

SOUTH AFRICA / JUDGMENT

Transnet SOC Ltd v Husselman and Others (1302/2012) [2012] ZANCHC 44 (21 September 2012)

[2012] ZANCHC 44

COURT

Northern Cape High Court, Kimberley

BEFORE

KGOMO JP

CASE / FILE NUMBER

1302/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High
Court, Kimberley)

Case

No: 1302/2012

Heard: 28/ 08/ 2012

Delivered: 21/09/2012

In

the matter between:

TRANSNET
SOC LIMITED

.....Applicant

v

ARNOLD

HUSSELMANNFirst

Respondent

MARTIN

& EAST (PTY) LTDSecond

Respondent

VAN

ZYL BLASTING – EARTHWORKS CC Third Respondent

JUDGMENT

KGOMO JP

The applicant, Transnet SOC Limited trading as Transnet Freight Rail (Transnet), sought an order on urgency interdicting the First respondent (Arnold Husselman), the Second respondent (Martin & East (Pty) Ltd) and Third respondent (Van Zyl Blasting-Earthworks CC) from carting away and further dissipating crusher-waste or crusher-dust material deposited on Transnet's property, which material is located adjacent to a quarry which was worked by Transnet's predecessor in title, Iscor Steelworks Corporation, pending the determination of action proceedings to be instituted by the applicant within 30 days from the date of an order in this matter.

Transnet is the owner of Portion 3 (a portion of portion 1) of the farm RietFonteins 165, held under Deed of Title No T7570/93 and Portion 4 (a portion of portion 1) of the farm RietFonteins 165 held under Deed of Title 907/93. Both properties are situate in the Kenhart administrative district in the Northern Cape. The crusher-waste stockpile is located on these properties.

MrHusselmann, the First respondent, resides on the adjoining farm, RietFonteins 185, Potions 0 and 1. A letter by Elliot Maris, Wilmans& Hay dated 22 June 2012 addressed to Transnet on behalf of Husselmann sketches fairly comprehensively the basis upon which Husselmann claims the crusher-waste to be his property. The letter (Annexure FA11) reads:

“REMOVAL OF CRUSHER-WASTE AT KENHARDT BELONGING TO MR A HUSSELMANN

With regard to the letter which our client, Mr A Husselmann, addressed to you on the 1st June 2012, our client informs us that you have requested him to furnish you with a translation of the letter in order that you may refer the matter to your Company's legal department.

At the outset, we wish to place it on record that ownership of the crusher waste vests in our client who has been selling the crusher waste for his own account. It is not clear exactly what claim Transnet intends to lay in regard to the crusher waste or our client's right to remove the crusher waste. In the circumstances you must please inform us as to what claim Transnet intends to make in regard to the crusher waste. Without any admission or waiver on our client's part whatsoever, we wish to furnish you with the background of the facts concerning the crusher waste, which is as follows:

At the time when the railway line between Sishen and Saldanha was constructed, Iscor was granted permission by our client's father to make a quarry on our client's father's farm for purposes of removing stone which was required for construction of the railway line. Consideration for the stone used for construction purposes was paid by Iscor but no consideration whatsoever was paid for the crusher waste which was a by-product. The crusher waste which was a moveable asset, belonged to our client's father as owner of the farm and he was entitled to dispose and sell the crusher waste as and when he pleases. Iscor was in agreement with this position and at no stage did Iscor lay any claim to the crusher waste or the removal thereof.

After completion of the railway line, Spoornet approached our client's father with the view of obtaining approximately 60 hectares of ground on which the quarry was situated with the sole purpose of being able to mine stone from the quarry in future as and when it may be required for purposes of maintenance for construction of the railway line. During these negotiations it was specifically agreed that the crusher waste would remain the property of our client who would be entitled to remove the crusher waste and to sell it for his own account. In addition thereto, our client's father was allowed grazing rights in regard to the area of approximately 60 hectares as only the quarry itself was fenced in. Our client was not required to make any payment in respect of the grazing rights.

After Transnet took over from Spoornet, the demand for crusher waste increased. The contractor who transported the crusher waste from the site made use of the service road of Transnet. However, as a result of negotiations between a representative of Transnet by the name of Ivan [Luzmore] and our client, the use of the service road of Transnet for purposes of transporting crusher waste from the site was terminated and our client proceeded to construct a road over his own farm adjacent to the expropriated portion of approximately 60 hectares, to the site from which the crusher waste was transported.

Apparently some of the purchasers of the crusher waste requested a formal letter authorizing them to remove and transport the crusher waste and it seems to us that this was the reason why our client addressed a letter to Mr Attie Coetzee requesting a formal letter confirming that the crusher waste was the property of our client, Mr Husselmann, and that our client was entitled to remove the crusher waste.

Our client inherited the farm as well as the crusher waste from his father and he is the present sole owner of the crusher waste which has been removed and sold by our client's father and our client since the crusher waste was made by Iscor during or about 1977.

It is clear that Transnet could not have received more rights than Spoornet had and Spoornet could not have received more rights than Iscor had. In the circumstances, it will be appreciated if you or your legal Department will kindly address a letter to our firm acknowledging receipt of this letter and confirming that Transnet does not lay any claim to the crusher waste or our client's right to remove and sell the crusher waste for his own account." [Emphasis added]

The dispute between Transnet and Husselmann was triggered by the following events. On 19 October 2007 Mr Frik Strauss, who owns a farm adjoining Transnet's property, telephoned Mr John Marshall, an employee of Transnet, and complained about the conduct of a Mr Wouter Van Zyl (of the Third respondent), contracted to Husselmann to transport the crusher-waste from Transnet's property by means of interlinks and trucks. Strauss was not best pleased because the contractor trespassed on his farm and had broken the lock to his farm-gate. Strauss prohibited the contractor from accessing the crusher-waste through his farm.

Van Zyl then accessed the material via the Railway Service Road. According to Transnet this manner of accessing the quarry on its property posed a safety risk because the contractor had to cross the railway line by means of an existing level crossing which was not designed to

withstand heavy vehicles. On 30 October 2007 Ivan Luzmore of Transnet, alluded to in the quoted letter, attempted to mediate between Strauss and Husselmann. The ownership of the crusher-waste was not broached for the obscure reason that will shortly become apparent. Luzmore consulted with Husselmann, Strauss and Van Zyl separately on this very day. Of particular moment was the report to Luzmore by Husselmann the gravamen of which has already been regurgitated in the letter by his attorney quoted hereinbefore (Annexure FA11). Husselmann added that the complaining Strauss harbours envy because he wanted to purchase the crusher-waste stockpile. Hence the closure of the access road through his (Strauss's) farm.

Transnet and its counsel, Adv Terry Motau SC, urged that it be noted and underscored that Husselmann in recording the agreement reached with Luzmore the same day (30/10/2007) in his letter (Annexure FA3) to Mr Attie Coetzee of Transnet (who is ostensibly senior to Luzmore) did not seek permission from Transnet to remove crusher waste from the stockpile. For that reason and because Husselmann suggests that he was present when the oral agreement was reached between his late father, Andreas Jacobus Husselmann, on 03 November 1981 it is prudent to quote Annexure FA3 in full. (Translated for the benefit of those who are not proficient in Afrikaans – all the translations in this judgment are mine:

“IN RE: QUARRY ADJACENT TO “LOOP13.”

With the inception of quarrying an agreement was reached between my father, who was the owner, and Iscor that he will be compensated for the ballast-stone. This was complied with. Crusher-waste was left behind for my father for his own use, as it was our property. The purchase transaction occurred before 1973.

After the completion of the construction of the railway line in 1975 and the quarrying of ballast-stone had stopped, Sproornet approached my father with a view to the expropriation of the quarry. This was done with the aim of utilizing the quarry in future, if the need arose.

My father and I and the negotiator on behalf of Spoornet (Van der Merwe – unsure of surname) were involved in the negotiations on 03 November 1981. The terms of the oral agreement were the following:

My father consented to the expropriation of the quarry with contiguous land 39,9 hectare and 19,7 hectare in size against compensation;

The entire crusher-waste should be removed and the ecology be restored [rehabilitation must be done];

The quarry had to be fenced off and the remainder (the rest) of the land was allocated for grazing.

In April 2007 I thought it fit to donate crusher-waste to Jaco Van Dorp for the resurfacing of the Service Road after soil erosion and would do so in the future if necessary.

Subsequent to negotiations with Ivan [Luzmore] the following situation will take effect:

No vehicles will utilize the Service Road to the quarry;

A private road will be constructed on my property up to Pofadder [main] road;

I request Transnet to fix the fence and install lockable gates that the crossing (562mps) to prevent unauthorized access to the quarry.

Your co-operation in this connection will be appreciated.”

The applicant and its counsel point out that precisely five months later, on 30 March 2008, when Husselmann wrote to Mr Steve Jacobs, Transnet, Saldanha, (Annexure FA4) he oncemore did not seek permission to remove the crusher-waste but merely sought a right-of-way. This letter (translated) reads:

“IN RE: REMOVAL OF CRUSHER-WASTE

I hereby request written permission to transverse Transnet’s land in order to remove the crusher-waste stockpiled on Transnet’s property. I have already commenced with the removal action. However, due to uncertainty in the minds of the contractors on whether they are authorized to traverse Transnet’s land, the removal has been delayed.

I will in no way make use of the Service Road in the transportation of the waste as I have constructed a road over my land after negotiations with Transnet.

In view thereof that Transnet and I have travelled a long road together (have come a long way), have developed a good relationship and have cared for each other’s interests, I will appreciate it if this matter received your urgent attention.”

The following day (on 31/03/2008) Jacobs made the following endorsement on Annexure FA4 (translated):

“Ivan [Luzmore],

Please inform Mr Husselmann that he has grace until the end of July [2008] to remove the waste. This is so because we permitted him +/- 5 months ago to complete the removal and nothing has apparently been done. I have also identified a need for Transnet with the crusher-waste.

Obtain vehicular registration numbers in order for us to issue permits for 6 months.”

The so endorsed Annexure FA4 was dispatched per facsimile to Husselmann on the same date of the endorsement (31/03/2008) which Husselmann duly received. Transnet’s deponent (Luzmore) emphasizes the fact that:

“It should be borne in mind that at this stage Transnet had no reason to investigate the issue of ownership of the crusher-waste stockpile.”

On 01 June 2012 in Annexure FA7 Husselmann writes again to Coetzee of Transnet and repeats a lot of stuff that has already been adverted to. Of particular significance are his concluding paragraphs in which the following is stated (translated):

“According to the delegate [Ivan Luzmore], regard also being had to the note which he furnished me which was undersigned by Mr Jacobs, I have been authorized to proceed with the transportation of the crusher-waste provided I do not damage the land surface or the mineral vein (die ertsterein).”

I am experiencing a problem with some of the purchasers because the crusher-waste is not located on my land. I have presented the note that Ivan furnished me with but they require a formal letter. The involvement of the contractors is the speediest method to cart-away the crusher-waste because, as a farmer, I lack the capacity to do so. The purchasers appreciate fully that the crusher-waste is a movable asset which is not integral to the expropriated land. The structured letter that they require has to incorporate the following:

An acknowledgement that the crusher-waste is the property of Mr J A Husselmann (which has already been done via the note or the endorsement by Jacobs).

Permission to remove the crusher-waste from the expropriated property (in other words I merely ask for a letter).

In view thereof that I have been removing the crusher-waste peacefully for years in the face of Transnet (teenoor Transnet), I will appreciate it highly if my request is favourably considered.”

Transnet’s reaction in its founding papers to Husselmann’s request was to say:

“32. --- This was the first time that Husselmann sought Transnet’s written confirmation that he was in fact, the owner of the stockpile.

33. This raised concerns due to the fact that Transnet was surprised, and myself in particular, that why and how come Husselmann required such written confirmation, when at all times, he advised Transnet that he was the owner of the stockpile, and his assertions were never second-guessed(“FA7”).
34. On 2 June 2012, I contacted Husselman telephonically requesting more information regarding the request, and advised him that the matter was receiving attention by Transnet’s legal division. I also requested him to stop the removal of the stockpile, pending the outcome of his request. He ignored the request.
35. On 3 June 2012, Husselmann sent an email attaching a letter dated 27 September 1974, from Iscor, addressed to his father. This letter raised further suspicions. [The suspicions appear in para 12 below of Greenfield’s report].
37. Apart from these difficulties, Transnet is in possession of a similar letter, addressed to a different individual, JM Storm, which addressed similar issues. This letter also bears the similar reference: “TLEX PS 672/749/791/792”, dated 27 September 1974, as Annexure “FA8”; contains two (2) pages, both of which appear to be typed by way of typewriter, unlike the earlier one which has two different fonts. In addition, the letters appear to be signed by the same person, but the signatures appear to be different. This letter is --- “FA9”.

38. This caused Transnet to appoint Cecil Greenfield ('Greenfield'), a forensic examiner of the questioned documents, to opine on the two

(2) letters"

The aforesaid Greenfield's report reads as follows in part (Annexure F10):

"3. I was consulted by the Applicant's attorneys of record for the purposes of examining a document provided to the Applicant by Mr A J Husselmann which, I am given to understand, was sent to Mr Husselmann's father by ISCOR. The letter is dated 27

September 1974, consists of 2 pages and is attached hereto as Annexure "A".

4. I have examined the document and found:

4.1 The typestyle/font on page 2 of Annexure "A" was found to differ from that on page 1 of Annexure "A. Furthermore

differences were found in the left-hand margin and the interline spacing of page 1 and page 2.

4.2 The above differences would suggest that page 2 is a part of another document and that it is not the second page of the letter addressed to Mr A J Husselmann.

4.3 I was also provided with a copy of a letter addressed to Mr J M Storm from ISCOR, annexed hereto marked as Annexure "B", with the same date as Annexure "A". With regard to this letter I found that the typestyle/font of both pages of the document were found to be consistent, this also applies to the left-hand margin and the interline spacing.

Bearing in mind, further, that both documents purport to have been written on 27 September 1974, the signatures purporting to be those of G J Botha were found to differ considerably.

In order to confirm these findings I would need to examine the originals of both documents and have conveyed the same to the Applicant's

attorneys of record."

Annexure FA8 is pivotal to the proper decision of this application. This is so because Husselmann provided the document to underpin his claim to ownership of the crusher-waste stockpile. It is written by a Mr G J Botha of Iscor, in his capacity as Chief Project Manager, Sishen Saldanha Project, and dated 27 September 1974 (38 years ago). The letter is addressed to Husselmann's father, Mr A J Husselmann. It reads as follows in its translated form:

"USE OF THE SERVICE ROAD ALONG THE SISHEN/SALDANHA-RAILWAY LINE.

I wish to direct a friendly request to you to co-operate with [ISCOR] Corporation and under no circumstances use the Service Road running along the Iscor-Railway line, unless written authorization therefor has been obtained. In view thereof that the Service Road is private property which is used by the contractors for the construction of the railway line and ancillary tasks, and that they maintain the road, the contractors would be justified in demanding that Iscor

repair the road if private individuals are allowed to use it. This would bring about a huge expense burden for the Corporation.

Inherent in the use of the [Service Road] is to expose you [A J Husselmann] to dangers and risks attendant to construction work. These risks and responsibilities will in turn render the Corporation liable for the consequences flowing therefrom because it is a criminal offence for any private person to trespass on Iscor's property. This could lead to all sorts of claims against the Corporation.

ELECTRIFICATION OF THE RAILWAY LINE

We wish to bring it to your attention that the Sishen/Saldanha railway line will be electrified by 1977. Consequently, farm-implements and other equipment moving over level-crossings cannot exceed a height of 5,2 metres (about 17 ft). In order to ensure your and your employees' safety Iscor will put up the necessary safeguard (barricade) at the maximum permissible height."

The controversial page 2 reads as follows:

"No contact with the powerlines will therefore be possible.

CRUSCHER-DUST MATTER

As far as this matter is concerned I wish to bring to your attention that the Corporation (Korporasie) will not compensate you for the "cruscher dust", but you are free to utilize it for your own use and to sell (trade) it in future for your own account.

I trust that the Corporation (Korporasie) can bank on your full (complete) co-operation with regard to this important aspect."(Emphasis added and note the misspelling of "crusher" – the lost "c".

Before embarking on some analysis in respect of Annexure FA8 it is convenient to capture Husselmann's response to the suspicions raised around it. He states (translated):

"AD PARAS 35 TO 40 THEREOF

122. I acknowledge that I have supplied the letter dated 27 September 1974 [Annexure FA8] from Iscor to the Applicant.
123. I came across this letter in June 2012 when I searched through old documents for any confirmation of my ownership of the crusher-waste.
124. This was necessitated by the request of Messrs Botes and Kenney who required written confirmation in this connection.
125. I discovered these two pages [page 1 is quoted at para 13 (a) to (c) and p2 at para 14 (d) to (f) above] in my father's old documents. Although the documents were not stapled together, in my view, they belonged together (they are one and the same document). I am the one who stapled them together.

126. The contents thereof are also consistent with my recollections between my late father and one MrLochner of Iscor during the 1970's, as already alluded to above.
127. I have never previously used this letter in support of the agreement between my father and Iscor, as the necessity therefor never arose because I was present when this agreement was entered into.
128. With regard to the request by the Applicant that Mr Greenfield requires the original documents for analysis, he is more than welcome to make the necessary arrangement with my attorneys in this connection.”

It is not known whether Lochnerwas available to supply a confirmatory affidavit.

This response by Husselmann is not only perfunctory but it is a complete avoidance of the kernel issue.

16.1 In his Answering Affidavit at paras 122 to 128 (above) Husselmann responds to the allegations in Annexure FA8, that was written on 27 September 1974. He states that he actively participation in the negotiations. This prompted me to enquire from his counsel, Adv A G Van Tonder whether he minds to inform the Court when his client, the deponent, was born. He took instructions and was informed that Husselmann was born in

1953. When Annexure FA8 and FA9 were written in September 1974 he was 21 years old. Nothing should turn on his age.

16.2 The contrast between pages 1 and 2 is so marked; even to the naked and untrained eye. It is in fact, or perhaps in part, this dichotomy which raised the suspicion of the applicant and had it subjected to forensic

analysis.

16.3 Page 1 of Annexure FA8 and page 1 of Annexure FA9 are verbatim replicas. As far as pages 2 of these annexures are concerned page 2 of FA9 does not deviate from its page 1 pattern, whereas FA8 does. Annexure FA9 was written on the same date to a Mr J M Storm, Ellisrust, Olifantshoek, in the Northern Cape.

16.4 Annexure FA9 does not contain para 14(e) above. It does however contain paras 14(d) and (f) the wording of which is identical to that in FA8. The discrepancies remain unexplained.

16.5 In page 1 of both Annexures FA8 and FA9 the word “Korporasie”, for Iscor, the upper-case “K” is used six times. Not once is the lower case “k” used. At Page 2 of Annexure FA9 (the document whose authenticity is not called into question) the author, the aforesaid G J Botha, uses the word “Korporasie” only once, in the upper-case in what would be para 14(f). However, in the suspect page 2 of Annexure FA8 of paras 14(e) and (f) the letter “K” in the “korporasie” is written in the lower case on two occasions. This is not how G J Botha portrayed Iscor in the uncontested authentic portions of page 1 of Annexure FA8 and pages 1 and 2 of Annexure FA9.

In my view there is a high degree, a high probability, a prima facie case made out that page 2 of Annexure FA8 has been tempered with. In short, there is little doubt that Husselmann produced a fraudulent document to bolster his case. It does not really matter who may have altered the document. I cannot ignore this controversial document.

Husselman, in providing some historical background, attached to his Answering Affidavit a letter, Annexure “A”, written by J G H Loubser, Chief Director, South African Railways, on 26 June 1981 to Husselmann’s father. This was written in response to a letter that Husselmann senior wrote to Dr S W Van Der Merwe, Chairman of the Committee of Economic Affairs of the President’s Council. Annexure “A” shows that the response was also with the concurrence of the Minister of Transport. The opening paragraph relates to the offer made for the property, which is not relevant for present purposes. However, the concluding paragraph bears some relevance. It states (translated):

“Due to the fact that it is not envisaged that the quarry on your farms would be re-opened before 1984/1985 by the Department, you are hereby authorized to utilize the existing boreholes and the land for a period of three years, and thereafter on a month-to-month basis free of charge for grazing purposes, to enable you to sink boreholes elsewhere on your farms in the intervening period.”

As Mr Motau, for the applicant, submits it not without significance that no mention is made of the ownership of crusher-waste. Mr Van Tonder argued that Transnet has not produced any document to prove that it is the owner of the crusher-waste stockpile. I am not certain how seriously I can entertain this argument. Transnet has attached the Title Deed that shows that they are the owners of the land on which the stockpile rests. The presumption is that it is the owner. The gravel/crusher-waste/mineral or by-product was excavated/extracted from its land. Where else should it have been deposited? Whoever claims ownership of the crusher-waste must prove it. At this stage Annexure FA8 seems to demonstrate the converse.

Mr Motau has raised the issue that in terms of s5(4) of the Minerals and Petroleum Resources Act, 28 of 2002 (the M&PR Act) Husselmann and the other respondents required permits authorizing the transportation or removal of the crusher-waste by them from Transnet’s property.

20.1 S5(4)(b) & (c) provides that:

“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-

- (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;
- (c) notifying and consulting with the land owner or lawful occupier of the land in question.”

20.2 That the crusher-waste is a mineral is unquestionable. The M&PR Act defines it as follows:

“‘mineral’ means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits”

Mr Van Tonder has countered this argument by submitting that the M&PR is not applicable to crusher-waste that existed before the coming into operation of this Act and cites as authority *De Beers Consolidated Mines Ltd v Atarqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZADSHC 74 (13/12/2007) paras 67 and 68. Consolidated Mines Ltd was the holder of the mineral rights by virtue of a notarial deed of cession of mineral rights which was registered on 20 September 1973 in terms whereof New Jagersfontein

Mining and Exploration Company Ltd, the cedent, ceded, assigned and transferred and made over to De Beers, inter alia, all rights to all precious stones, precious metals, base minerals etc. The question arose whether having regard to the cession of movable assets to De Beers, the tailing-dumps, obviously bearing diamondiferous gravel, were included in the cession.

This already is a distinguishing factor from the case under review (*Transnet SOC Ltd v Husselmann*).

A second distinguishing feature is that the First respondent, Atarqua Mining (Pty) Ltd of the Free State case, was issued a prospecting

permit/right by the Director-General of Minerals and Energy, seemingly with the concurrence of the Minister of Minerals and Energy. The decision was set aside. In this case *Husselmann* had no permit for the removal of the crusher-waste issued by the authorities. These cases are not comparable. If in September 1974 Iscor forbade *Husselmann*’s father from using the Service Road without written permission how could they conceivably allow the crusher-waste to be removed with a permit? See para 13 (above).

A further issue that requires short shrift is Mr Van Tonder’s argument that even if *Husselmann* is unsuccessful with his bid that there existed an oral agreement between Iscor (including Iscor’s successors in title) and his father, *Husselmann* has nevertheless become the owner of the crusher-waste stockpile through acquisitive prescription by virtue of the provisions of s1 of the Prescription Act, 68 of

1969. This section provides:

“Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.”

Husselmann is free to raise this issue at the trial in due cause, if so advised. I cannot see how he can claim to have been in possession of the crusher-waste stockpile which had been on Transnet's land since it became owner of the stated land. Husselmann had no physical possession, which is a requirement or one of the elements for prescription. See *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd and Another* 1972(2) SA 464 (W) at 474A – 475D; and *Morgenster 1711 v De Kock N.O* at 63B – 64E (paras 12- 18).

In conclusion I am satisfied that the requisites for an interdict have been satisfied by Transnet. In *Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973(3) SA 685 (a) at 691C- G Holmes JA stated:

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are -

- (a) a right which, 'though prima facie established, is open to some doubt';
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater

the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing

considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. v Ramlagan*, 1957

(2) SA 382 (D) at

- p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration.”

I am satisfied that Transnet will suffer irreparable harm should the relief sought not be granted. Husselmann spurned the following proposal by Transnet which, in my view, was eminently reasonable:

“We reiterate our request therefore that your client immediately ceases with the removal of the stockpile pending the institution of an action by our client for the determination of the ownership dispute within 30 days from date hereof.

In the event that your client does not cease with the removal and based on information received by our client the estimated size of the stockpile is 290 000m³. A quotation received by our client further indicated that the current market value at which 1m³ is being sold is R118,91 and in the circumstances the estimated value of the stockpile is R34 483 900,00. This also represents the damages potentially to be suffered by our client should the stockpile be depleted. Kindly arrange for the aforementioned amount to be deposited into an interest bearing trust account to be held until the finalization of the ownership dispute.”

I therefore grant the following order:

The first respondent (Arnold Husselmann), the second respondent (Martin & East (Pty) Ltd) and third respondent (Van Zyl Blasting –Earthworks CC), and any contractor who operates through first respondent, are hereby forthwith interdicted and restrained from removing and dissipating the crusher-waste or crusher-dust material stockpile from the applicant’s (Transnet SOC Limited’s) property (Portion 3 (of portion 1) of the farm RietFonteins 165, held under Deed of Title No T7570/93 and Portion 4 (a portion of portion 1) of the farm RietFonteins 165 held under Deed of Title 907/93) pending the determination of action proceedings to be instituted within 30 (thirty) days from date of this order.

The costs of this application shall be costs in the aforementioned action proceedings.

FDIALE KGOMO

JUDGE-PRESIDENT

Northern Cape High Court, Kimberley

On behalf of theApplicants: Adv. T. Motau SC

Assisted by: Adv S Yacoob

Instructed by: Roux Welgemoed& Du Plooy Attorneys

On behalf of the Respondent: Adv A. Van Tonder

Instructed by: Elliott Maris Wilmans& Hay Attorneys

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/transnet-soc-ltd-v-husselman-and-others-unknown-topic-anchc-2012--6a3ea5173b1caa912980dd90>

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