

SOUTH AFRICA / JUDGMENT

Van den Heever v Minister of Minerals and Energy and Others (150/2014)

[2015] ZASCA 19 (19 March 2015)

[2015] ZASCA 19**COURT**

Supreme Court of Appeal

BEFORE

Brand, Lewis, Cachalia, Zondi, Dambuza

CASE / FILE NUMBER

150/2014

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 150/2014

In the matter between:

GERT VAN DEN HEEVER.....APPELLANT

and

THE MINISTER OF MINERALS AND ENERGY.....FIRST RESPONDENT

THE DIRECTOR GENERAL: DEPARTMENT OF

MINERAL RESOURCES.....SECOND RESPONDENT

TRANS HEX MYNBOU LIMITED.....THIRD RESPONDENT

TRANS HEX OPERATIONS (PTY) LIMITED.....FOURTH RESPONDENT

Neutral citation: Van den Heever v Minister of Minerals and Energy (150/14)

[2015] ZASCA 19 (19 March 2015)

Coram: Brand, Lewis, Cachalia and Zondi JJA and Dambuza AJA

Heard: 4 March 2015

Delivered: 19 March 2015

Summary: Whether content of a letter, objectively viewed, evinced an intention of the writer to abandon a mining right. Construed in its context and in light of background facts, abandonment not established.

ORDER

On appeal from: Northern Cape High Court, Kimberley (Kgomo JP and Hughes-Madondo AJ sitting as court of first instance)

‘The appeal is dismissed with costs, including the costs of two counsel in respect of both first and second respondents on the one hand, and of the third and fourth respondents on the other.’

Cachalia JA (Brand, Lewis and Zondi JJA and Dambuza AJA concurring)

[1] This appeal concerns a dispute over a right to mine for diamonds on two contiguous pieces of land on the farm Richtersveld No 11 (the property) situated in the Namaqualand district of the Northern Cape. The dispute has its genesis in the appellant’s failed attempt to secure mining permits from the Department of Mineral Resources in

2008. The appellant’s applications for the right to mine were refused on the ground that a permit to mine on the same property was already in existence and held by Trans Hex Operations (Pty) Ltd, the fourth respondent, when the application was made. The right was initially held by a public company, Trans Hex Mynbou Limited (Mynbou), the third respondent, under a mining lease and thereafter ceded to the fourth respondent in May 2001. Both entities are subsidiaries of a holding company, Trans Hex Group Limited.

[2] The appellant disputes the fourth respondent’s claim to hold the mining right over the property. He says that on 26 January 2001, before the cession took place, Mynbou wrote to the Department of Minerals and Energy (the predecessor of the Department of Mineral Resources) indicating that it was foregoing its right to mine on the property, and had thereby abandoned its right. This means, so the appellant submits, that Mynbou’s purported cession of the right to the fourth respondent is invalid as it had no right to cede. And the department’s refusal to grant the application on the ground that the fourth respondent held the mining right is therefore unlawful.

[3] The respondents’ answer to this claim is that properly construed, and in light of the background facts, the January letter

did not constitute an abandonment of its mining right, but was merely a request for the department to amend the mining lease in order to give effect to Mynbou’s declared intention to make the land available to the Richtersveld community for agricultural purposes.

[4] The dispute gave rise to a review application in the Northern Cape High Court in which the appellant sought orders: declaring that Mynbou had abandoned its right to mine for diamonds on the property; reviewing and setting aside the decision to convert the abandoned old order mining right previously held by Mynbou into a right contemplated in the second schedule of the Mineral and Petroleum Resources Development Act 28 of 2002

(the MPRDA); reviewing and setting aside the Director General's decision under s 96 of the MPRDA to refuse his appeals against the Regional Manager's rejection of his applications for mining permits under s 27 read with s 27(3)(b) of the MPRDA; and remitting his applications for mining permits for reconsideration by the relevant official.

- [5] The application failed before the high court in a judgment delivered by Hughes-Madondo AJ in which Kgomo JP concurred. The appeal before us is with leave of this court.
- [6] At the commencement of the hearing, Mr Barnard, who appeared for the appellant, accepted that the central issue in this appeal is whether Mynbou, in its letter relinquished its right to mine for diamonds over a portion of the property for which the appellant had applied for mining permits in terms of s 27 of the Mineral Development Act 28 of 2002. He accepted too that in the event of this court finding that Mynbou had not abandoned its right to mine on the property, the appeal must fail.
- [7] It is trite that abandonment or relinquishment of a right is never presumed: clear proof is required and it must be shown that the person intended this result with full knowledge of the right in question. The test is objective: the intention of the person is to be determined by the outward manifestation of his or her conduct.
- [8] It is appropriate to quote the letter, which was addressed to the department, in full:

‘Geagte Mnr Nieuwoudt

VERKLEINING VAN RICHTERSVELD MYNHUURGEBIED: TRANS HEX MYNBOU

Trans Hex Mynbou onderhandel reeds geruime tyd met die Richtersveld Oorgangsraad (nou die Richtersveld Munisipaliteit) vir die beskikbaarstelling van verskeie stukke grond vir besproeiingsdoeleindes langs die Oranjerivier. Ooreenkoms is nou bereik dat 13 afsonderlike [stukke grond], wat gesamentlik 363,14 hektaar beslaan, aan die Oorgangsraad oorhandig sal word vir landbougebruik, en uit die mynhuurgebied uitgesluit sal word. Die stukke grond maak tans deel uit van die Richtersveld mynhuurgebied wat in terme van mynhuur 2/91 aan Trans Hex toegeken is (sien meegaande plan met koördinate).

Die stukke grond wat uitgesluit moet word beslaan vier afsonderlike stukke in die Swartwater/Koeskopgebied (gesamentlik ongeveer 122,57 hektaar groot), drie aaneenlopende stukke in die Sanddrifgebied (gesamentlik ongeveer 24,67 hektaar groot), vier alleenstaande stukke in die Bloeddrifgebied (gesamentlik ongeveer 100,94 hektaar groot), en een stuk in die Jakkalsberggebied, die sogenaamde Reuning besproeiings erf (ongeveer 11,59 hektaar groot).

U word dus versoek om die 13 stukke grond, waarvan die omvang in detail deur middel van koördinate op meegaande plan gedefinieer word, uit die bestaande mynhuurgebied uit te sluit, en die wysiging so by die Mynbriewekantoor in Pretoria te laat registreer. (Emphasis added)

‘n Kope van die oorspronklike notariële mynhuurdokument 2/91 gaan hiermee saam vir die nodige endossement. Die besluit om die mynhuurgebied te verklein word bekragtig deur meegaande direksiebesluit gedateer 24 Januarie 2001.’

- [9] The appellant relies on the passage I have highlighted – in particular the phrase: ‘uit die bestaande mynhuurgebied uit te sluit’ – to support his contention that Mynbou relinquished its right to mine over the 13 portions of land to which reference is made in the letter. However, Mr Barnard properly accepted that we are entitled to have regard to the background

facts

in giving meaning to the letter.

- [10] The farm Richtersveld 11, where the mining lease area is situated, was owned by the State. In terms of s 7 read with s 11 of the Rural Areas (House of Representatives) Act 9 of 1987, Farm 11, vested in the Minister of Land Affairs to be held in trust for the Richtersveld Community. This is reflected in the farm’s title deed. Mining in this area could therefore only be undertaken with the consent of the Minister.
- [11] In 1991 Mynbou became the holder of Notarial Mining Lease 2/91, which gave it the right to mine for diamonds on the farm. This lease encumbered the land in favour of Mynbou, as did the deemed mineral right and mining licence in its favour. Mynbou had no rights to the land other than those embodied in, and flowing from, the lease.
- [12] Clause 4 of the lease restricted the surface use within the mining lease area for mining purposes. This meant that Mynbou could not use the land or sublet it for any other purpose without breaching this clause.
- [13] In terms of s 3(1)(a) read with s 1 of the Transformation of Certain Rural Areas Act 94 of 1998, Farm 11, being trust land, could be transferred to a municipality or communal property association registered under the Communal Property Associations Act 28 of 1996 within a transitional period that the Minister of Agriculture and Land Affairs would determine.
- [14] During 1998, a claim was lodged by the Richtersveld Community in terms of the Restitution of Land Rights Act 22 of 1994. A communal property association called the Richtersveld Sida! Hub Vereniging vir Gemeenskaplike Eiendom (GEV) was formed to pursue the claim.
- [15] The Minister determined that 19 January 2001 would be the date on which a transitional period of 18 months would commence. During this period a Transitional Council would advise the Minister of the entity to which the land had to be transferred. Although the Transitional Council (succeeded by the Richtersveld Municipality) initially represented the community, there was disagreement over whether the real representative of the Community was the GEV (which had lodged the land claim), or the Municipality. The disagreement has limited bearing on the dispute before us.

- [16] Mynbou became aware of the land claim and started negotiations with the Richtersveld Community soon thereafter. It employed the University of the Free State to do soil surveys in order to identify suitable agricultural land on the farm, and to make it available to the community for agricultural purposes. Once the land was identified careful rehabilitation could be done to make the soil amenable to irrigation.
- [17] On 8 April 2000, Mynbou entered into a fencing agreement ('omheiningsooreenkoms') with the Richtersveld Community,
- which was then represented by the Richtersveld Transitional Council. In this agreement, which dealt essentially with fencing-off of part of the mining area, Mynbou undertook to excise 'landbou-erwe' and open areas between the erven next to a river from the (fenced) mining lease area in order for the use of those irrigation areas to be transferred to the Richtersveld Community for agricultural purposes.
- [18] Clause 6 of this agreement is important. It provided that any amendment of the mining lease or of the consent required to implement
- these provisions in terms of Act 9 of 1987, would be without prejudice to the rights of Mynbou under the mining lease. Simply put
- the fenced-off area would be made available to the community for agricultural purposes, but Mynbou would retain its mining rights over the entire area.
- [19] This then was the background to Mynbou's the letter of 26 January 2001 to the department requesting an amendment of the mining lease so as to reflect the excision of the 13 portions of land for irrigation purposes and for the amendment to be registered. Clause 4 of the mining lease to which I have referred earlier obliged Mynbou to obtain the Minister's consent before any part of the land was sublet for purposes other than mining. And it was to comply with this clause that the letter was despatched to the department.
- [20] So, far from relinquishing its right to mine, the content of the letter reflects the opposite intention: that Mynbou would retain its rights under the mining lease, even though the irrigation areas would be physically excised from the mining lease area. And the excision would occur, if the Minister approved, only for the purpose of allowing surface use of these portions for irrigation purposes, and not with respect to the right to mine.
- [21] That this was what Mynbou intended, and also what the representatives of the Richtersveld community agreed to was confirmed in a later agreement entered into in August 2001 between Mynbou and the GEV, long before the appellant applied for mining permits over the excised portions of the mining area. In this agreement, the parties agreed that GEV would not allow mining on the properties.

[22] In any event, for reasons that are not immediately germane to the present dispute, no amendment to the mining lease was ever effected and the mining of diamonds in the area continued under the terms of the original mining lease. The appellant could hardly not have been aware of this.

[23] I conclude that Mynbou did not abandon its right to mine for diamonds over the 13 portions of land. Mynbou's conduct before it despatched the letter, and subsequently thereto, reveals that it never evinced any intention to abandon its mining right. In this context the letter, objectively viewed, is not capable of a construction the appellant seeks to place on it. The appeal must fail.

[24] The following order is made:

A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant: T A Barnard

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