials by Mr Swartz.
75. This is certainly sufficient evidence to establish the road A- D as a public road established by immemorial usage, though open to some doubt as set out in the case of Webster v Mitchell[9]. In the fullness of time Mr Coetzee's evidence will be tested by cross examination in the pending trial for final relief. For present purposes, sufficient has been established for interim relief.
76. Turning now to the 'road of necessity' relief sought by the applicant s'. In the event of this court considering this alternative basis for a right to traverse Than farm, it would be common cause between the parties that Droogeveldt farm had no direct access to a public road. In any event, no evidence was adduced to show that the road over the farm Rooipoort was a public road. If the opposing respondents', concede that the road A- D-C and beyond was a public road, then they would in effect concede that applicants', were entitled to at least the interim relief they seek in the alternative. This the opposing respondents' have not done. In this sense, that there is no direct access to a public road, Droogeveldt farm must be landlocked.
77. Droogeveldt being landlocked in that sense, persons having business on Droogeveldt are entitled to a right of way by way of necessity. This right of way must be over the shortest route. This requirement is qualified to the extent that such route must also be the route that causes the least harm or inconvenience.
78. The opposing respondents' raise two arguments against the route of necessity claim. The first being that the shorter route is over the farm Rooipoort . The second being that the applicants were the authors of their own problems and that in such circumstances they cannot claim a right of way by way of necessity.

79. It appears that the route over Rooipoort is marginally shorter. However, the applicants have indicated that their employees live in a settlement that is substantially closer to the route over Than farm. The opposing respondents simply say they should employ other workers that live on the Rooipoort side of Droogeveltdt. In my view, this is not a satisfactory answer given the fact that the inherent probabilities support the fact that the applicants' have been using

the route over Than farm for years and that they only used the route over Rooipoort farm when the river was in flood.

80. The inherent probabilities I refer to in the paragraph above are based on the 2012 application where relief was granted against the CPA to allow the trust, being the tenth respondent herein, and through the trust allowing the applicants the right to traverse Than farm. Furthermore, the tenor of the correspondence between the applicants' attorney and the representative of the owner of Rooipoort farm supports the claim that Rooipoort farm was only used as a means to obtain access to Droogeveltdt farm in exceptional circumstances.
81. The second argument raised by Mr Van Heerden went along the lines that, the applicants ought to have ensured that the EMP provided for their right to traverse Than farm to access Droogeveltdt farm for the purposes of mining on Droogeveltdt farm. Accordingly, Mr Van Heerden submitted that the applicants' were the authors of their own misfortune. In support of this argument, Mr Van Heerden referred the court to the case of *Bekker v Van Wyk*[10]. My reading of *Bekker's* case shows that on the facts of that case, it is completely distinguishable from the facts in the present case. In any event, nothing was placed before this court to substantiate the opposing respondents' claim that the right of way over a neighbouring property needed to be dealt with in the EMP. There was also nothing to show that the EMP could displace a right of way created by the common law or statute. Which is after all what the applicant s' claim in their several alternative claims for a right of way.
82. In my view this establishes the alternative claim for a right of way because of necessity on a prima facie basis though open to some doubt in the manner contemplated in the case of *Webster v Mitchell*[11].
83. On the question of whether the applicants' have established the second requirement, being an injury or a reasonable apprehension of an injury, I have already dealt with the arguments raised by the opposing respondents' in relation to s5A and s48 of the MPRDA. The applicants' have established the injury in that they have been deprived of the right to traverse Than farm to access Droogeveltdt farm to exercise their mining right on Droogeveltdt farm. To the extent that is necessary such injury has been established. It flows from this that there is a well-grounded fear of irreparable harm if the interim relief is not granted and the applicants', subsequently succeed in their act ion. They would have been deprived of their right to develop, establish and operate their mine. An impediment that the sixth respondent, a competitor, does not have to contend with, for the period it may take to finalise the action

for final relief. There is also evidence that the part owner and/or director of the sixth respondent tried to acquire the mining right of the first applicant.

84. Turning now to the next requirement, being the balance of convenience must favour the grant of interim relief. On this point, Mr Van Heerden, on behalf of the opposing respondents', argued that interim relief would have a permanent effect. He submits that the effect would be permanent because the trial could take years to finalise and

the mineral resource, being the diamonds, could be exhausted on the farm Droogeveldt by the time such action is finalised. This argument exposes the true nature of the dispute between the applicant s' and the opposing respondents'.

85. On this aspect, the opposing respondents' should have been more astute on pursuing the review application, which they have allowed to flounder on at least two occasions. This argument carries little if any weight when assessing the balance of convenience.
86. The other issues raised by the opposing respondents', on the question of the balance of convenience are that, in sixth respondent running the mine on Than farm it has obligations in relation to security and

health and safety. It was submitted on behalf of the sixth respondent that there are mining activities on Than farm carried out by a number of sub-contractors, that there are a number of risks involved in allowing people to traverse the farm Than in those circumstances.

87. In response, the applicants' have undertaken to comply with the reasonable requests of the sixth respondent relating to its security and health and safety obligations. Furthermore, the applicants ' have tendered a full but reasonable indemnity. I believe this response by the applicants covers the concerns of the opposing respondents, including the sixth respondent.
88. Lastly, the opposing respondents complain that the interim relief sought by the applicants is too wide ranging and far reaching that it could mean that they have access to Than farm 24 hours a day, seven

days a week. In response to this argument, Mr Subel pointed out that there has never been a complaint relating to applicants' accessing

the farm Than to traverse it at unreasonable times.

89. Having considered all of these factors, in my view the balance of convenience favours the grant of the interim relief.
90. The issue of no other alternative remedies has already been dealt with above. In my view, there are no other reasonable alternative remedies available to the applicants'.
91. Mr Subel asked me to consider ordering interim access to the farm Droogeveldt over the route B-A- D on the farm Than, because that was where the sixth respondent had established its controls for security and health and safety risks. He also pointed to the previous correspondence between the applicants' attorney and the opposing respondents' attorney

and based on the history of such correspondence submitted that the fewer issues left to negotiation between the parties the better. I think Mr Subel has a valid point. I can certainly make such order if I grant interim access on the basis of a route of necessity. For the reasons set out above, I would be entitled to grant such relief and I intend to do so.

92. The last remaining issue is the issue of costs. As this is interim relief, I intend to reserve the question of the costs of this matter, including the costs of the relevant postponement for the decision of

the court that determines the action referred to above.

ACCORDINGLY, THE FOLLOWING ORDER IS MADE:

- 1) Pending the final determination of the action instituted by the applicants out of this court under case number 1697/2017 {"the

action") to determine the applicants' entitlement to traverse and make use of the roads on Portion 1 of the Farm Than No. 280 in the Administrative District of Barkly West ("the Than farm") as described in the locality plan annexed to the Notice of Motion marked "NM1", the following orders shall operate:

- a) subject to compliance with the sixth respondent's reasonable and necessary health and safety requirements, the applicants and their employees, contractors, invitees and guests are entitled to traverse the Than farm by making use of the road marked B-A-D, traversing the Than farm as described on annexure "NM1" to the Notice of Motion in this matter, for the purpose of accessing the

public road R311 {"the public road") from Droogeveldt farm identified on annexure "NM1" of the Notice of Motion and for the purpose of accessing Droogeveldt farm from the said public road.

- b) save for the reasonable and necessary health and safety requirements referred to above, the first and sixth respondents are interdicted and restrained from taking any steps to prevent or hinder the applicants and their employees, contractors, guests and invitees from making use of the road marked B-A-D on the locality plan annexed to the Notice of Motion marked "NM1".

- 2) The costs of this matter, including the costs of the relevant postponement/s are reserved for the court entertaining the action referred to above.

L. LEVER AJ

NORTHERN CAPE

PROVINCIAL DIVISION

For the Applicants:

ADV SUBEL SC with ADV BM GILBERT

(oio Duncan & Rothman Inc.)

For the 1st and 6th Respondents: ADV CN VAN HEERDEN

(oio Van De Wall Inc.)

[1] Act 28 of 2002.

[2] Webster v Mitchell 1948 (1) SA 11 86 (TPD) at 11 89

[3] Unreported judgment in case number 1959/2016 handed down on the 25 November 2016.

[4] Above.

[5] 1993 (4) SA 196 at 19 9E- F

[6] Above at p 1189

[7] 2004 (6) SA 222 (SCA).

[8] Oudekraal case., above at para 26 .

[9] Above.

[10] 1956 (3) SA 13 (T).

[11] Above.

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