



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 284/2013

In the matter between:

! URIS SAFARI LODGE (PTY) LIMITED

APPLICANT

And

WEATHERLY MINING NAMIBIA LIMITED

1ST RESPONDENT

ONGOPOLO MINING LIMITED

2ND RESPONDENT

THE ENVIRONMENTAL COMMISSIONER, NAMIBIA

3RD RESPONDENT

THE MINISTRY OF ENVIRONMENT & TOURISM

4TH RESPONDENT

THE MINISTER OF MINERALS AND ENERGY

5TH RESPONDENT

SYNERGISTICS ENVIRONMENTAL SERVICES (PTY) LTD

6TH RESPONDENT

Neutral citation: *Uris Safari Lodge (Pty) Ltd v Weatherly Mining Namibia Ltd* (A 284-2013 [2014] NAHCMD 266 (11 September 2014))

Coram: MILLER, AJ

Heard: 9 July 2014

Delivered: 11 September 2014

Flynote: Practice – Applications and motion – Urgency – Urgency self-created. Application struck from the Roll.

ORDER

I make the following order:

I will accordingly strike the matter from the roll with costs which will include the costs of one instructing and two instructed counsel.

JUDGMENT

MILLER, AJ:

[1] It is not often if ever the case that a luxury tourist lodge and a copper mine seek to exist harmoniously on the same piece of land. That, however in the situation in which the applicant and the first and second respondent wittingly find themselves.

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[2] They are presently in litigation on several fronts. There is an action pending before my brother Damaseb JP in which the first and second respondent seek the eviction of the applicant from the property they sold to the applicant, the property being described as farm !Uris No 481. I shall refer to it as the property. That transaction was concluded in 2002. I was informed that the trial will commence in November 2014. On 16 August 2013 the applicant launched review proceedings by notice of motion against the respondents. The relief claimed is set out in two parts in the following terms:

Part "A"

1. Reviewing and setting aside the decision of the third and/or fourth respondent to grant an environmental clearance certificate to second respondent and setting aside the granting of such certificate on 24 April 2013 for purposes of permitting second respondent to exercise mining rights over mining licence 125 granted on 2 December 2002.
2. Directing first, second, third and fourth respondent jointly and severally, the one to pay the other to be absolved to pay the costs of this application.
3. Granting the applicant such further and/or relief as this honourable court deems fit.

Part "B"

4. Interdicting and restraining first and second respondent from undertaking any actions whatsoever, and exercising any rights whatsoever in terms of the mining licence granted to second respondent upon the immovable property of the applicant:
 - 4.1 In contravention of the provisions of section 50(o) of its Minerals Act and/or
 - 4.2 In contravention of section 52(i) and (ii) of the Mineral's Act and/or
 - 4.3 Pending finalisation of the review application to set aside the granting by the Environmental Commissions of the environmental clearance certificate to second respondent on 24 April 2013 and/or

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4.4 Through any company, entity or enterprise other than the company to which mining licence 125 had been granted.

5. Directing the first and second respondent, jointly and severally to pay the other to be absolved, to pay the costs of the application.
6. Granting the applicant such further and/or alternative relief as this Honourable Court may deem fit.”

[4] The proceedings are currently pending before me. I may add that the use of disjunctive “and/or” at the end of prayers 4.2 and 4.3 does not make sense really but I understand that the applicant seeks an interdict pending the outcome of the review proceedings contemplated in Part A. Mr Neethling who deposed to the founding affidavit explain the reason for the inclusion of Part B as follows in paragraph 24 of the affidavit as follows:

“Although Weatherly indicated that it intends going ahead with the implementation of the mining activities, there is nothing to suggest to the applicant that the implementation of such mining activities will take place in the immediate foreseeable future. For such reason the application is not brought as one of urgency. If however prior to the finalisation of this application it appears to the applicant that first or second respondent or any entities under the control of either of them intends forthwith commencing with mining activities applicant reserves the right to launch urgent proceedings, based upon what is set out in this application duly supplemented to the extent necessary for purposes of protecting its rights.”

[5] As matters turned out the application launched the threatened urgent application on 14 May 2014. It seeks relief in the following terms:

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- ”1. Dispensing with the forms and service provided in the rules of court and hearing this application as one urgency in terms of the provisions of rule 73(6) of the rules of court;
2. Interdicting and restraining first and second respondents from undertaking any activities, whatsoever, and exercising any rights, whatsoever, in terms of or under or arising from the mining licence ML125 granted to second respondent, upon immovable property of applicant described as “Farm !Uris no 481” , pending the finalisation of the main proceedings instituted by applicant under the above case number;
3. Directing the first and second respondents, jointly and severally, the one to pay the other to be absolved, to pay the costs of this application;
4. Granting the applicant such further and/or alternative relief as this Honourable Court may deem fit.”

[6] That application became opposed and was heard by me. This judgment deals with that application.

[7] Apart from contesting the merits of the application, the first and second respondents also contend that the matter is not urgent and if so such urgency was self-created. In *Bergmann v Commercial Bank of Namibia and Another* 2001 NR 48(HC) the court held that in such circumstances urgent applications will not be entertained. I should also mention that I granted leave to the third, fourth and fifth respondents to file answering affidavits at a late stage.

[8] Mr Barnard who appears for the applicant fully addressed me on both the merits of the application as well as the issue of urgency. He contends as far as the merits are concerned that the applicant has good prospects of success in the review application, but that the integrity of the litigation will be severely compromised by the delay in finalizing the proceedings including any possible appeals, unless the first and second respondents are interdicted from continuing with its mining operations.

[9] As far as urgency is concerned Mr Barnard argue that the applicant was entitled to delay the urgent application until such time as it was apparent the mining activities are about to commence. I find no quarrel with that submission as a matter of legal principle, provided it is supported in the facts.

Urgency

[10] I have decided to deal with the issue of urgency first and then, if necessary to consider the merits.

[11] Mr Neethling who also deposed to the founding affidavit in this application deals with this issue in the following manner in paragraphs 19 and 20 of its affidavit. In paragraph 19 he reiterated his earlier stand and should it come to the knowledge of the applicant that he first and second respondents intend to go ahead with mining operation an urgent interdict will be sought. In paragraph 20 he states the following:

“20. It has now come to the knowledge of the applicant that Ongopolo and Weatherly intend going ahead with their mining operations and that they have actively engaged in doing so, hence the necessity to launch this urgent application for interim relief pending the finalisation

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of the main application. Mr Neethling than proceeds to set out the negotiation between the applicant and the first and second respondents over a period of times preceding this application.” It was held in *Bergmann vs Commercial Bank and Another* (supra) that the fact the parties were negotiating is not an excuse to bring the application at the last minute.”

[12] The allegation made by Mr Neethling in paragraph 20 which I quoted does not sit well with the facts apparent from two e-mail communications by Mr Neethling. The first correspondence is dated 21 January 2014 and it reads as follows:

“Dear Craig,

Best wishes for 2014. We have noted the movement by parties associated with your mining activities of Farm! Uris 481. Please note, as previously discussed, that Farm !Uris is a registered game farm. We have recently recorded armed poaching on the farm and regular movement of suspected criminals. We are at the same time hunting on the farm and it is therefore important for the safety of all parties to coordinate movement on its property.”

I pause to mention that “Craig” is Mr Craig Thomas is the first respondent.

The second correspondence is dated 14 February 2014 and reads as follows:

“As far as the Tschudi project is concerned we have been informed that construction commenced (Weatherly web page) and that a construction camp is being established ...” (my underlining)

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In a replying affidavit Mr Neethling seeks to explain the matter as follows in paragraph 23:

“23. Prior to end April / the beginning of May 2014 there we no substantive activities on the part of Ongopolo that demonstrates the conduct of mining activities....”

That allegation flies on its face of the statement in the e-mail dated 14 February 2014 that construction had commenced.

[13] It also runs counter to the earlier statement by Mr Neethling to which I referred earlier to the effect the applicant will launch urgent proceedings once it becomes aware that first and second respondent intend commencing mining activities. By delaying the launch of the threatened urgent application applicant cannot now complain that mining activities are now taking place on the property. It finds itself in a situation of its own making.

[14] I will accordingly strike the matter from the roll with costs which will include the costs of one instructing and two instructed counsel.

P J Miller
Acting Judge

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APPEARANCES

APPLICANT: Adv T Barnard

Instructed by: MUELLER LEGAL PRACTITIONERS

1st, 2nd and 6th RESPONDENTS: Adv R Heathcote, SC

Instructed by: LORENTZANGULA INC.

3rd, 4th and 5th RESPONDENTS: Adv G Hinda

Assisted by: Adv S Akweenda

Instructed by: GOVERNMENT ATTORNEY