IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 92090/2016

In the matter between:

AUBREY LANGA and 16 OTHERS **Applicants**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

16/02/2017 [signature] Murphy

DATE SIGNATURE

and

IVANPLATS (PTY) LTD and 19 OTHERS **Respondents**

JUDGMENT

Murphy J

1. The first respondent ("Ivanplats") has been granted mining rights for the mining of platinum group metals, gold, silver, nickel, copper, iron, vanadium and chrome by the Director-General of the Department of Mineral Resources. A notarial mining right was executed on 4 November 2014 which describes the mining area as "Macalacaskop 243 KR and Turfspruit 241KR, excluding all graves, graveyards, built-up areas and protected areas". It is common cause that there are several graves on the land. For that reason Ivanplats has taken steps to have the graves relocated.

2. The applicants allege that South African Heritage Resources Authority ("SAHRA") and the Limpopo Provincial Department of Cooperative Governance, Human Settlement and Traditional Affairs ("COGHSTA") made administrative decisions on various dates to permit Ivanplats to exhume and relocate the graves on the land in order for the mining to go ahead. Mr Aubrey Langa, the first applicant, was advised by email in April 2016 that SAHRA had approved the permits for the first respondent to relocate the graves. Mr Langa has lodged an appeal to the Chairperson of the Board of SAHRA against the decision of SAHRA to grant the permits to relocate grave sites. According to the applicant's the appeal is pending and has not been decided upon. The relocation of graves continued as there was no decision prohibiting it and for the most part has been completed.

3. On 28 November 2016, the applicants sought and obtained, in terms of Part A of their notice of motion, an *ex parte* order on an urgent basis interdicting the first respondent ("Ivanplats") from proceeding with the relocation of graves on the site, pending a review (in terms of Part B of the notice of motion) of the decisions of SAHRA and COGHSTA to grant permits for the grave relocation. The *ex parte* order was granted in the form of a rule nisi, with a return day of 26 January 2017, calling upon Ivanplats to show cause on the return day why the interim interdict should not be made final. Ivanplats filed its answering affidavit in Part A on 24 January 2017. The matter was set down irregularly in the urgent court on 26 January 2017 where the return day was extended and the application was again irregularly postponed to the urgent court in the week commencing 30 January 2017. According to the relevant practice directive of this court, opposed applications to discharge or confirm a rule nisi must normally be set down on the opposed motion court roll and not in the urgent court. Be that as it may, in the interests of justice I opted to hear the matter on 2 February 2017. After hearing argument, I discharged the rule nisi and reserved judgment on the question of costs. These are my reasons and judgment on costs.

4. The ex parte order granted in the absence of Ivanplats was by its nature provisional and subject to variation or reconsideration after hearing all the parties.[1] The applicants bore the onus before me of establishing that, had all the facts before me been before the court when it issued the ex parte order, the interim interdict would still have been granted and should continue to operate beyond the return day.[2]

5. The requirements for an interim interdict are well-established. Firstly, there must be (at a minimum) a prima facie right on the part of the applicant. Secondly, there must be a well-grounded apprehension of irreparable harm if interim relief is not granted. Thirdly, the balance of convenience must favour the granting of interim relief. Fourthly, there must be no other ordinary remedy that is available to give adequate redress to the applicant. These factors must be balanced against one another. The stronger an applicant's *prima facie* right, the less the need to rely on prejudice. Conversely, the weaker the applicant's prospects of success, the greater the need for the other factors to favour him or her.[3]

6. Ivanplats submitted that the applicants did not satisfy the requirements for an interim interdict and that the rule nisi should be discharged. In argument, it went somewhat further and argued that the interdict sought was in fact a final interdict and that the applicants were obliged to prove a clear right and an injury actually committed or reasonably apprehended. Where a final interdict is sought on the basis of a clear right, there is no requirement that the balance of convenience must favour the grant of relief.

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[1] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 8.

[2] *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) at 332B-C

[3] *Eriksen Motors Ltd v Protea Motors* 1973 (3) SA 85 (A) at 691F; *Radio Islam v Chairperson, IBA* 1999 (3) SA 897 (W) at 903G

7. The contention that the interdict sought is final in nature rests on the undisputed fact that the relevant permits will expire on 24 March 2017; and without any guarantee of renewal, the effect of the interdict will finally extinguish the right of Ivanplats to remove the graves in accordance with the permits. The submission is well made. Consequently, the applicants are required to establish a clear right. The burden upon them is accordingly different. A court will grant an interim interdict upon a degree of proof less exacting than that required for a final interdict. The applicant for an interim interdict is merely required to prove a right which, though *prima facie* established, is open to some doubt. The approach to the factual basis of the right is for the court 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 on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicants they may not succeed in obtaining temporary relief, for the right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.[4] Where, however, the applicant bears the onus of establishing a clear right then the facts must be determined in accordance with the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[5] The court must be satisfied that the applicant is entitled to final relief on the facts stated by the respondent (excluding those which are wholly incredible or untenable) together with the facts in the applicants' affidavits admitted by the respondent.

8. Ivanplats has raised a preliminary point of non-joinder. The applicants state in the founding affidavit that there are four individual applicants who are opposed to the grave relocation process. However, they fail to mention the fact that there are many family members who have consented to grave relocations and who support the

[4] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; and *Gool v Minister of Justice* 1955 2 SA 682 (C) at 688.

[5] 1984 (3) SA 623 (A) at 634

grave relocation process. Ivanplats is currently in the process of implementing Phase 1 and Phase 1.5 of the grave relocation process, which involves 94 graves belonging to 35 families. These are the only graves for which Ivanplats has obtained permits.

9. The answering affidavit makes it plain that the vast majority of families in the community support the grave relocation process. They do so because there are a number of positive consequences flowing from the relocation of the family graves, including that the graves will be moved to formal cemeteries which are situated closer to the homes of the next-of-kin and will be better maintained there. Ivanplats will provide tombstones for a number of graves which were previously unmarked, as well as other resources to ensure the relocation is performed with appropriate dignity. Relatives of the deceased have signed contracts, memoranda of understanding ("MOU's"), with Ivanplats in terms of which Ivanplats agrees to carry the costs of facilitating the exhumations and re-burial ceremonies, including the costs of new burial plots, coffins, the services of undertakers, transport, refreshments and so on. These costs may run into thousands of rand.

10. From the remaining 30 graves of the original 94 for which permission to relocate has been granted in Phase 1 and 1.5 of the relocation process, there is undisputed consent from the next-of-kin for 27 of them to be moved. Consent is only disputed in relation to 3 of the remaining graves. The interdict sought by the applicants aims to restrain the relocation of all graves and thus will deprive the next-of-kin who have consented of the substantial benefits to which they are entitled under the MOU's. If the interdict is granted, Ivanplats will be unable to implement the MOU that each next-of-kin has concluded.

11. The common-law rules relating to obligatory joinder require that every person who has a direct and substantial interest in any order which the court might make, should be joined as a party to the litigation. Our courts have consistently refrained

from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect such interests.[6] Once it is shown that a necessary party has not been joined, a court will not deal with the issues until joinder has been effected.

12. As I have said, in the present matter, the next-of-kin who have consented to the relocation of the graves and who have concluded a MOU with Ivanplats, will be affected if the rule nisi is confirmed. They will lose substantial financial benefits. They accordingly ought to have been joined as respondents. They have not been; and on this ground alone, the rule nisi must be discharged. However, I am also persuaded that the facts do not establish the existence of any clear or *prima facie* right in terms of substantive law.

13. Part B of the notice of motion indicates that the applicants intend to review three decisions. The first is the decision of SAHRA to grant Ivanplats permits to relocate the graves. The second is the decision of COGHSTA to grant permission for the exhumation and relocation of the graves. The third is an alleged decision taken by an unidentified entity to grant Ivanplats permission to change the land use of the mining right area from agricultural to industrial mining use.

14. The removal of graves is governed by the National Heritage Resources Act[7] and its Regulations. Section 36(3) prohibits any person from disturbing or destroying burial grounds and graves older than 60 years which are situated outside a formal cemetery administered by a local authority. No person may exhume or remove any

[6] *Amalgamated Engineering Union v Minister of Labour* 1949 3 SA 637 (A) at 659

[7] Act 25 of 1999. Regulations published in Government Notice No R 548 in Gazette No 21239, 2 June 2000.

grave from its original position. A person may only do so with a permit issued by SAHRA or a provincial heritage resources authority. Section 36(5) provides that SAHRA may only issue a permit for the relocation of a grave if it has satisfied itself that the applicant for the relocation of the grave has made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave or burial ground; and reached agreements with such communities and individuals regarding the future of such grave or burial ground.

15. In paragraph 17 of the founding affidavit, the applicants allege that the decision of SAHRA was unlawful because it had already made a decision in respect of the grave relocation when it responded to the environmental authorisation prior to April 2016, and was therefore *functus officio* and unable to issue the permits. The doctrine of *functus officio* means that once an administrative body has made a final decision, it has discharged its powers and generally has no competence to reconsider that decision at a later stage. I agree with the respondents that SAHRA had not made any decision at all before it granted the permits to Ivanplats in March 2016. The Limpopo Department of Economic Development, Environment and Tourism granted an environmental authorisation to Ivanplats on 27 June 2014. Section 38 of the National Heritage Resources Act imposes various requirements in the case of developments. Section 38(8) provides that those requirements do not apply to developments that are governed by other environmental legislation. This is subject to the proviso that the consenting authority must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent. It follows that SAHRA's statutory role in respect of the environmental authorisation granted by the Limpopo Department of Economic Development, Environment and Tourism was limited to making comments and recommendations. The Department was required to take those comments and recommendations into account before granting the environmental authorisation. SAHRA provided comments and observations in a letter of 8 November 2013. However, it did not take a decision in terms of section 36 of the National Heritage

Resources Act. The first time it took a decision was when it granted the permits. The doctrine of *functus officio* therefore finds no application at all. SARHA was entitled to consider Ivanplat's application for the permits and to grant such permits, as it did on 24 March 2016.

16. The second basis for review advanced in the founding papers was that Ivanplats had not properly consulted the community. The applicants allege that SAHRA should not have granted Ivanplats the permits to proceed with the grave relocation because Ivanplats had failed adequately to consult with the affected community members.

17. Section 36(5), as mentioned, provides that SAHRA may only issue a permit for the relocation of a grave if it has satisfied itself that the applicant for the relocation of the grave has:

> "(a) made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave or burial ground; and
>
> (b) reached agreements with such communities and individuals regarding the future of such grave or burial ground."

Regulation 40 of the Regulations provides as follows:

> "(1) The applicant must consult any interested parties identified through the process in regulation 39 regarding the effect of the proposals on the grave or burial ground, with the aim of reaching agreement about the future of such grave or burial ground.
>
> (2) ...
>
> (3) If the consultation under sub regulation (1) fails to result in agreement, the applicant must submit records of the consultation and the comments of all interested parties as part of the application to the provincial heritage resources authority."

18. The answering affidavit describes the process that was followed by Ivanplats and PGS Heritage in order to ensure that all family members were identified, consulted and informed of progress regarding the relocation of the graves. It is apparent that Ivanplats made a concerted effort to identify the descendants and family members of the persons buried in the graves, and any other person or community by tradition concerned with such grave or burial ground. It identified and recorded each possible grave through extensive consultation with community members, and the use of GPR surveys and test trenching, obtained written consent by the authorised next-of-kin and concluded written agreements with them. It met with all the families and next-of-kin of affected graves to discuss ceremonial requirements and practical arrangements. Once an exhumation schedule was prepared, it informed all family representatives of the date of the exhumation and ensured that they were able to be present. In addition to the extensive consultation with the direct next-of-kin of the graves, Ivanplats consulted with the Mokopane Traditional Council and the Tshamahansi Council, and published notices regarding the relocations in a national and local newspaper. It therefore submitted that it had complied with the requirements of the National Heritage Resources Act and the Regulations.

19. The applicants have not challenged the averments in the answering affidavit in a meaningful way, at least in so far as they relate to the Phase 1 and Phase 1.5 process of relocation, and I am accordingly obliged to accept them as proven. I am persuaded that Ivanplats complied with its obligations under the Act.

20. The founding affidavit does not set out any grounds of review to justify an order reviewing the decision of COGHSTA to grant permission for the exhumation and relocation of the graves. The applicants have made out no case at all in relation to such relief and are accordingly unable to establish a *prima facie* right on this basis. Likewise, the notice of motion does not identify the decision for changed land use referred to in the prayers and there is no reference to it in the founding affidavit.

Ivanplats has not applied for any change in the zoning or land use of the relevant properties. The land in question is designated as "Mining 2". These averments in the answering affidavit have not been denied in the reply. The applicants are accordingly unable to establish a *prima facie* right on this basis either.

21. Ivanplats also submit that the application to review that SAHRA decision is out of time. SAHRA issued the permits on 24 March 2016. Mr Langa was advised by SAHRA on 4 April 2016 that the permits for the grave relocations had been approved. The application was instituted on 28 November 2016. The application was accordingly made outside the 180-day period for instituting review proceedings as required by section 7(1) of the Promotion of the Administrative Justice Act [8] ("PAJA"). The applicants have not in Part B of their notice of motion sought condonation for their delay in terms of section 9 of PAJA. Ivanplats accordingly submitted that without a proper condonation application before me, I am unable to determine that the review of SAHRA's decision has prospects of success. For that reason too, it maintained, the applicants have failed to establish a *prima facie* right.

22. The applicants argued that the question of condonation in respect of the late lodging of the review application is only relevant in respect of the review application and not this application and that the interests of justice on these facts would in any event permit condonation. In their view, the importance of the constitutional rights involved will warrant the grant condonation. The submission misses the mark because it fails to appreciate that the failure to file an application for condonation in the main application means there are no factual averments before me explaining the delay and justifying the grant of condonation. This court may not speculate as to the potential merits of a condonation application which has not been made. Absent a proper condonation application it cannot be said that the applicants have established a *prima facie* right to the relief they seek.

[8] Act 3 of 2000

23. As stated at the outset, Phase 1 and Phase 1.5 of the grave location process involve 94 graves. The process of exhumation and burial began on 14 November 2016. So far 54 graves were relocated and 10 were discovered to have no remains. This left 30 graves which have not yet been relocated. The relocation of these graves was halted on the issuing of the rule nisi. And, as also mentioned, according to Ivanplats in relation to 27 of the 30 graves in question, the next-of-kin have validly consented to relocation. This averment is baldly denied in the replying affidavit. Absent a fuller denial there is no basis for concluding that the respondent's averment is un-creditworthy or untenable to the extent that it must be ignored.

24. Only four of the seventeen applicants are alleged to be next-of-kin relatives of an affected grave in Phases 1 and 1.5. The first, Ms Anna Mphoshi, failed to attach a confirmatory affidavit and the grave in which she is alleged to have an interest does not form part of the Phase 1 or Phase 1.5 relocation processes for which the permits have been issued. This has not been denied by the applicants. The seventh applicant, Mr Daniel Phele, has an interest in a family grave, but he appears at an earlier stage to have consented to the relocation and other family members have consented to the relocation and stand by their consent. On the respondent's version, Mr Daniel Phele is a sole dissenter, while the rest of the family have consented sufficiently, as contemplated by the legislation. The applicants have not sought to join the other Phele family members as respondents, and any claim by Mr Daniel Phele must be non-suited for non-joinder. The balance of convenience is also against him. The fifth applicant, Ms Maria Maphago, originally gave her written consent by way of an MOU upon which she has reneged. There is a dispute of fact on the papers about whether the graves in which she may have an interest in fact exist. The averment of the respondent is that as a consequence of Ms Maphago reneging, test excavations were not performed and there is no evidence that the graves exist. The applicants have put up no evidence or creditworthy averment that counters this allegation. The eight applicant, Ms Margaret Tsweleng, is a member of the Moatshe family who identified three graves, two of which have already been relocated with the consent and full participation of the Moatshe family, in particular the closest next-of-kin. They deny that Ms Tsweleng has authority to dispute their

consent. Again there is little beyond unsubstantiated denials bringing these averments into question.

25. The evidence in relation to these four applicants is therefore simply insufficient to justify the grant of a final interdict restraining the relocation process in respect of the remaining 30 graves or of those in which they claim to have an interest.

26. In their heads of argument, the applicants took a different tack. They built upon two cryptic averments in paragraphs 13 and 38 of the founding affidavit which record that the Minister in granting the mining right excluded graves from the mining area defined in the notarial deed. No averment is made that Ivanplats is unlawfully seeking to vary the mining right by mining outside the defined area or that mining where graves were located prior to relocation was excluded and thus unlawful. As I understand the point, the applicants essentially rely (without specifically referencing the relevant provisions) on section 25(2)(d) of the Mineral Resources and Petroleum Act[9] ("the MRPA") which provides that the holder of a mining right must comply with the terms and conditions of the mining right.

27. It will be recalled that Ivanplat's mining right described the mining area to which the mining right applies as *"Macalacaskop 243 KR and Turfspruit 241 KR - Excluding all graves, graveyards, built up areas and protected areas"*. The mining right therefore does not include graves and graveyards.

[9] Act 28 of 2002.

28. It is only the Minister who has the power to grant mining rights as well as vary or extend mining rights under the MRPA. Moreover, Clause 4.1 of the mining right provides that the terms of the right may not be amended or varied without the written consent of the Minister. The decision by SAHRA and COGHSTA to approve the permits for exhumation and relocation of ancestral graves, according to the applicants, is an extension and amendment of the mining right. This, they maintained, is not something SAHRA or COGHSTA has the power to do, only the Minister has the power to vary the extent of the mining right. The applicants submitted that this provides a basis for review in terms of section 6(2)(f) and (i) of PAJA which permits judicial review of an administrative action if the action contravenes a law or is otherwise unlawful.

29. The argument misses the essential point that after the grave relocation process, lawfully conducted under the SAHRA permits, there will be no graves in the mining area. There is no amendment to the mining right. The prohibition against mining in areas where there are graves still stands. Once the graves are lawfully relocated the prohibition will no longer have application to those areas where graves previously existed.

30. In the premises, the applicants have failed to establish a clear right or a *prima facie* right entitling them to an interdict. There is consequently no need to consider the other requirements. Suffice it to say that the balance of convenience favours Ivanplats. The Platreef underground mine represents one of the most significant foreign direct investments into the South African economy in recent years. It has the potential to be developed into the largest underground platinum mine in the world, yielding very significant benefits to the South African economy in general and the economy of Mokopane and the Limpopo Province in particular. The confirmation of the rule nisi would cause a delay in the construction and development of the project, because the development of the mine surface infrastructure cannot proceed unless

the graves are relocated. A delay will cause significant prejudice to Ivanplats and the broader community.

31. As already explained, the overwhelming majority of next-of-kin have consented to relocation of their family graves. They have done so in order to secure benefits from the fact that the graves are being moved to formal cemeteries which are situated closer to their homes. Moreover, Ivanplats and the local communities have concluded a broad-based black economic empowerment transaction allowing a significant level of economic participation to historically disadvantaged South Africans. Ivanplats is bound by the provisions of a Social and Labour Plan ("SLP") forming part of the terms and conditions of its mining right. The specific projects that Ivanplats has committed to support in terms of its SLP include: adult basic education and training for employees and the broader community; core technical and non-technical skills for employees; the establishment of a community training centre; mentorship, bursaries, learnerships and internships, mainly for employees or prospective employees, but also including a limited number of bursaries for community members to study disciplines other than those typically required in the context of a mining business; the upgrading of the curriculum of the Limpopo University's geology programme; sanitation for schools and community clusters; and the development of small- medium- and micro-enterprises. If the rule nisi were to be confirmed, these benefits of the SLP will be delayed.

32. With regard to the question of costs the applicants have prevailed upon me not to award costs should they be unsuccessful. While the application for an interdict was misconceived, it was motivated by a legitimate assertion of cultural and traditional rights. The removal of ancestral graves to make way for mining and commercial development is a sensitive matter, which often will benefit from an independent assessment. Those deeply affected and aggrieved by a progress they

might not prefer should not be discouraged from pursuing constitutional claims for fear of being mulcted in costs.[10] I am thus disinclined to make a costs award.

33. It will be convenient to confirm the order I made in court on 2 February 2017 by repeating it. The flowing orders are issued:

33.1 The rule nisi issued by this court on 28 November 2016 is discharged.

33.2 There is no order as to costs.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	2 February 2017
Counsel for the Applicants:	Adv C van der Linde, Adv M Shata
Instructed by:	Z & Z Ngogodo Attorneys
Counsel for the Respondents:	Adv A Cockrell SC, Adv F Hobden
Instructed by:	Falcon and Hume Attorneys
Date of Judgment:	16 February 2017

[10] *Biowatch Trust v Genetic Resources* 2009 (6) SA 232 (CC).