REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HD-MC-CIV-MOT-GEN-2024/00505

In the matter between:

DORO !NAWAS CONSERVANCY	**FIRST APPLICANT**
UIBASEN TWYFELFONTEIN CONVERSANCY	**SECOND APPLICANT**
#AODAMAN TRADITIONAL AUTHORITY	**THIRD APPLICANT**
ULTIMATE SAFARIS (PTY) LTD	**FOURTH APPLICANT**

and

OTTILIE NDIMULUNDE	**FIRST RESPONDENT**
THE ENVIRONMENTAL COMMISSIONER	**SECOND RESPONDENT**
THE MINISTER OF ENVIRONMENT, FORESTRY AND TOURISM	**THIRD RESPONDENT**
THE MINING COMMISSIONER	**FOURTH RESPONDENT**
THE MINISTER OF MINES AND ENERGY	**FIFTH RESPONDENT**
TIMOTEUS MASHUNA	**SIXTH RESPONDENT**
SORRIS SORRIS CONSERVANCY	**SEVENTH RESPONDENT**
DÂURE DAMAN TRADITIONAL AUTHORITY	**EIGHTH RESPONDENT**

Neutral citation: *Doro !Nawas Conservancy v Ndimulunde* (HC-MD-CIV-MOT-GEN-2024/00505) [2024] NAHCMD 607 (16 October 2024)

Coram: SCHIMMING-CHASE J
Heard: **4 October 2024**
Delivered: **16 October 2024**

Flynote: Practice — Motions — Urgent applications — Applicant must explicitly set forth the reasons why the matter is urgent, and reasons why substantial redress cannot be obtained in due course — Applicants seeking to interdict first respondent's mining activities pending a decision in terms of s 42 of the Environmental Management Act 7 of 2007 whether to suspend or cancel an Environmental Clearance Certificate issued on a disputed mining claim and pending finalisation of a review application seeking to set aside the decision to grant a mining licence and Environmental Clearance Certificate to first and sixth respondents — Court satisfied in present case that application is urgent.

Practice **—** Parties — *Locus standi* — Applicants launched their applications as duly registered conservancies in terms of s 24A of Nature Conservation Ordinance of 1975 with environmental and sustainable development obligations, and as parties to joint venture and partnership agreements to create tourism and protection of wildlife in conservancies where competing mining rights were granted — Applicants showed that they are rights bearing entities and are interested parties in the present case.

Motions **—** Prerequisites for interim interdict applicable in interdict *pendente lite* — *Prima facie* or clear right — Balance of convenience — Irreparable harm — No other remedy — Applicants must also satisfy court of prospects of success — Court satisfied in present case that applicants had prima facie right and good prospects of success for part of the interim relief sought and *mandamus* granted.

Summary: The applicants sought wide ranging urgent *pendente lite* relief to

suspend the first respondent's mining activities pending a decision in terms of s 42 of the Environmental Management Act 7 of 2007 ('the Environmental Act'), and pending determination of an application to review and set aside the registration of the first respondent's mining claim, as well as the issue of an Environmental Clearance Certificate ('ECC') in terms of s 37(2) of the Environmental Act. The ECC enabled commencement of mining operations in an area where existing and future development by the applicants of infrastructure for tourism activities was taking place. This area was also a known tourist attraction and habitat for the black rhinoceros.

The applicants claimed that the first respondent was building a wide road and that graders were being used for the creation of a road. This was alleged to be in non-compliance with the conditions of the ECC and was causing irreparable harm as there was a risk of poaching by miners, and the noise would not only drive the rhinoceros away but decimate the tourism activities already underway. This was why the review application had been instituted to ultimately prevent mining activities in the particulars area. As a result of the first respondent's activities, a request was made in terms of s 42 of the Environmental Act for an order suspending the ECC, the granting of which was sought to be set aside on review. No response was received from the governmental respondents until service of this application, after which, the second respondent indicated under oath that a decision in terms of s 42 of the Environmental Act would be made by 18 October 2024. The governmental respondents otherwise did not oppose the application.

The first respondent attacked the urgency of the application on the basis that the applicants had brought a similar urgent application (save for the prayer of a mandamus) which was struck from the roll by the court, *per* Sibeya J, on 27 September 2024. The first respondent disputed that the applicants had *locus standi* because the mining claims do not fall within the jurisdiction of the first to third applicants, and that the fourth applicant has no interest in this matter (if any, it is only a derivative interest).

The first respondent also disputed that the applicants had established a prima

right for purposes of an interim interdict, and also that the balance of convenience did not favour the applicants, rather the first respondent, who was exercising legitimate and legally obtained mining rights. On the merits, the first respondent disputed that she was building a road as alleged and that the works taking place are merely for the mining site, and not in contravention of the terms of the ECC

Held that, as regards urgency, although still on short notice, the application was brought with somewhat less onerous set down dates. It was launched on 1 October 2024, with the hearing date on Friday, 4 October 2024. The parties appeared as represented before and substantial founding, answering and replying papers (exceeding 1500 pages) were filed. The parties have been embroiled in legal disputed on the same subject matter. It is also not disputed that certain activities are taking place on the 'disputed area', which, if ultimately found to be construction of a road, would be in contravention of the ECC conditions, and may well harm the tourism activities and cause wildlife to leave and create a risk of poaching of endangered wildlife.

*Held further that, n*o response had been forthcoming from the Environmental Commissioner on the application to consider suspending the first respondent's ECC, and the first respondent clearly indicated that she would not stop the mining activities pending a decision from the Environmental Commissioner, or pending a final decision in the review application.

Held further that, the applicants have made out a case for urgency.

Held further that, the first to third applicants are registered conservancies in terms of the Nature Conservation Ordinance, and their environmental sustainability obligations have been legislatively enjoined and amplified through Government Policies. The conservancies have concluded extensive joint venture agreements with, inter alia, the first to third applicants to create and maintain tourism activities inclusive of rhino trekking in the area where mining is taking place. They have a direct interest in the outcome of the matter as established in the founding papers, and accordingly the applicants have *locus*

standi as rights bearing entities.

Held further that, the purpose of an interdict *pendente lite* is the preservation of the status *quo*, or the restoring thereof, pending the final determination of the parties' rights; it does not affect or involve the final determination of such rights.

Held further that, in an application for interdictory relief *pendente lite*, the onus on the applicant is to establish a *prima facie* right, though open to some doubt, unless the balance of convenience is against the award of a temporary interdict.

Held further that, there is *prima facie* non-compliance with the ECC for these reasons. However, that decision lies squarely in the hands of the Environmental Commissioner, who has undertaken to provide a response to the complaint in terms of s 42 of the Environmental Act by 18 October 2024. Given that he has not opposed the relief, an opportunity should be provided to him to consider the complaint in line with his constitutional and legislative mandate.

Held further that, given the time period within a reasoned decision will be provided, an order that mining activities cease pending the decision, together with mandamus ordering that the decision be made within a reasonable time, would be the proper order.

Held further that, a case is not made out at this stage for interim relief pending finalisation of the review application already instituted. The irreparable harm lies at this stage with the failure to respond to the s 42 request for suspension or cancellation of the first respondent's ECC. The parties have alternative remedies, including setting down the instituted review application down on an expedited basis as the record has been filed.

ORDER

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1. The applicants' non-compliance with the rules relating to form and

service set forth in rule 73(3) of the rules of court is condoned and the matter is heard as urgent.

2. Pending the decision of the second respondent, alternatively the third respondent, in terms of s 42 of the Environmental Management Act 7 of 2007:

   2.1 the first respondent and any person employed or acting under her directions is interdicted from in any manner whatsoever, using heavy machinery, including graders, excavators and tipper trucks to construct a new road, or anything else, from the D2612 in a westerly direction to the site of the mining claims located at GPS coordinates -20.772500 S, 14.459167 E, or any new roads, road works or vehicular tracks on the Farms 535 Probeer; and

   2.2 the first respondent and any person employed or acting under her directions is interdicted from in any manner whatsoever conducting any mining activities on the mining claims, or further activities of any kind on the mining claims or in the area referred to as the 'Diagonal Map of the mining claims', forming part of Figure 3 in the Environmental Impact Assessment Scoping Report, annexed to the founding papers as 'LH31'.

3. The second respondent, alternatively the third respondent, is directed to make and communicate a decision as envisaged in s 42 of the Environmental Management Act 7 of 2007 by no later than Thursday, 24 October 2024, as to whether or not to suspend and/or cancel the Environmental Clearance Certificate issued in terms of s 37(2) of the Environmental Management Act 7 of 2007 to the first respondent, by the second respondent, on or about 13 October 2023, alternatively 26 October 2023, in respect of the proposed establishment of mining activities on the mining claims.

4. The first respondent is ordered to pay the costs of this application, such

costs to include the costs of one instructing and two instructed counsel, where employed.

5. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

(a) At the core of the dispute between the parties, lie two competing interests, both of which substantially contribute to Namibia's Gross Domestic Product ('GDP'). These competing interests are tourism, tied together with the protection of Namibia's ecological environment – in this case; the protection of an endangered species, the black rhinoceros – and mining, an equally important activity.

Relief sought

(b) The applicants apply for urgent *pendente lite* relief, summarised as follows.

(c) The applicants seek an interim interdict, pending the decision of the second, alternatively the third, respondent in terms of s 42 of the Environmental Management Act 7 of 2007 ('the Environmental Act'), as to whether or not to suspend or cancel an Environmental Clearance Certificate ('ECC') issued to the first respondent for commencement of mining activities. An interim interdict is also sought pending the final determination of a review application seeking to review and set aside the decision to issue the ECC to the first and sixth respondents, and to set aside the decision of the fourth respondent to register mining claims in the names of the first and sixth respondent. The terms of the interim interdict sought are to restrain the first respondent or any person

employed or acting under her direction from constructing a new road from the main road to her mining claims; and furthermore, to restrain the first respondent from conducting any mining activities on the mining claims.

(d) The applicants also seek a mandamus directing the second, alternatively the third, respondent to make a decision envisaged in s 42 of the Environmental Act by no later than Friday, 18 October 2024 (alternatively such period which this court may deem reasonable in the circumstances). Equally, an order is sought suspending the first respondent's mining operations until the decision is made.

The parties

(e) The first applicant is Doro !Nawas Conservancy ('Doro'), registered as a communal area conservancy in terms in terms of s 24A of the Nature Conservation Ordinance 4 of 1975 ('the Ordinance').

(f) The second applicant is Uibasen Twyfelfontein Conservancy ('Uibasen'), registered as a communal area conservancy in terms of s 24A of the Ordinance.

(g) The third applicant is #Aodaman Traditional Authority ('#Aodaman'), established in terms of s 2 of the Traditional Authorities Act 25 of 2000. The Doro and Uibasen fall under the traditional authority area of #Aodaman.

(h) The fourth applicant is Ultimate Safaris (Pty) Ltd ('Ultimate Safaris') a company with limited liability, registered in terms of the applicable Namibian company laws.

(i) The first respondent is Ms Ottilie Ndimulunde, an adult female residing in Windhoek. The first respondent is the only respondent who opposed the application. She will be referred to interchangeably as cited, or as 'Ms Ndimulunde'.

(j) The second respondent is the Environmental Commissioner ('the

Environmental Commissioner'), duly appointed as such in terms of s 16 of the Environmental Act.

(k) The third respondent is the Minister of Environment, Forestry and Tourism ('the Environment Minister'), duly appointed as such in terms Art 32(3)(i)*(bb)* of the Namibian Constitution and the responsible Minister concerning the matters relevant to this application.

(l) The fourth respondent is the Mining Commissioner ('the Mining Commissioner'), duly appointed as such in term of s 4(1) of the Minerals Prospecting and Mining Act 33 of 1992 ('the Minerals Act').

(m) The fifth respondent is the Minister of Mines and Energy ('the Mining Minister'), duly appointed as such in terms Art 32(3)(i)*(bb)* of the Namibian Constitution, and similarly the responsible Minister concerning the matters relevant to this application.

(n) The sixth respondent is Mr Timoteus Mashuna, an adult male residing in Windhoek. He will also be referred to as the sixth respondent or 'Mr Mashuna', interchangeably.

(o) The seventh respondent is Sorris Sorris Conservancy ('Sorris Sorris'), registered as a communal area conservancy in terms in terms of s 24A of the Ordinance.

(p) The eighth respondent is the Dâure Daman Traditional Authority ('Dâure Daman'), established as such in terms of s 2 of the Traditional Authorities Act 25 of 2000. Sorris Sorris falls within the traditional authority area of Dâure Daman.

(q) No relief is sought against the fourth, fifth, seventh and eighth respondents in these proceedings

Background

(r) It is necessary to refer shortly to previous applications launched by the applicants against most of the respondents, which were determined by this court, differently constituted, essentially relating to the same disputes now serving before court in this application.

(s) The applicants launched an urgent application on 24 August 2024 ('the first urgent') in case number HC-MD-CIV-MOT-GEN-2024/00417. An order was made by Miller AJ on 24 August 2024, after only hearing Mr Corbett SC, appearing for the applicants. The order interdicted the sixth respondent, Mr Mashuna, or any person employed or acting under his direction, from in any manner whatsoever using heavy machinery to construct a road to his mining claims; and furthermore, from conducting any mining activities on their mining claims, pending the final determination of a review application to be instituted in this court. This application was only opposed on 28 August 2024 by Mr Mashuna after the order was made by Miller AJ. It was not opposed by the governmental respondents.

(t) Mr Mashuna has applied for leave to appeal against the order, which, according to the information contained on the e-Justice court file, will be heard on 18 October 2024 at 09:00.

(u) In addition, Mr Mashuna made application to the Supreme Court to review and set aside the order of Miller AJ, as envisaged in terms of s 16 of the Supreme Court Act 15 of 1990. The principal ground of review was that Mr Mashuna had not been afforded sufficient time to oppose the urgent application. On 27 September 2024, the Deputy Chief Justice declined the request to the Supreme Court to invoke its review jurisdiction.

(v) On 12 September 2024 and under case number HC-MD-CIV-MOT-REV-2024/00455, the applicants instituted review proceedings seeking to review and set aside the decision of the Environmental Commissioner to issue the ECCs to Ms Ndimulunde and Mr Mashuna. The applicants further applied to review and set aside the decision of the Mining Commissioner to grant Ms Ndimulunde and Mr Mashuna their respective applications for the registration of mining claims

within the boundaries of what is termed the Joint Management Area ('JMA'), an area set aside by Doro, Uibasen and Sorris Sorris ('the conservancies'), together with the Ultimate Safaris, for conservation and tourism activities. I deal with the JMA in more detail below.

(w) The applicants then launched a second urgent application for *pendente lite* interdictory relief, after it came to their knowledge that, subsequent to obtaining the first interdict against Mr Mashuna, Ms Ndimulunde had obtained an ECC from the Environmental Commissioner to conduct mining activities within the JMA. According to the applicants and on 11 September 2024, employees of Ultimate Safaris observed that heavy earthmoving equipment had been transported into the JMA and mining continued.

(x) The second urgent application was for an interdict to suspend Ms Ndimulunde's mining activities pending a review of the decision to grant the ECC and to register the mining claims. It was launched over the weekend of 14 to 15 September 2024. Again, the governmental respondents did not oppose that urgent application, which was only opposed by Ms Ndimulunde. The application was heard on 16 September 2024.

(y) On 27 September 2024, this court, *per* Sibeya J,[1] delivered judgment and struck the matter from the roll together with costs, on the basis of a lack of urgency. The central reason, as I understand it, was that the court found that no reasons were advanced by the applicants as to why that application could not be heard on a normal court day other than on Sunday, 15 September 2024.[2] Secondly, the court found that the applicants failed to meet the requirements of rule 73(4)(*b*) by not establishing that they cannot be afforded substantial redress at a hearing in due course. This is because s 42(3) of the Environmental Act[3]

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[1] *Doro !Nawas Conservancy v Ndimulunde* (HC-MD-CIV-MOT-GEN-2024/00467) [2024] NAHCMD 564 (26 September 2024).

[2] Ibid para 19, Sibeya J pointed out that the applicants lodged that urgent application on Friday, 13 September 2024, to be heard on Sunday, 15 September 2024, at 15h00; See also para 42.

[3] Section 42 reads as follows: '(1) Subject to subsection (3), the Environmental Commissioner may, by notice to the holder of the environmental clearance certificate suspend or cancel an environmental clearance certificate if the holder of the certificate – (a) has contravened any condition of the certificate; (b) has contravened this Act; or (c) is convicted of an offence in terms

permits a party to approach the Environment Minister to suspend or cancel an ECC, even on an emergency basis. The court held that the applicants could have approached the concerned Minister to suspend or cancel the ECC held by Ms Ndimulunde.[4] The court did not deal with the merits of the matter.

(z) The applicants now bring this application on an urgent basis for the relief summarised above which is only opposed by Ms Ndimulunde.

(aa) The Government Attorneys, representing the governmental respondents in this matter, indicated that their clients will not oppose the review application should the applicants not pursue a costs order against them in the review proceedings. There is as yet no agreement on this aspect, and accordingly, the governmental respondents have filed a notice of opposition in the review which is pending. A record was delivered in terms of rule 76 on 4 October 2024. The review application is also opposed by Ms Ndimulunde

(bb) In an affidavit deposed to by the Environmental Commissioner dated 3 October 2024, it was indicated that the Environmental Commissioner and Environment Minister do not oppose the substantive relief sought by the applicants in this urgent application, but informed that the time-frame to comply and render a decision envisaged by s 42 of the Environmental Act was short and requested time until 18 October 2024, should the court be inclined to grant the relief sought in these proceedings.

(cc) In summary, the applicants allege that the decision by the Mining Commissioner to permit the registration of mining claims (in specified areas in the Kunene Region) of Ms Ndimulunde and Mr Mashuna on 27 June 2024 is

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of this Act. (2) An environmental clearance certificate may be suspended under subsection (1) – (a) for the period specified in the notice of suspension; or (b) until the Environmental Commissioner is satisfied that the person concerned has rectified the failure which led to the suspension. (3) Except in a situation that the Minister considers to be an emergency that warrants action without notice to the holder of the environmental clearance certificate, the Minister may not suspend or cancel an environmental clearance certificate without first giving the holder an opportunity to be heard.'

[4] *Doro* supra para 47 fn 3.

reviewable. The applicants, therefore, also take issue with the granting of ECCs to Ms Ndimulunde and Mr Mashuna, respectively, on 23 October and 8 February 2024. Ms Ndimulunde and Mr Mashuna require an ECC in order to conduct mining operations in terms of s 37(2) of the Environmental Act. The ECC is valid for a period of three years, and it is not in dispute that the ECC contains certain conditions, which the applicants allege Ms Ndimulunde, and also Mr Mashuna, are also not complying with.

(dd) The applicants allege that Ms Ndimulunde is in the process of, or has constructed a district size road which is intended to extend for 20km, and that the construction of the road is in violation of the terms of the ECC. It is further alleged by the applicants that the construction activities are causing the departure and or potential death of the black rhinoceros residing in the same locations, where protected on-going tourism activities are being undertaken by, or through, Doro, Uibasen and #Aodaman. The apprehended harm would be caused by the noise and heavy road works for building a road (in violation of the terms of the ECC), as well as potential poaching from miners taking up residence in the area. The construction is alleged to be on-going, with the apprehended harm at risk of manifesting on a daily basis. There is fear that the rhinoceros may leave the area and create deleterious results for the applicants who have set up tourism in the same area.

(ee) Ms Ndimulunde filed extensive answering papers and disputes that this application is urgent. The *locus standi* of the applicants is also challenged, and on the merits, it is alleged that Ms Ndimulunde is not building a road, and that the works taking place are merely for the mining site, and not in contravention of the terms of the ECC. She asserts that she is entitled to pursue mining operations, armed with mining rights and the necessary ECC, and that she will continue her works, as is her right.

(ff) The urgency alleged by Ms Ndimulunde not to exist, lies in the previous order of Sibeya J, in the second urgent application, which was struck from the roll for a lack of urgency. It is alleged that the applicants come to court on the same facts for urgent relief and that this is not permissible. Thus, and save for

an attempt to argue that they have now complied with s 42 of the Environmental Act in relation to Ms Ndimulunde, no new facts have been placed for urgent determination.

(gg) As regards the *locus* point, Ms Ndimulunde submitted that the applicants have not made the necessary allegations in their founding papers to establish *locus standi*. It was submitted that the agreement or agreements sought to be relied on relating to the JMA, to establish *locus standi* (which I deal with below) are unlawful and are a nullity.

(hh) On the merits, it is contended that the applicants do not make out a *prima facie* case required for the granting of interim interdicts, mainly for the same reasons that *locus standi* is alleged to not exist. I deal below with the points raised in sequence.

Urgency

(ii) I am mindful of the decision and the facts before Sibeya J. I must, however, determine the application on the facts before me, and whether the facts raised are sufficiently new facts for the court to hear this matter on truncated dates.

(jj) The first aspect to be considered is that although still on short notice, the application was brought with somewhat less onerous set down dates. It was launched on 1 October 2024, with the hearing date on Friday, 4 October 2024. The parties appear as represented before (and have previously filed papers relating to the same issues in other matters pending before this court), and substantial founding, answering and replying papers (exceeding 1400 pages) were delivered.

(kk) It is also not disputed that certain activities are taking place on the 'disputed area', which are continuing, and Ms Ndimulunde has indicated that she has no intention to stop. If it is ultimately found that the on-going works are, as alleged, to be taking place by the applicants, this may well harm the tourism activities and cause exodus of the (black) rhinoceros, maybe even through

poaching of miners.

(ll) As regards the issue of substantial redress, the second leg for consideration for purposes of urgency, it is alleged that the matter was previously found not to be urgent by Sibeya J, and that save for an attempt by the applicants to argue that they have now complied with s 42 of the Environmental Act in relation to Ms Ndimulunde, no new facts have been placed for urgent determination.

(mm) I have had regard to the founding papers. It is alleged that on 10 September 2024, the applicants wrote a letter to the Environmental Commissioner urgently requesting that the process in terms of s 42 of the Environmental Act be followed to cancel Ms Ndimulunde and Mr Mashuna's ECCs. The letter is annexed to the founding papers as 'LH36'. This was after the urgent interdict was granted by Miller AJ on 24 August 2024 in the first urgent application. The letter is detailed and summarises most of the issues that are deposed to by the applicants in this application, relating to the activities of both Ms Ndimulunde and Mr Mashuna.

(nn) A response was received on the same date (attached as 'LH37') indicating that the Environment Minister's legal team was reviewing the request and a response would be communicated when the review was completed. To date, no response was received. Given the failure to put up opposing papers by the Environmental Commissioner on this allegation, I take it as admitted. Thus, I find as a matter of fact that the Environmental Commissioner was approached as in terms of s 42 of the Environmental Act. I also bear in mind that a request was made for time until 18 October 2024, and that there is no intention to suspend the activities complained about.

(oo) In the light of the foregoing, I find that the applicants have explicitly set forth the reasons why the matter is urgent, and why they would not be able to obtain substantial redress in due course, [5] especially due to the response of the

[5] *Xinfeng Investments (Pty) Ltd v Minister of Mines and Energy (*HC-MD-CIV-MOT-REV-2023/00188) [2023] NAHCMD 356 (27 June 2022) paras 56-63.

Environmental Commissioner, or lack thereof.

Locus standi

(pp) Ms Ndimulunde alleges that the applicants have not made the necessary allegations in the founding papers to assert any standing to institute these proceedings. An exception in motion is taken based on the 'Stipp' principle.[6] It is further submitted that in the event that *locus* is established, the applicants seek to circumvent the provisions of the Communal Land Reform Act 5 of 2002.

(qq) I am mindful in this regard of the onus to prove *locus standi*, which is that the person seeking relief from the court, namely, the party instituting proceedings, bears the burden to prove his or her standing in the founding papers. It is an onus in the true sense.[7]

(rr) The applicant dealt with its *locus standi* upfront in the founding affidavit, and the following substantive allegations were made; also within the context of the protection of wildlife.

(ss) According to the applicants, the members of the duly registered conservancies at all times lived on communal land to the south-west of Khorixas and have always lived with wildlife. Doro and Uibasen are both registered as communal area conservancies in terms of s 24A of the Ordinance. Both these conservancies fall within the traditional authority area of #Aodaman. The geographic boundaries of the area in respect of which the conservancies were declared, fall within the area where Ms Ndimulunde and Mr Mashuna have mining claims together with their ECCs. In terms of s 24A(4) of the Ordinance, a conservancy so declared shall have rights and duties with regard to the consumptive and non-consumptive use and sustainable management of game in such conservancy, in order to enable the members of such community to derive benefits from such use and management.

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[6] *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC).

[7] *Mahe Construction (Pty) Ltd v Seasonaire* 2002 NR 398 (SC) at 403G; See also *Veira v Prosecutor-General and Others* 2023 (1) NR 62 (HC) para 42 and the authorities collected there.

(tt) It is alleged that the area in which the conservancies have been established is a significant habitat for black rhinoceroses, which are considered critically endangered. Namibia allegedly has the largest free-roaming black rhinoceros population outside national parks in the world. In addition, and due to this co-management of natural resources between the Namibian Government and conservancies, Namibia's elephant population allegedly also grew from around 8000 to 16 000 between 1995 and 2005.

(uu) The founding affidavit is deposed to by Lourens Hoeseb, vice chairperson of Doro. His affidavit is supported by Johannes Nanuseb, vice president of Uibasen, and Christophine Claasen, who is the Acting Chief of #Aodaman.

(vv) As indicated earlier, the applicants refer to a JMA, which is a combined conservation and tourism zone managed by the conservancies, including Sorris Sorris, which hosts an exclusive tourism operation with Ultimate Safaris, and which pays financial dividends to the conservancies together with providing a significant number of tourism related employment opportunities. It is further alleged that #Aodaman is required by law to ensure that the members of the traditional community, being members of Doro and Uibasen, use the natural resources at their disposal on a sustainable basis.

(ww) According to the founding papers, Ultimate Safaris was established in 2008 and is a commercial tourism company with a commitment to developing tourism in conservancies in the north-west of the country in co-operation with local communities. Ultimate Safaris has invested over N$29 million into tourism and wildlife activities in the JMA.

(xx) Ultimate Safaris, with the support of the conservancies and a prominent non-governmental organisation in the area of rhinoceros protection (Save the Rhino Trust), led by Mr Simson Uri-Khob, engage in tourism with specific focus on the protection of black rhinoceros that inhabit the JMA. After consultation with traditional leaders, Ultimate Safaris concluded a number of joint venture

agreements with the conservancies,[8] namely:

(a) a joint venture agreement for Camp Onduli concluded with Doro on 9 May 2019 (annexure 'TCB1');

(b) a joint venture agreement for Camp Doros concluded on 19 October 2023 with Uibasen, Sorris Sorris and Doros (as part of the Red Mountain Joint Management Area Management Committee, represented by the conservancies (annexure 'TC2');

(c) a joint venture operators' agreement for Doros Luxury Lodge concluded on 20 March 2024 with Uibasen, Sorris Sorris and Doro; and

(d) the same parties also concluded a general partnership agreement on 15 September 2018.

(yy) It is alleged by the applicants that in terms of the above agreements, the parties in essence agreed to co-operate and manage the JMA as a collective. Accordingly, and for the past six years, they have co-operated and have managed wildlife in the area and benefitted from tourism in terms of the tourism joint venture agreements concluded with Ultimate Safaris.

(zz) Doros Luxury Lodge and Camp Doros are two of the three ventures which operate in the JMA. Camp Doros is a tented camp which has been in operation since 2023, solely focusing on rhinoceros tourism. In terms of the joint venture agreement signed in March 2024 in relation to Doros Luxury Lodge, the intention is to build a luxury lodge to a value of N$30 million in the JMA to cater for 'high end' travellers, also entirely focused on rhinoceros tourism. Camp Onduli, now operating as Onduli Ridge, is the third venture established by Ultimate Safaris, and is located in Doros. Rhinoceros tracking activities are conducted as part of the tourism experience at Onduli Ridge. Onduli Ridge

[8] Copies of the complete agreements were attached to the founding papers through the affidavit of Tristan Cowley, on behalf of Ultimate Safaris, and confirmed by the other deponents.

alone was apparently a N$29 million investment by Ultimate Safaris. An addendum extended the period for Onduli Tourism Venture for a further 20 years with Onduli alone. Cash payments, salaries, conservation investment and capital camp investments are alleged to amount to N$67,5 million. Rhinoceros rangers are employed by the conservancies and were already in the employment of the conservancies prior to the signing of the joint venture agreements. Numerous spreadsheets and additional information were attached to the affidavits for purposes of the factual scenario summarised above.

(aaa) The applicants also rely on government policies, together with the duties on the conservancies to ecologically sustain their habitat, as well as the income earning potential and currently created in the JMA. It is the applicants' case also, as part of *locus*, that the areas in which the conservancies have been established are a significant habitat for black rhinoceroses, which are considered critically endangered, and fall for protection under Art 95 of the Namibian Constitution.

(bbb) It is alleged that poaching of both white and black rhinoceros has recently become a very large problem for the MEFT and the communal area conservancies. In this regard, the applicants state that the mining operations sought to be commenced by Ms Ndimulunde and Mr Mashuna pose a 'direct and imminent threat' to the black rhinoceros that occur within the JMA. Moreover, the inevitable result of mining in the JMA is the migration of black rhinoceros from the area, or even worse, the reduction of black rhinoceros numbers through poaching.

(ccc) The applicants point out that in February 2024, Save the Rhino Trust wrote to MEFT to notify them about the concern with rhinoceros poaching within the JMA. The concerns were the result of the discovery of snares used to trap wild animals, which could have included rhinoceroses. The manufacture and deployment of these snares were linked to miners who temporarily settled within the JMA and were working on mining claims, which were some of the mining claims held by Ms Ndimulunde. An urgent request to revoke the mining claims was made in this letter, similarly attached to the founding papers.

(ddd) It was further pointed out that the issuing of mining claims within a well-known rhinoceros range area, such as the JMA, was a direct contradiction of the National Strategy on Wildlife Protection and Law Enforcement. This is a policy document signed by the Environment Minister in December 2020, which recognises the unprecedented levels of rhinoceros poaching in Namibia and the need to ensure the effective enforcement of laws governing wildlife resources in the country. This document was attached to the founding papers. Reference was also made to the National Policy on Prospecting and Mining in Protected Areas, a policy prepared jointly by MEFT and the Ministry of Mines and Energy ('MME'), and signed by both the Environment Minister and the Mines Minister in late 2018 that was to endure for a period until 2022. The policy recognises that the 'potential negative impacts of exploration and mining activities can be devastating to biodiversity and ecosystems'. The applicants submit that the policy was thus developed to 'guide decision-making with regard to exploration and mining in protected areas' and the policy was extended by the aforesaid Ministers and is still currently a guide to decision-making. The applicants aver that the approach in the aforementioned policy was to allegedly exclude prospecting and mining, amongst others, in biodiversity priority areas, high value tourism areas, and known breeding areas of specific species. None of the allegations relating to National Strategy and Policy referred to has been disputed by the governmental respondents.

(eee) Finally, the applicants, in particular Doro, Uibasen and #Aodaman, rely on the constitutional protection given to ecosystems, essential ecological processes and biodiversity of Namibia and the utilisation of living natural resources on a sustainable basis for the benefit of all Namibians contained in Art 95(*l*) of the Namibian Constitution.

(fff) In her challenge to the applicants' *locus standi*, Ms Ndimulunde alleges that both her mining claims and those of Mr Mashuna are not in the area of jurisdiction of the Doro or Uibasen, but in Sorris Sorris, which is the purported party that has the statutory right in terms of s 24A(4) of the Ordinance to protect and manage wildlife within the geographical boundaries. They are also not

located in the area of #Aodaman. Thus, according to Ms Ndimulunde, the land in question does not fall within the area of jurisdiction of Doro, Uisaben or #Aodaman, but Sorris Sorris.

(ggg) Ms Ndimulunde states further that Doro and Uibasen's reliance on their entitlement to exercise some rights in respect of the land relying on the joint venture agreement with Ultimate Safaris is ill-advised. According to Ms Ndimulunde, this joint venture agreement contains a suspensive condition at clause 10.7, which directs that the terms of the agreement shall only take effect or begin when the obligation to obtain a right of leasehold is fulfilled, which has not been obtained. The result is this; that the joint venture agreement has not yet come into effect or began, and no rights may arise from it. It is not disputed that deeds of leasehold have been applied for.

(hhh) It is also stated that Sorris Sorris is not a protected area because it is not declared as such by the Environment Minister acting in terms of s 14(1) and (2) of the Ordinance.

(iii) As regards Ultimate Safaris, it is alleged that it relies on derivative rights that stem from the agreement(s) that never came into effect, and which is unlawful in a number of respects. The agreement circumvents the process contemplated by the Communal Land Reform Act 9 of 2002 for the allocation of rights to utilise communal land, and it further circumvents the process contemplated by s 17 of the Ordinance to grant rights to conduct tourism activities and provide services related to the conducting of tourism on communal land, which is owned by the State.

(jjj) Ms Ndimulunde confirms that when she initially sought consent to mining activities, #Aodaman granted such consent. Thereafter, she was notified by #Aodaman that it had no jurisdiction over the communal land in question and that the Dâure Daman has sole jurisdiction over the communal land, where the mining claims are located. It is submitted that the mining claims are located exclusively within the geographical area falling under Dâure Daman. Dâure Daman as well as the Sorris Sorris – where the mining claims are located –

support the mining activities.

(kkk) Reference was further made to the affidavit of Acting Chief Claasen, the acting chief of #Aodaman, where she conceded that the mining claims are not in their area of jurisdiction. Ms Ndimulunde also takes issue with the fact that Acting Chief Claasen is only acting, and that the Traditional Authorities Act 25 of 2000 ('Traditional Authorities Act') does not contemplate an acting chief.

(lll) I point out here that what Acting Chief Claasen also states in the founding papers, representing #Aodaman (with no objection from the senior traditional councillors, one of whom signed the letter advising of her appointment) is that #Aodaman is recognised as a traditional authority under the Traditional Authorities Act for the community members of Doro and Uibasen, and that the mining claims of Ms Ndimulunde and Mr Mashuna are located within the JMA, between Doro, Uibasen and Sorris Sorris. She confirmed further that the JMA is a combined conservation and tourism zone managed by the conservancies. The JMA hosts Ultimate Safaris as an exclusive tourism operator, which pays dividends to the conservancies. Members of #Aodaman are employed and receive benefits from activities within the JMA.

(mmm) She further states that #Aodaman is required by law to ensure that the members of Doro and Uibasen use the natural resources at their disposal on a sustainable basis and in the manner that conserves the environment and maintains the ecosystems for the benefit of all Namibians. Acting Chief Claasen confirms that in the performance of that duty, #Aodaman is enjoined to give support to the policies of the Namibian Government and to refrain from any act which undermines government policy.

(nnn) In the circumstances, she states that Doro, Uibasen and #Aodaman have standing to institute action in relation to the land over which the Ordinance and the Communal Land Reform Act grant rights and obligations.

(ooo) Acting Chief Claasen also recollects the correspondence that the late Chief Ukongo authored on 22 October 2022 (not attached to the answering

papers). She states, however, that the late Chief only granted rights to Ms Ndimulunde and Mr Mashuna to conduct an environmental impact assessment process on their claim. Acting Chief Claasen was alerted to the mining operations during August 2024 when construction of a road through the conservancy commenced. When the late Chief Ukongo's letter was brought to her attention, it occurred to her that his letter did not authorise any mining operation. It also became apparent that the specific area in the JMA in respect of which the mining operations were intended did not fall under the jurisdiction of #Aodaman, which means that the late Chief Ukongo had no authority to consent to the environmental impact assessment, in any event.

(ppp) Ms Ndimulunde also contends that the land in question does not fall within the area of jurisdiction of Doro, Uisaben or #Aodaman, but Sorris Sorris, and that Sorris Sorris no longer supports this application.

(qqq) It is apposite to mention here that it is not in dispute on the papers that Sorris Sorris initially provided instructions for launching of the urgent application that was heard and granted by Miller AJ on 24 August 2024. It was even the leading applicant in those proceedings. Subsequent to the granting of the interdict by Miller AJ, a meeting was convened in Khorixas with representatives of all the applicants and Sorris Sorris. Members representing Sorris Sorris thereafter signed a resolution authorising the applicants' instructing legal practitioners to launch the review application. This resolution was signed on 28 August 2024. It is apparent from the resolution that a Dr Ella Manga was authorised, on behalf of Sorris Sorris, to launch those proceedings.

(rrr) Subsequently and on 4 September 2024, and in a complete about-face, a further resolution emanated from Sorris Sorris stating, inter alia, that the issue of challenging the mining claims of Ms Ndimulunde was not discussed, and that Dr Manga was not provided the necessary authority by Sorris Sorris' Committee, and further, that Sorris Sorris 'fully supports' the mining activities.

(sss) In the applicants' replying affidavit, it is admitted that Doro's mining claims are situated on land which falls within the jurisdiction of Sorris Sorris and

reference was made to the allegation in the founding affidavit and in the affidavit of Mr Cowley of Ultimate Safaris where it was expressly alleged that the mining claims fall within the JMA, managed in terms of the agreements attached to the founding papers and mentioned above. Sorris Sorris is clearly a party and signatory. The applicants submit that by virtue of these agreements, the conservancies and Ultimate Safaris have rights in respect of the JMA, irrespective of who holds the conservancy rights in respect thereof.

(ttt) It was also admitted that there is no formal declaration in respect of the area covered by the JMA. However, it was alleged that has always been regarded as a protected area in terms of the National Policy on Prospecting and Mining in Protected Areas substantially discussed in the founding papers.

(uuu) As regards the suspensive condition contained in the joint venture agreement, Ms Ndimulunde pointed out that there is no allegation in the founding affidavit that the applicants rely on an existing right of leasehold in respect of the land where Ms Ndimulunde's mining claims are located, and thus the agreement is unenforceable.

(vvv) The applicants denied that the joint venture agreement (annexure 'TC3') is subject to a suspensive condition, and submitted that Ms Ndimulunde incorrectly interprets the agreement. Firstly, it is pointed out that the joint venture agreement would only have been suspended if there were any conditions in the agreement, which the parties agreed (in Annexure A) must be fulfilled before the agreement can take effect. Clause 10 of Annexure A provides that the agreement is not contingent upon the fulfilment of any suspensive conditions. None of the terms in Annexure A can thus be regarded as suspensive conditions. The agreement has already taken effect and will remain valid for a period of 25 years until 19 March 2050, as provided for in clauses 2 to 4 of Annexure A.

(www) I note in this regard that clause 10.7 of the joint venture agreement provides that 'suspensive conditions are any requirements in Annexure A that must be fulfilled' before the agreement can take effect. Annexure A does provide

that a right of leasehold shall be obtained by the conservancies, but clause 10 of Annexure A specifically provides that 'this agreement is not contingent upon the fulfilment of any suspensive conditions'. (Emphasis supplied).

(xxx) The applicants further contend that Sorris Sorris, irrespective of its 'change of heart', has clear obligations in terms of the partnership agreement dealt with in the founding papers, to which Sorris Sorris is a party and signatory. Thus, even though Sorris Sorris no longer supports this application (which it did before), it remains bound by the terms of the joint venture agreement and the partnership agreement.

(yyy) The applicants further deny that the agreements relied on by them are illegal or unlawful for any of the reasons relied on by Ms Ndimulunde. They submitted that Ms Ndimulunde's reliance on the provisions of the Communal Land Reform Act and the Traditional Authorities Act is misplaced, and that this is not a dispute between traditional authorities and persons wishing to mine. This is a dispute primarily between the conservancies and the tourism operator, and those wishing to exercise rights in respect of registered mining claims.

(zzz) They also pointed out that the underlying rights in respect of the conservancy areas are conferred by s 24A of the Ordinance. Both Doro and Uibasen were recognised by the Environment Minister as conservancies in 1999, as envisaged by s 24A(2)(*i*) of the Ordinance. The Environment Minister declared the area within which the conservancies and their geographical boundaries in the relevant government gazettes which were attached to the replying affidavit.

(aaaa) It is maintained in reply that Doro and Uibasen have been engaged in conservancy activities in protecting and managing wildlife within the geographical boundaries for the past 25 years. This has also included exercising rights, as provided for in s 24A(4) of the Ordinance, to the consumptive and non-consumptive use and sustainable management of game in their respective conservancies, in order to enable the members of that community to derive benefits from such use and management. These statutory rights have been

exercised outside of the scheme provided for in the Traditional Authorities Act or the Communal Land Reform Act.

(bbbb) Ms Ndimulunde also raised the argument that *locus* was not made out in the founding, but only the replying affidavit and sought to have the allegations in reply stuck or ignored on this basis.

(cccc) I am mindful of the fact that the government gazettes establishing and recognition of the first and second applicants as conservancies in 1999 as envisaged by s 24A(2)(*i*) of the Ordinance by the Environment Minister were attached to the replying affidavit, together with the relevant circular emanating from the MEFT. This circular gave effect to the Ordinance by giving conditional and limited rights over wildlife to communal area farmers that were previously enjoyed by commercial farmers, and to link conservation with rural development by enabling communal area farmers to derive a direct and financial income from the sustainable use of wildlife from tourism.

(dddd) However, these allegations are not new. They were expressly made in the founding affidavit by the deponents but the necessary government gazettes were not attached. These allegations were denied in the answering papers, and the applicants, in my view, had a right to respond to these denials in the replying papers.

(eeee) It was clear from the founding papers that Doro and Uibasen are registered conservancies with the resultant protection under the Ordinance. It is also clear that activities are taking place within the JMA to which Doro, Uibasen and Sorris Sorris concluded agreements for purposes of developing tourism and wildlife for an extended period. Ultimate Safaris has, with reference to the agreements and the attached documents, substantiated its own substantial investment.

(ffff) In the Supreme Court decision of *Tsumib and Others v Government of the Republic of Namibia*,[9] the following was stated:

[9] *Tsumib and Others v Government of the Republic of Namibia and Others* 2022 (2) NR 558

'This court has previously said that standing is a matter both of procedure and substance. Apart from sufficiency and directness of interest, it must be demonstrated that the party litigating is the rights bearing entity and if not itself that the party litigating in its name is authorised.'

(gggg) The court stated further that '[a]ccording to Boberg, juristic persons are those entities or associations of persons which, having fulfilled certain requirements, are allowed by the law to have rights and duties apart from the individuals who compose them or direct their affairs'. A juristic person can be 'a community or group of persons having legal personality and therefore the capacity to be the bearer of rights and duties and the ability to participate in the life of the law and in its own name'.[10]

(hhhh) The Supreme Court also recognised a *universitas* which it described as 'a legal fiction incorporeal abstraction which may be created in terms of legislation'.[11] Doro, Uibasen and Sorris Sorris were created as a *universitas* when they were declared as such by the then Minister of Environment and Tourism in December 1999. The declaration was in terms of s 24A(2)(*i*) of the Ordinance contain in Government Notice No. 278 in Government Gazette No. 2248 of 15 December 1999 and Government Notice No. 262, in Government Gazette No. 2238 of 1 December 1999. This was provided in reply, but is merely in amplification of what was already stated in the founding papers, in my view.

(iiii) The declaration as conservancies accordingly gave the applicants specific statutory obligations to manage the flora and fauna within the conservancies, together with the now MEFT. The conservancies also have statutory rights and duties 'with regard to the consumptive and non-consumptive use and sustainable management of game' in the conservancies 'in order to enable the members of such community to derive benefits from such use and management'. I believe that it stands to reason that the consumptive use would

(SC).

[10] Ibid para 72.

[11] Ibid para 78; See also para 13 of the replying affidavit by Mr Hoéseb on behalf of Doro, which deals extensively with the *universitas* created.

include the sustainable hunting of game in the area of the conservancies, whilst non-consumptive use and the deriving of benefits are centred around tourism within the conservancies.

(jjjj) These conservancies accordingly have particular responsibilities for the management of wildlife in their areas. This includes black rhinoceroses.

(kkkk) There is currently a fear of poaching. In my view, Doro and Uibasen, by virtue of their designation, have an interest in these proceedings due to the provisions of, inter alia, the Ordinance and their own responsibilities to manage the area in an environmentally safe manner.[12] Their responsibilities in terms of the JMA and agreements signed are clear. Even Sorris Sorris has contractual obligations that it simply cannot dispute. The activities allegedly apprehended fall within the JMA. It is also common cause that Dâure Daman, the area where Ms Ndimulunde's mining claims are located, falls within the exclusive jurisdiction of Sorris Sorris, an undisputed signatory to the joint venture and partnership agreements.

(llll) As regards Ultimate Safaris, their tourism operations are based principally on rhinoceros tracking and the wildlife in the area. Although Ultimate Safaris has no claim to the area, its investment is substantial and given the responsibility to protect wildlife, I am not prepared to hold that its interest is merely derivative, based on the ratio in the decision of *Tsumib*.

(mmmm) The failure of the governmental respondents to come on record and dispute any of these allegations is also telling. Thus, the applicants are rights bearing entities and I find that they have *locus standi* in these proceedings.

Interdictory relief

(nnnn) I have found that the matter is urgent and that the applicants have *locus*

[12] *Anabeb Conservancy Committee v Muharukua and Others* 2022 (2) NR 492 (HC) at 508-510 paras 52-60 on the description of a duly registered conservancy.

standi. I will now consider whether a case is made out for the interdictory relief sought. The applicants seek an interdict pending the decision in terms of s 42 of the Environmental Act and the final determination of the review application. The interdict is the suspension of any construction activities pending the decision in terms of s 42 and the review application. A mandamus is also sought that the decision in terms of s 42 of the Environmental Act be made by 18 October 2024.

(oooo) Again, I bear the relevant legal principles in mind which I set out at the outset before dealing with the facts raised in support of the interdictory relief. All the parties assent to the legal propositions, but differ in the application of the relevant legal principles.

(pppp) The purpose of an interdict *pendente lite* is the preservation of the status *quo*, or the restoring thereof, pending the final determination of the parties' rights; it does not affect or involve the final determination of such rights.[13]

(qqqq) The Safcor [14] approach to interdicts *pendente lite* is well recognised and has been adopted by the Namibian Supreme Court in, inter alia, *Rally for Democracy*[15] and *Standard Bank of Namibia Limited*.[16]

(rrrr) The South African Appellate Division in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others*[17] stated that

'[The power to grant an interdict pendent lite] - . . . is based on the existence of ''general power' or, put differently, an inherent jurisdiction to grant pendente lite relief to avoid injustice and hardship. An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are

[13] *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (C) at 651D – E.

[14] *SAFCOR Forwarding (Johannesburg) (Pty) ltd v National Transport Commission* 1982 (3) SA 654 (AD).

[15] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010(2) NR 487 (SC) para 41.

[16] *Standard Bank of Namibia Limited v Atlantic Meat Market* 2014 (4) NR 1158 (SC) para 19.

[17] *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1986 (2) SA 663 (A).

present and where, but for the exercise of such power, a litigant would be remediless, as the case here.'

(ssss) In an application for interdictory relief *pendente lite*, the onus on the applicant is to establish a *prima facie* right, though open to some doubt, unless the balance of convenience is against the award of a temporary interdict.[18]

(tttt) Accordingly, an applicant for this type of relief must show, that –

(a) the right which is the subject-matter of the main action and which he or she seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

(b) if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he or she ultimately succeeds in establishing his right;

(c) the balance of convenience favours the granting of interim relief; and

(d) the applicant has no other satisfactory remedy.[19]

(uuuu) Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the court's approach in determining whether the applicant's right is prima facie established, though open to some doubt, 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 should not on those facts obtain final relief at the trial of the main action, or in this case the review proceedings.[20]

[18] *Webster v Mitchel* 1948 (1) SA 1186 (W); *Van Rensburg v Coetzee* 1945 (2) SA 320 (T) at 321C.

[19] *Per* Corbett J (as he then was) in *LF Boshoff Investments v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267A – F.

[20] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 687 – 688; Pietermaritzburg *City*

(vvvv) These requisites are not considered in isolation since they interact. This interaction was helpfully described thus:

'It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak. The expression *prima facie* established though open to some doubt seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict — it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience — the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.' [21]

(wwww) Again, the parties are at odds on whether the applicant has obtained a prima facie right for the interim relief sought, the main factual dispute to my mind, is whether Ms Ndimulunde is building a road (contrary to the conditions of the ECC) on areas located within the JMA, and whether the building of the road, as part of Ms Ndimulunde's mining activities interfere with and cause prejudice to the tourist activities envisaged and taking place within the JMA. Aligned to this is the determination of whether a case is made out for interim protection by temporary cessation of the mining activities pending a decision from the Environmental Commissioner in terms of s 42 of the Environmental Act, and also whether that relief should be extended to pending the determination of the review application launched on 12 September 2024,

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Council v Local Road Transportation Board 1959 (2) SA 758 (N) at 772.

[21] *Per* Holmes J (as he then was) in *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383J.

where a record has been filed.

(xxxx) Doro and Uibasen are both registered as communal area conservancies in terms of s 24A of the Ordinance. #Aodaman is recognised as a traditional authority in terms of the Traditional Authorities Act, for community members living in Doro and Uibasen. Ms Ndimulunde's mining claims are situated on land which falls within the jurisdiction of Dâure Daman, but is within the Sorris Sorris jurisdiction. Sorris Sorris is also registered as a communal land conservancy. It was the first applicant in the application that served before Miller AJ, which was granted. It did not participate in the urgent application that served before Sibeya J that was struck from the roll. It does not participate in the review relief that is pending, having now decided to support mining.

(yyyy) The mining claims fall within a JMA set aside by the conservancies, including Sorris Sorris, which JMA was specifically created for conservation and tourism activities. Doro, Uibasen and Sorris Sorris have concluded joint venture agreements, and a general partnership agreement with Ultimate Safaris for, inter alia, establishing various tourist camps for these purposes. The conservancies receive income from these agreements, which are long term, and Ultimate Safari's investment has been substantial. Rhinoceros tracking activities are conducted as part of the tourism experience in camps set up to operate within the JMA. This area is a habitat for rhinoceros.

(zzzz) Ms Ndimulunde made application for and was granted registration of mining claims 72300, 72301, 72303, 72304, 72305, 72400, 72401, 72402 by the Mining Commissioner on 27 June 2024 for mining of base and rare metals, industrial minerals, precious metals and semi-precious stones. Mr Mashuna also made application for and was granted registration of mining claims 73291, 73292, 73293, 73294, 73295, 73296, 73297, 73298, 73299.

(aaaaa) Ms Ndimulunde and Mr Mashuna are currently legally exercising their rights to conduct mining activities, through ECCs granted to them by the Environmental Commissioner in terms of s 37(2) of the Environmental Act. Mr Mashuna was granted the ECC in February 2024 for a period of three years. Ms Ndimulunde was similarly issued with an ECC in October 2023 valid for a period

of three years.

(bbbbb) Ms Ndimulunde alleges that she employs 27 persons and intends to employ 150 persons, who will be recruited in consultation with Sorris Sorris and the Traditional Authorities. Some of the persons to be employed with names and the 081 prefix to cellular phone numbers were outlined in a document annexed to the answering papers. No additional documentation was attached.

(ccccc) Ms Ndimulunde avers that she intends to pay salaries for rangers to ensure that poaching does not take place within the mining area. She pointed out that there is no allegation in the founding papers that previous mining in the area led to poaching of black rhinoceros (there is a dispute between the parties whether the previous mining activities were small or large scale mining). She states that she intends to carry out professional mining operations, with security and will actively ensure that rangers are paid living wages. She further avers that she has already invested and secured financing in the sum of N$18 million, but nothing was attached to evince this.

(ddddd) Ms Ndimulunde states further that the mining operation is fully in production and she will have secured investment in the mine in the sum of N$55 million. The benefits will not just include jobs, financial support to Sorris Sorris, but will also bring about infrastructure development which actually benefits the persons living in the boundaries of Sorris Sorris.

(eeeee) Ms Ndimulunde points out that she complied with all obligations to obtain the mining license and the ECC, and that they were properly granted. Reference was made to a letter from the Environmental Commissioner addressed to the Mining Commissioner dated 24 May 2024, where he specifically informed that, after consultation with the relevant competent and necessary authorities, the areas on which the mining claims exist are not considered an ‘environmentally sensitive area by the Ministry of Mines’. This appears contradictory to the conditions of the ECC, which I set out below.

(fffff) As regards the disputed ‘road’ the applicants’ reference the conditions

'specified in the Environmental Assessment Report and Draft Management Plan dated March 2023', which Ms Ndimulunde is required to comply with. Condition 15 states that:

'Any changes, to or deviations from the scope of project activities approved in respect of the assessment received and reviewed for the purpose of granting this ECC No. (ECC2401220) are subject to an amendment application and approval by the Environmental Commissioner prior to adopting/implementing any such changes/deviations.'

(ggggg) Condition 17 confirms that any non-compliance with the conditions contained in the ECC or the Environmental Management Plan may render Ms Ndimulunde and Mr Mashuna liable to criminal prosecution.

(hhhhh) According to the applicants, the specific mitigating factors referred to in the Environmental Impact Assessment Scoping Report in respect of the mining claims (which report was identical in respect of both Ms Ndimulunde and Mr Mashuna) served as a condition to the granting of the ECC. In paragraph 3.3 of the reports, Ms Ndimulunde and Mr Mashuna committed to the following:

'The mining claims are accessible via a track which branch out of the 02612 towards the west. The 02612 road branched out of the C35 road which stretches from Uis to Khorixas. Due to the ecologically sensitive of the area there will be no new roads that will be established therefore the proponent should work closely with the tourism operators in the area to ensure that there is compatibility between tourism and the planned small to medium scale mining project. There is also a need for the two industry to align their activities and promote appropriate co-existence.' (Emphasis supplied).

(iiiii) The applicants allege that there was a manifest failure by Ms Ndimulunde and Mr Mashuna to comply with any of these obligations. There was no prior communication at all between Ms Ndimulunde and Mr Mashuna and Ultimate Safaris concerning access to the mining sites.

(jjjjj) On Wednesday, 21 August 2024, Ultimate Safaris noticed for the first

time, through a report from one of their employees, that heavy machinery was being brought into the area. This was allegedly done without any consultation with any employee of Ultimate Safaris. There was also no consultation with the conservancies. On Friday, 23 August 2024 an employee of Ultimate Safaris, Mr Christiaan de Wet, who deposed an affidavit, observed a road grader grading a wide road – equivalent to the size of a district road – over the existing tracks, and for approximately three kilometres along the road, before the new road veered south towards the location where Ms Ndimulunde and Mr Mashuna intended to mine. The road is described as ‘extremely wide’.

(kkkkk) Mr de Wet further observed both a grader and a bulldozer being used to construct the road and was informed by one of the machine operators that a tipper truck would be coming to continue building the road. Later it was confirmed that the construction of the road was also being done on behalf of Ms Ndimulunde.

(llllll) It is also alleged that that the grader and other earthmoving equipment had entered by way of Ultimate Safaris' official access road, ignoring a sign clearly stating that there was no entry without a reservation as this is a private tourism area. In addition, someone (presumably employed by Mr Ndimulunde and Mr Mashuna) removed all the signage along the route directing Ultimate Safaris' guests to the airstrip which is being constructed within the tourism area and official pick-up point for tourists. Photographs depicting the ‘affected’ area were provided.

(mmmmm) It is submitted by the applicants that this is unlawful activity. Firstly, the failure to comply with the condition attached to an ECC constitutes, in terms of s 37(3) of the Environmental Act, an offence. Secondly, this forms the basis for the Environmental Commissioner to suspend or cancel Ms Ndimulunde and Mr Mashuna’s ECCs.

(nnnnn) The conservancies wrote urgent letters to the Executive Director and the Deputy Executive Director of the MEFT, as well as the Environmental Commissioner laying a complaint of the violation of the conditions of the ECC

and of the Environmental Act. They asked the Environmental Commissioner to approach this court urgently to stop the illegal activity and to consider suspending or cancelling the ECCs, in terms of s 42 of the Environmental Act.

(ooooo) No response was initially received to these letters. Consequently, the conservancies' legal practitioners of record wrote a follow up letter. A response was finally received from the Environmental Commissioner indicating that his office was seeking legal advice, would conduct a review and would respond in due course.

(ppppp) It was only when the applicants' legal practitioner was approached by the legal practitioner representing the governmental respondents after this application was launched that an indication was given that a decision could be expected in respect of the process in terms of s 42 of the Environmental Act by 18 October 2024.

(qqqqq) Ms Ndimulunde denies that she is constructing a road or that she is in breach of the conditions of the ECC. She states that she is using the existing tracks to access the mining site as authorised by the ECC, and that the grader is simply being used to clear the mining site. For this reason, the consultation called for was not necessary, and the applicants' apprehensions of harm are without merit.

(rrrrr) Expert evidence was presented the opinion being that it is normal and acceptable for mining activities to occur in an area where tourism activities occur. Reference was made by Ms Ndimulunde to earlier small scale mining that had previously conducted in the same sites. Pictures of the remnants of the previous mining were similarly attached to the answering papers.

(sssss) I have considered the photographs filed of record. Firstly, it is apparent to the naked eye that a wide road has been created and graded. There is clear evidence already of destruction of flora in the area, such as uprooted trees strewn on the road and the grader and tipper are also clearly apparent from the pictures. It is difficult to infer from Ms Ndimulunde's affidavit that what is

being created is merely a mining site or access to a mining site. On the photographs, the applicants have shown at the very least that, prima facie, a road is being constructed. The photographs also do not align with the allegation that the pre-existing tracks are being used for mining purposes and not the road.

(ttttt) Whilst it may be so that it is normal and acceptable for mining activities to occur in an area where tourism activities occur, co-existence would logically remain the key word. This co-existence assumes balancing environmental conservation and tourism in this instance – and mining, both of which contribute to Namibia's economic development. It also assumes that mining should not severely impact ecosystems, wildlife habitats and the community members of the communal land concerned. A harmonised environment based on proper researched and considered legislation and policy, as well as application and implementation of the relevant legal frameworks is necessary to protect both interests.

(uuuuu) The pictures of the remnants of previous mining activities do not show any form of road, but wide spaces, and a couple of piles of rock. There is no recent destruction of trees in this area either.

(vvvvv) There is, to my mind, prima facie non-compliance with the ECC for these reasons. However, that decision lies squarely in the hands of the Environmental Commissioner, who has undertaken to provide a response to the complaint in terms of s 42 of the Environmental Act by 18 October 2024. Given that he has not opposed the relief, an opportunity should be provided to him to consider the complaint in line with his constitutional and legislative mandate. A suspension of the ECC will in terms of s 24 of the Environmental Act effectively result in the cessation of the construction activities (and immediate irreparable harm), as the ECC is necessary for the continuation of operations. Also, and given the time period within which a reasoned decision will be provided, I hold the view that an order that mining activities cease pending that decision, together with mandamus ordering that the decision be made within a reasonable time, would be the proper order.

(wwwww) I say this bearing in mind that both the envisaged activities involve substantial investment, and both parties stand to suffer prejudice. I also hold the prima facie view that the applicants have, at the very least, a prima facie established a potential threat to the rhinoceroses 'residing' in the area and that there is an apprehension of irreparable harm, given the refusal to cease activities pending a decision.

(xxxxx) As regards an interdict pending finalisation of the review application to set aside both the registration of the mining claims as well as the issue of ECC of Ms Ndimulunde, I have noted that the review record was filed on 4 October 2024. The applicants have a right to deliver supplementary papers, and the respondents will need time to file answering papers. This will be followed by a replying affidavit and a case management conference before the matter is set down for hearing. This could take approximately eight months (if not more), and this excludes the guidelines for delivering judgment in the normal course. There is also the possibility of setting the matter down for an expedited hearing, should the parties meaningfully engage in terms of rule 1(3), especially because of the consequences both interests may suffer, especially if the decisions are successfully reviewed.

(yyyyy) The Environmental Commissioner has undertaken to make a decision that may or may not have the effect of suspending Ms Ndimulunde and Mr Mashune's mining activities. This is the decision-maker and opportunistically must be provided for the decision to be made. Until then, it is somewhat far-reaching to grant the balance of the interdictory relief, as the order made would remove the irreparable harm component of the application. I accordingly exercise my discretion to grant part of the relief sought as set out in the order made.

(zzzzz) As regards the question of costs which is within the discretion of the court, the applicants did not succeed in all the relief sought. However, the opposition by the respondent was also extensive, raising defences and in points *in limine*, as she was entirely entitled to do. In the circumstances, the applicants having attained success, are also entitled to their costs.

Conclusion

(aaaaaa) In the light of the foregoing, I hold the view that the applicants have made out a case for the interdictory relief and mandamus application as it relates to a decision in terms of s 42 of the Environmental Act, and the court will grant such relief. I therefore make the following order:

1. The applicants' non-compliance with the rules relating to form and service set forth in rule 73(3) of the rules of court is condoned and the matter is heard as urgent.

2. Pending the decision of the second respondent, alternatively the third respondent in terms of s 42 of the Environmental Management Act 7 of 2007:

   2.1 the first respondent and any person employed or acting under her directions is interdicted from in any manner whatsoever, using heavy machinery, including graders, excavators and tipper trucks to construct a new road, or anything else, from the D2612 in a westerly direction to the site of the mining claims located at GPS coordinates -20.772500 S, 14.459167 E, or any new roads, road works or vehicular tracks on the Farms 535 Probeer; and

   2.2 the first respondent and any person employed or acting under her directions is interdicted from in any manner whatsoever conducting any mining activities on the mining claims, or further activities of any kind on the mining claims or in the area referred to as the 'Diagonal Map of the mining claims', forming part of Figure 3 in the Environmental Impact Assessment Scoping Report, annexed to the founding papers as 'LH31'.

3. The second respondent, alternatively the third respondent, is directed to make and communicate a decision as envisaged in s 42 of the Environmental Management Act 7 of 2007 by no later than Thursday, 24 October 2024, as to whether or not to suspend and/or cancel the Environmental Clearance Certificate issued in terms of s 37(2) of the Environmental Management Act 7 of 2007 to the first respondent, by the second respondent on or about 13 October 2023, alternatively 26 October 2023, in respect of the proposed establishment of mining activities on the mining claims.

4. The first respondent is ordered to pay the costs of this application, such costs to include the costs of one instructing and two instructed counsel, where employed.

5. The matter is regarded as finalised and removed from the roll.

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E M SCHIMMING-CHASE

Judge

APPEARANCE

APPLICANTS:	A Corbett SC, assisted by N Bassingthwaighte Instructed by Ellis Shilengudwa Inc., Windhoek
1ST RESPONDENT:	T Chibwana, assisted by A Shimakeleni Instructed by Appolos Shimakeleni Lawyers, Windhoek
2ND AND 3RD RESPONDENTS:	W Uakuramenua Of Office of the Government Attorney, Windhoek