IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable

Case No: CA & R 65/2022

In the matter between:

QCK LEZMIN 4791 CC	**FIRST APPELLANT**
LORE TRADE AND INVESTMENT (PTY) LTD	**SECOND APPELLANT**
DULOSTYLE (PTY) LTD	**THIRD APPELLANT**

And

SIKHOVA IMPORTERS CC	**FIRST RESPONDENT**
RE HARD ROCK MINING (PTY) LTD	**SECOND RESPONDENT**

Neutral citation: *QCK Lezmin 4791 CC and Others v Sikhova Importers and Another* (Case no CA & R 65/22) (23 February 2024)

Coram: PHATSHOANE AJP, NXUMALO J and OLIVIER AJ

Heard: 16 October 2023

Delivered: 23 February 2024

Judgment

Phatshoane AJP

Introduction

[1] This appeal, with leave of the court a quo (per Moses AJ), was initially on a limited basis. It is now on unqualified terms, with leave of the Supreme Court of Appeal,

against the whole of the judgment and order of the court a quo in which it had directed that QCK Lezmin 4791 CC (QCK) and Dulostyle (Pty) Ltd (Dulostyle), the first and third appellant, restore to Sikhova Importers CC (Sikhova), the first respondent, its peaceful and undisturbed possession of a certain remainder of a farm known as Koedoeskloof 602, Griekwastad, Northern Cape, including some machines and equipment moved by Sikhova onto that property; ordering Sikhova and Re Hard Rock Mining (Pty) Ltd (Hard Rock), the second respondent (the respondents), to pay the costs of Dulostyle in respect of the declaratory relief and dismissing QCK and Lore Trade and Investment (Pty) Ltd (Lore), the second appellant's, application to strike-out the whole of the replying affidavit or the greater part of its paragraphs with costs. Dulostyle did not participate in this appeal.

Applications for condonation

[2] QCK and Lore defaulted in complying with rule 49(6)*(a)* which requires that within sixty days after delivery of a notice of appeal, an appellant make written application to the registrar for a date for the hearing of the appeal and rule 49(7)(a) which provides in part that simultaneously with the application for a date for the hearing the appellant file with the registrar three copies of the record on appeal and furnish two copies to the respondent. Therefore, they seek condonation for non-compliance and the reinstatement of the appeal insofar as it may be deemed to have lapsed. In their application seeking condonation they demonstrated that their attorneys acted with due diligence in an attempt to secure the appeal record and had not adopted a supine attitude in prosecuting the appeal.

[3] The record which they sought to file, which delayed the prosecution of the appeal, constitutes of oral argument by counsel in the court a quo which naturally ought not to have formed part of the appeal record. The attorneys for QCK and Lore stated that they laboured under the misapprehension that the filing of the record concerned was necessary and were incorrectly advised by the registrar's personnel for that to be the case which advise they bona fide accepted. It is so that the administration of justice is sometimes a demanding discipline that even

the most skilful practitioners do make mistakes.[1] In my view, the forceful and prolix opposition to the reinstatement of the appeal by Sikhova and Hard Rock is fastidious and not well-founded. This is so because the appeal lapsed on 25 August 2022 and the application for condonation and reinstatement was brought on 23 September 2022, merely a month later. The delay is not excessive and, in the interest of justice, condonable. It follows that the application for condonation and the reinstatement of the appeal ought to be upheld for the further reason that it has reasonable prospects of success.

[4] Sikhova and Hard Rock were also late with the filing of their heads of argument, having delivered this only 05 days prior to the hearing of the appeal. Thus, they sought condonation which went unopposed. Heads of argument are for the convenience of the court and so their application for condonation would have to succeed. There can hardly be any prejudice.

The background

[5] QCK is the owner of Farm Koedoeskloof 602 (the farm). At all relevant times Lore held a prospecting right over a portion of the farm. The disputes between appellants and the respondents have their origin in two agreements. First, the so-called Surface Use, Access and Mining Royalty Agreement (Surface Use Agreement) allegedly concluded during mid-August 2019 in terms of which Sikhova and Hard Rock aver that, QCK, being the registered owner of the farm, inter alia, purportedly granted Sikhova access to the farm so as to prospect for, dig, mine, win, remove, for its own benefit and to dispose of manganese ore and iron ore. Furthermore, Sikhova and Hard Rock allege that QCK granted Sikhova an unrestricted right of access to the farm and to bring any plant, machinery or equipment reasonably required to exercise an exclusive right to prospect for and remove the minerals mentioned from the farm for its own benefit and account.

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[1] Albeit said in a different context, see the remarks by Steyn J in *Waar v Louw* 1977 (3) SA 297 (O) at 304F-G.

[6] QCK and Lore intimated that the Surface Use Agreement was designed to be a tripartite agreement which would involve QCK, Lore and Sikhova. It is not in dispute that Lore was not a signatory to the said agreement because it says that at no stage did it agree to any of the terms of the Surface Use Agreement with either QCK or Sikhova. Lore went on to say that its involvement in the said agreement is a legal substratum to its lawful existence. Absent its participation, it argued, the agreement was not validly entered into.

[7] Sikhova and Hard Rock allege that a prospecting right, similar to the one described above, was granted to the joint venture between Lore and Sikhova which had been defined in the Surface Use Agreement as the "Unincorporated Hard Rock Mining Koedoeskloof Joint Venture". The operation of the agreement would allegedly continue until Hard Rock Mining Koedoeskloof Joint Venture or Hard Rock as its successor-in-tittle had completed its exploration of the minerals.

[8] In exchange for the rights granted by QCK under the Surface Use Agreement, Sikhova was required to pay R30 000 monthly occupation fee on or before the 15th of each month for the first six months of the mining activities and thereafter a royalty to the extent described in the agreement. In the event of failure by the "Joint Venture" or Hard Rock, as the joint venture's successor-in-tittle, to pay the amounts due in terms of the agreement or in the event of, inter alia, a material breach of the agreement and failure to remedy such breach within 90 days, QCK would be entitled to cancel the agreement and resume possession of the prospecting area without prejudice to its claim of the arrear amounts owing or damages it may have suffered by reason of the breach.

[9] The second agreement, the joint venture (JV), was allegedly concluded on 16 August 2019 between Sikhova and Lore, as the holder of the prospecting rights. The JV is to the effect that "the company", which Sikhova and Hard Rock submit is Hard Rock, would locate, prospect, explore, mine and market the minerals for an indeterminate period unless the JV was mutually cancelled by the parties. According to Sikhova and Hard Rock, Lore had to apply for the extension of the prospecting rights or for the granting of mining rights in respect of all minerals available on the farm which obligation would survive any termination of the JV.

Sikhova would hold 700 shares of the issued share capital whereas Lore 300 shares. Any of the parties who wished to withdraw from the JV would be required to give the other party three months' written notice provided that such party would not be discharged from performing any obligation already due or becoming due.

[10] QCK and Lore intimated that the above JV was entered into so as to promote and incorporate a company which would exploit and exercise the prospecting rights. They maintain that the JV in question did not materialise because, inter alia, a company which was to be "promoted" to the JV was never registered or incorporated. According to them Hard Rock is unknown to Lore and denied that it was the company envisaged by the JV. They submitted that it was incorporated by Sikhova acting on a frolic of its own and that none of the terms of the JV were given effect to.

[11] In the exercise of the rights conferred upon Sikhova in terms of the above agreements Sikhova and Hard Rock state that as from mid-August 2019 they gained access to the farm and commenced extensive prospecting operations on the identified portion of the farm (the prospecting area). They further claim that various tests were conducted to determine the existence not only of manganese ore and iron ore but also other minerals. They further contend that they had been in peaceful and undisturbed possession of the prospecting area. It is not in dispute that Sikhova had moved various machinery and equipment on the farm such as one Hitachi Front End Loader, two Kamatsu PC 600 Excavators and various components of the crushing and screening Plant.

[12] Sikhova and Hard Rock state that about four months later, during mid-December 2019, they temporarily ceased operations because various heavy machinery and equipment, meant for further exploration on the property, could not be moved thereon because of an embargo on vehicles carrying abnormal heavy loads on the roads during the festive season. On Sikhova's and Hard Rock's return to the farm during January 2020, to continue with their mining activities, they claim, QCK refused them access into the farm including access to their machinery and equipment in that QCK replaced the locks mutually used by them with theirs.

[13] As support for their contention that they had been despoiled, Sikhova and Hard Rock heavily relied on a letter dated 25 January 2020 from Ms J M Labuschagne, the erstwhile legal representative for QCK. The translated relevant part reads:

> "..Our instructions are that our clients had a partially oral, partially written agreement which terms and conditions were breached by your client in that your client had fallen in arrears with two months' occupation fee in the amount of R60 000.00....your client has failed to perform in terms of the partially oral and partially written and wilfully ceased exploration operations, which actions are to the detriment of our clients and have placed them in a financial predicament.
>
> Your client's actions therefore leave our client no choice but to cancel the consent to surface and the agreement and we confirm our instructions that the agreement is hereby cancelled and our client specifically cancels access to the surface.
>
> Our instructions are that our client exercise their retention rights on the assets of Sikhova Importers CC held on Farm Koedoeskloof, Griekwastad, and exercises same until such time as the arrears of R60 0000.00 occupation fee had been settled in full.
>
> Our instructions are that should your client unlawfully remove the assets our client will bring a special application, the costs of which your clients will be held liable."

[14] Sikhova and Hard Rock submitted that what can be distilled from the letter above is that the denial of access had been on two bases. First, that Sikhova owed QCK R60 000 occupation fees and had deliberately ceased exploration activities on the property. Secondly, that the Surface Use Agreement was summarily cancelled consequent upon the alleged breaches, thus Sikhova and Hard Rock were informed that QCK was exercising its right of retention over all Sikhova's assets until the arrear of R60 000 had been paid. Sikhova and Hard Rock maintain having paid the arrear on 28 January 2020 and denied having ceased exploration activities.

[15] As already discussed, QCK and Lore dispute the existence, validity and enforceability of the JV and the Surface Use Agreement. To the extent that the JV may be said to have been valid, which QCK and Lore deny, they intimated that Sikhova and Lore were joint parties to the agreement and further that the

rights arising from the said agreement (if any) accrued to the said parties jointly and could not be exercised by Sikhova to the exclusion of Lore. They further deny that the Surface Use Agreement gave the respondents access to the farm to exploit mineral resources, for their own benefit. They assert that the Surface Use Agreement was cancelled not only because of the breach but also on the basis that Lore was never a party thereto. They further contended that the payment by Sikhova, which was for past access, was made following the cancellation of the Surface Use Agreement, to the extent that it existed, which QCK and Lore deny.

[16] Reference is also made in the papers to a "new joint venture agreement" concluded between Dulostyle and Lore (the third agreement) which concerned the exercising of the prospecting rights in issue by Dulostyle which also took occupation of the portion of the farm for that purpose. It is on that basis that Sikhova and Hard Rock claim that Dulostyle equally despoiled them, alternatively that it occupied the farm unlawfully and had to vacate the prospecting area.

The relief sought in the court a quo

[17] Sikhova and Hard Rock sought an order in the court a quo directing QCK to restore to them, *ante omnia*, immediate peaceful and undisturbed possession of the farm, including their machinery and equipment that were still on the farm. The same spoliatory relief was sought against Dulostyle, alternatively, that Dulostyle vacate the property. They also sought a declarator that the JV between Lore and Dulostyle was unlawful and of no force and effect. Further consequential relief pertaining to costs of the application against QCK but also against Lore and Dulostyle, in the event of opposition, was sought. In addition, QCK, Lore and Dulostyle sought an order striking out the whole of the replying affidavit or the greater part of its paragraphs.

[18] On the date of the hearing of the applications Sikhova and Hard Rock abandoned the declaratory relief. The multifarious disputes regarding the validity and enforceability of the JV and the Surface Use Agreement were largely central to the declaratory relief that Sikhova and Hard Rock sought against Lore and

Dulostyle. That relief, as already mentioned, was aborted. What thus remained for consideration in the court a quo was the appellants' application to strike out; the respondents' spoliation application and the ancillary relief attendant to the costs of the applications.

The judgment of the court a quo

[19] In a judgment that stretches over 63 pages the court a quo found that Sikhova gained access to the farm and its prospecting area in mid-August 2019 with its machinery and equipment; it conducted mining activities on the farm from mid-August 2019 to December 2019 and had been in peaceful and undisturbed possession of the portion of the farm. The court held that Sikhova was denied access to the farm from January 2020 in that QCK, whom Lore made common cause with, refused to open the gate(s) which remained locked. The denial of access, the court found, was manifested in the cancellation of the agreements, which act was used by QCK and Lore to prohibit Sikhova and Hard Rock from accessing the farm and to remove the machinery. The court held that the acts were carried out without any court order authorising the ejectment and that Sikhova had never consented to vacating the farm. Accordingly, so the court reasoned, the denial of access amounted to wrongful dispossession of the farm. It rejected the appellant's submission that Sikhova and Hard Rock had abandoned the farm as speculative and unsustainable.

[20] As regards Dulostyle, the court a quo held, that it "gained possession of the mining area based on a "new joint venture" between [itself] and [Lore] with the permission and authority of [QCK] . . . [it] literally [stepped] in and [gained] the benefit of the spoils". The bona fides of Dulostyle's occupation of the prospecting site, it held, were questionable. It was on the aforesaid bases that the court a quo granted the spoliation order against QCK and Dulostyle.

[21] Turning its attention to the appellant's application to strike out the whole of the replying affidavit or the greater part of its paragraphs that court reckoned that the affidavit in issue had three parts. The first part, it found, was a fair and necessary exposition of the status of the case because it outlined the chronology of the

process followed from the date of service of the application. The layout assisted the court in revisiting the various allegations set out in the papers. The second part, the court concluded, was necessary as it addressed the allegations made by QCK and Lore which were denials of a general and vague nature. This, the court found helpful in determining where the balance of probabilities laid. The third part, albeit repetitive, the court held were responses to the answering affidavit and had been within permissible limits.

[22] The court a quo went on to hold that the averments in the replying affidavit contradicted many of the allegations contained in the QCK and Lore's answering affidavit and was of the view that QCK and Lore ought not to have complained of prejudice in the circumstances where their assertions were corrected and shown to have been untenable. Accordingly, the court dismissed the application to strike out with costs.

[23] Finally, the court a quo awarded costs to Sikhova for its success with the spoliatory relief. In respect of the aborted declaratory relief the court ruled that Sikhova and Hard Rock bear Dulostyle's costs. It made no similar order in favour of Lore, which had also opposed the declarator. The court reasoned that Mr Jan Erasmus, the sole member of Sikhova and the sole director of Hard Rock, deposed to the founding papers on behalf of both entities and there was no one, who independently deposed to an affidavit, representing Hard Rock. Insofar as Hard Rock was incorporated around January 2020, the court was of the view, it could not be mulcted in costs save for costs in respect of the abandoned declaratory relief.

Discussion on the application to strike-out

[24] As already alluded to, QCK, Lore and Dulostyle brought an application in the court a quo to strike out Sikhova and Hard Rock's replying affidavit in its entirety as constituting an abuse of court process. In the alternative, they sought an order that the greater portions of the affidavit be struck out as impermissible and or vexatious. The founding and the answering affidavit comprise 27 and 36 pages, respectively, appendices excluded, whereas the replying affidavit occupies a

staggering 56 pages, appendices excluded, (almost as long as the founding and answering affidavit combined).

[25] It is trite that two requirements must be met before an application to strike out can succeed in terms of rule 6(15) of the uniform rules. First, the matter sought to be struck out must be scandalous, vexatious or irrelevant; and secondly, the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced.[2] In *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd*[3] Schutz JA made this poignant and apt observation:

> "In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them."

[26] A respondent has the right to know what case he or she has to meet and to respond thereto, thus the general rule, although not absolute, is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. In exceptional circumstances a court may in the exercise of its discretion allow a new matter in a replying affidavit.[4] The primary purpose of the replying affidavit is to put up evidence which serves to refute the case made out by the respondent in its answering affidavit.[5] This is particularly so in spoliation proceedings where speedy relief is given upon the simple facts of possession

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[2] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733B; *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) para 27.
[3] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 80.
[4] *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) para 13.
[5] *Standard Bank of South Africa Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) para 21.

and dispossession which involves, or should involve, short affidavits filed expeditiously on those very limited issues.[6]

[27] It was not open to Sikhova and Hard Rock to regurgitate, in their replying affidavit, by means of a prelude which stretched over four pages, the case put up in their founding papers. In my view, paras 2.2 to 2.3.6, the prelude or so-called brief statement of Sikhova and Hard Rock's case, defeats the legitimate purpose of a replying affidavit and falls to be struck out.

[28] In paras 2.4 to 2.11 of their replying affidavit (which comprised about 12 pages) Sikhova and Hard Rock impermissibly and extensively subjected QCK and Lore's answering affidavit to their own argumentative and misdirected assessment prior to refuting the specific averments contained therein. The court a quo erroneously lauded the approach adopted by Sikhova and Hard Rock as having been helpful to it. In my view, the specified paragraphs are argumentative in nature and ought to be struck out.

[29] From paras 3 to 49 (the so-called part three of the replying affidavit) Sikhova and Hard Rock set out responses to specific paragraphs of the answering affidavit and its two supporting affidavits. QCK, Lore and Dulostyle urged that several paragraphs, in this part of the replying affidavit, in particular, paras 3.2, 33, 10.2, 12.2 to 12.5, 13.2 and its subparagraphs, 21.1.2, 25.2 and its subparagraphs, 27, 29,30, 31,33 to 36, 40 and 48 and all their subparagraphs, be struck out as they contain only argumentative matter; a new matter that should have been contained in the founding affidavit; or inadmissible evidence that ran counter to the parole evidence rule.

[30] Some of the assailed paragraphs in part three of the replying affidavit relate to the abandoned declarator and some, which seek to refute the averments contained in the answering affidavit, for the most part, are either argumentative, repetitive or seek to introduce new evidence. This ought to be strongly deprecated. However, I am unpersuaded that the impugned paragraphs should

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[6] *Willowvale Estates CC v Bryanmore Estates Ltd* 1990 (3) SA 954 (W) at 961E–F

be struck out. It is so that an applicant is entitled to file a replying affidavit. Even though the averments are inelegantly phrased it is to be borne in mind that Judges do disabuse their minds of any vexatious, scandalous or irrelevant matter contained in the affidavits.[7] For this reason the application to strike out the identified paragraphs in part three of the replying affidavit ought to fail. It follows that the application to strike out should succeed only in part.

Discussion on the spoliatory relief

[31] The spoliation application was launched on 23 September 2020, some nine months following the spoliatory event of early January 2020. Although this ought not to be taken as consistent with acquiescence in the dispossession, the delay is inordinate. The established principle is that spoliation must be adjudicated upon *ante omnia* and thus speedily.

[32] The requirements for spoliation are *(a)* peaceful and undisturbed possession of a thing; and *(b)* unlawful deprivation of such possession.[8] As I see it, insofar as Sikhova had gained access to the farm and conducted some mining operations, the determination of possession does not arise because it was established. What ought to be considered is the unlawful deprivation of possession. On this aspect the evidence as contained in the affidavits raised disputes of fact which QCK and Lore contended both in this Court and in the court a quo that they warranted to be interrogated through the prism of the time-honoured rule in *Plascon-Evans.*[9]

[33] The spoliation relief sought against QCK and Dulostyle was final in effect. In terms of the *Plascon-Evans* rule, where disputes of fact arise on the papers, subject to certain exceptions, a court would ordinarily rely on evidence given by the deponents for the respondents, in this case QCK and Lore.[10] The approach

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[7] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734A-C.
[8] *Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) para 5.
[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 – 635
[10] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) (2008 (2) SACR 421; [2008] ZACC 13) para 8.

was restated by Harms DP in *National Director of Public Prosecutions v Zuma*[11] as follows:

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule [*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 – 635] that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

[34] It is to be remembered that the event of spoliation, as articulated in the founding papers, was that QCK denied Sikhova and Hard Rock access to the farm "by having removed the mutually available key from the chain locks on the gate to the property and replaced it with its own locks."

[35] QCK and Lore contended that in the absence of prospecting rights founded on a valid Surface Use Agreement being available to Sikhova and Hard Rock their conduct in giving effect to the Surface Use Agreement was unlawful. QCK stated that Sikhova "probably abandoned the site where it had previously prospected unlawfully when it could no longer avoid the fact that its conduct was unlawful." More crucially, insofar as Sikhova and Hard Rock had alleged that there had been a mutually available key for the lock on a single gate to the farm that was removed and replaced by QCK, QCK demonstrated that there was more than one gate to the farm for the shared use by itself and Sikhova which fact was acknowledged by Sikhova in its replying affidavit. The true facts, QCK stated,

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[11] 2009 (2) SA 277 (SCA); (2009 (1) SACR 361; 2009 (4) BCLR 393; [2009] 2 All SA 243 (SCA) para 26.

were that Sikhova had installed its own gate to gain access to the portion of the farm, which gate Sikhova had its own key. It denied the existence of a mutually available key that could be removed and gainsaid that it replaced Sikhova's lock with its own.

[36] There appears to be no good reason to regard as untrue QCK and Lore's version. More so because Sikhova and Hard Rock did not in their reply place in dispute that Sikhova had its own lock. Instead, in their prolix replying affidavit Sikhova and Hard Rock put up a case at variance with the case they made out in their founding papers. This is what their deponent, Mr Jan Erasmus, intimated:

> "29.1 During the period mid-August 2019 to date on which the applicants were denied access to the property the arrangement between [Sikhova] and QCK was that the keys to the locks at the various gates were left, as mutually available keys, hanging behind the gate post where [Sikhova] could easily have reached it.
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> 29.2 However, on our return to the property during January 2020 it was discovered that the keys had been removed from where they were left during the period [Sikhova and Hard Rock] were conducting their operations on the property.
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> 29.3 Having noticed that the keys were so removed I assumed that the locks on the gate to the property had been removed and replaced with [QCK's] own locks."

[37] Apparent from the above excerpt Sikhova and Hard Rock admitted that there was more than one gate, reference is made to "various gates". They mentioned, for the very first time in their replying affidavit, that the keys were ordinarily "left hanging behind the gate post" where [Sikhova] could have easily reached them. This new evidence was clearly prejudicial to their opponents who could not have filed a further affidavit in response without the court's leave. Sikhova and Hard Rock also "assumed" that the lock on the gate to the property had been removed and replaced by QCK. That the antagonists locked the gates, as stated in the founding papers, was no longer factual but based on an assumption.

[38] A reading of the court a quo judgment shows that it was alive to the existence of the disputes of fact on the crucial evidence that pertained to the alleged act of

spoliation. This notwithstanding, the court did not subject these disputes to closer scrutiny. It impliedly took a robust view of the matter and labelled QCK and Lore's version (the respondents' in the court a quo) as vague and untenable without any substantiation.

[39] The alleged act of spoliation and unlawful deprivation of possession, in the present case, must also be viewed contextually having regard to the events that followed it. Some of the contemporaneous written exchanges between the parties provide useful exposition. In a letter of 23 January 2020 by Sikhova's erstwhile attorneys, Odendaal & Kruger Attorneys, to Ms Labuschagne, QCK's erstwhile legal representative, a proposal was made to purchase the farm from QCK. More strikingly, no mention is made of any spoliation, an issue which was supposed to have been the main point of contention at the time.

[40] In a further letter of 28 January 2020, the attorneys for Sikhova requested QCK's attorneys to provide written confirmation that it would not prevent Sikhova from carrying on with the exploration work. Once more no mention is made of any act of spoliation. A letter dated 17 March 2020 (which runs into five pages) by Sikhova's attorneys to Lore was apparently meant to clear some misunderstandings around the Surface Use Agreement and the attempt by Sikhova to buy the whole farm from QCK. The letter called for an urgent meeting to resolve contractual disputes – again nothing was said about spoliation, the matter of the moment.

[41] It was only 6 months later, on 26 June 2020, when Sikhova and Hard Rock's new attorneys took over, that it was mentioned in their letter directed to QCK attorneys, for the very first time, that Sikhova and Hard Rock had been despoiled. Still, nothing in this letter was said regarding the alleged act by QCK to change the lock. Instead, the act of spoliation was said to have its genesis in the cancellation of the Surface Use Agreement. It reads in part:

"9. In view of the aforegoing history of the issues involved in this matter, it is in our view apparent:

9.2 that your client has, contrary to, particularly clause 12 of the Surface use, Access and Mining Royalty Agreement, unlawfully denied our client access to the farm and furthermore cancelled the Surface Use Access and Mining Royalty Agreement, which amounts to an unlawful spoliation and has, in so doing, caused our client's suffering losses amounting to millions of rand."

[42] The above cancellation of the Surface Use Agreement through Ms Labuschagne's letter of 25 January 2020, in addition to the alleged changing of the lock, appeared to have weighed with the court a quo as an act of spoliation although in its judgment on leave to appeal the court stated that Sikhova did not rely on the cancellation as constituting an act of spoliation. In its main judgment the court remarked:

"Objectively therefore, on the facts at the disposal of this Court, that gate to the property remained locked and denied the first applicant at least, any access as from January 2020 until at least March 2020, and which denial of access to the said property was further manifested in their [the respondents] respective "cancellation" of the two agreements as afore-stated, which cancellation was used by both the first respondent and the second respondent to, in express terms, prohibit the applicants...from accessing the property.."

[43] In *Bisschoff and Others v Welbeplan Boerdery*[12] reliance had been placed on a letter which called for cancellation of a contract for breach as constituting an act of spoliation. It was there held that the mere use of 'strong and unequivocal' words in a letter, that a person should not trespass upon land, does not constitute deprivation, let alone unlawful deprivation, of possession of the land. The SCA held that by instructing their attorneys to write to the respondent, the appellants did no more than exercise their contractual rights of cancelling the lease agreements. One of the consequences of cancellation, as the appellants saw it, was that the respondent was not entitled to remain in possession of the property. The SCA further quoted with approval the Namibian decision in *The Three*

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[12] Ibid, Fn 8.

Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and Others[13] where it was said:

> "Describing the contents of the letter . . . of 28 August 2006 or the addressing of that letter to appellant as an act of spoliation is, in my opinion, stretching the meaning of the word spoliation beyond permissible limits, grammatically speaking, or is an interpretation beyond what common sense would allow. The most one can say of that letter is that it constitutes a threat and appellant's remedy for that would be no more than to seek an interdict against Respondent, as nothing done by the letter makes the principle *spoliatus ante omnia restituendus est* applicable."

[44] The principles adverted to in the above decisions apply equally to the present matter. In concluding as it did, the court a quo erred because spoliation is not available for threatened deprivation of possession. It is a remedy aimed at the actual loss of possession.[14] Its finding with regard to Dulostyle, as already discussed, was that its possession was questionable. Relying on the decisions of the High Court in *Malan v Dippenaar*[15] and *Painter v Strauss*[16] the court a quo held that even a bona fide possessor of a spoliated property may be ordered to restore possession of the property so spoliated. The view expressed in *Malan* and *Painter* is certainly not definitive because there is a differing opinion to the effect that spoliation does not lie in circumstances where possession of the property had passed into the possession of a bona fide third party.[17] In *Monteiro and Another v Diedricks*[18] the SCA found it unnecessary to enter upon the terrain of the academic controversy regarding the availability, in principle, of the remedy under those circumstances. It held:

> "That is so because the *mandament* by its nature may involve either mandatory elements, such as the delivery of movable property, or prohibitory elements, as in the case where a party is restrained from preventing certain steps being taken to restore

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[13] NASC SA 3/2007 ([2008] NASC 15).
[14] Ibid, Fn 8 *Bisschoff and Others v Welbeplan Boerdery* para 7.
[15] 1969 (2) SA 59 (O) at 65G – 66A.
[16] 1951 (3) SA 307 (O).
[17] *Burnham v Neumeyer* 1917 TPD 630 at 633; *Jivan v National Housing Commission* 1977 (3) SA 890 (W) at 894A – 896G.
[18] 2021 (3) SA 482 (SCA) para 21.

possession. Where the order cannot be carried into effect, it cannot, competently, be granted. Whether the order can be carried into effect is a question of fact to be determined by the court asked to grant an order."

[45] On the very limited evidence available following the alleged spoliatory incidents, Lore had concluded a new joint venture agreement with Dulostyle which took possession of the prospecting area. Clearly, Dulostyle could never have been the spoliator. There is also no evidence to suggest that it did not become the new possessor in good faith or took the law into its own hands.

[46] With regard to the machinery and equipment, the facts speak for themselves. It is so that in a letter dated 25 January 2020 by Ms Labuschagne QCK purported to exercise its right of retention over Sikhova's assets subsequent to Sikhova's alleged breach. However, in a letter dated 12 March 2020 by Lore to Sikhova, Sikhova was notified that the JV was cancelled. More relevant for present purpose, Sikhova was also instructed to remove its equipment from the property within a period of 21 days. It may well be that the instruction was absurd, as Sikhova and Hard Rock argued, because Lore had no authority over the farm or machinery. However, by means of an e-mail dated 22 July 2020, Ms Labuschagne informed Sikhova's attorneys:

"...(Y)our client [Sikhova] contacted our client directly to remove his machinery from the property and was requested to arrange for [the] removal of the machinery through our offices...

You are requested to furnish us with a list of machinery your client intent to remove from our client's property as well as information on persons and/or representatives who will assist in removing the machinery and equipment"

Apparent from the above correspondence, it remained open to Sikhova to collect its assets from the farm. As for Hard Rock, there could hardly have been any act of spoliation against it because it was incorporated and registered only on 21 January 2020, following the alleged spoliatory events.

[47] On the aforegoing analysis, the court a quo erred in concluding that Sikhova and Hard Rock had been unlawfully deprived of possession. Its order stands to be set aside on this score.

The question of costs

[48] On the conclusion I have come to, in respect of the application for condonation and the reinstatement of the appeal, in the normal course, a party who seeks an indulgence from the court ought to bear the costs. I have already found that the prolix opposition to the application for condonation and reinstatement of the appeal was fastidious. Therefore, it follows that Sikhova and Hard Rock ought to pay those costs. The costs of the appeal itself including costs in respect of the application for leave to appeal present no difficulty and must follow the result.

[49] That leaves costs in the court a quo. An appeal court will not lightly interfere with the exercise of the discretion of a court of first instance which granted costs, even where it is of the view that it would itself have made a different order. It will only interfere in the event of a misdirection or irregularity, or if there was an absence of grounds on which a court, acting reasonably, could have made the order in question.[19] As already alluded to, the declaratory relief was aborted on the morning of the hearing of the application. It was contended for Lore that it had, like Dulostyle, opposed the abandoned declarator but the court a quo awarded costs in respect of that relief in favour of Dulostyle excluding Lore. The differential treatment, so it was argued, was unjustified.

[50] In its main judgment there is a dearth of reasoning by the court a quo why Lore was deprived of its costs. However, in the leave-to-appeal judgment, the court a quo took issue, in the main, that Lore made common cause with QCK and Dulostyle in opposing the whole application. The reasoning is unpersuasive and certainly does not explain why Lore had to be deprived of its costs. Lore, like Dulostyle, having opposed the application, and in particular the aborted relief,

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[19] *Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd* 2023 (4) SA 568 (SCA) para 36; see also *Mngomezulu v Ethekwini Metropolitan Municipality* [2019] JOL 42098 (SCA), para 25.

was entitled to its costs in terms of the normal rule which is to the effect that when relief is abandoned a party so abandoning should pay the costs of the other party. However, I am not swayed that such costs should be on a punitive scale as contended for by QCK and Lore. Insofar as the court a quo made no costs order for the benefit of Lore, in respect of the abandoned declarator, it did not exercise its judicial discretion properly which merits our intervention. Insofar as I have determined that the application to strike out ought to have succeeded in part, I am of the view, that each party should bear its own costs. In the result, the following order is made.

Order:

1. The application for condonation and reinstatement of the appeal is granted with costs;

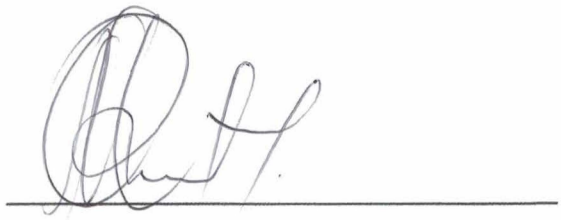
2. The appeal is upheld with costs including costs of the application for leave to appeal and costs consequent upon the employment of senior counsel where so employed;

3. The order of the court a quo is set aside and in its place is substituted the following:

   '1. The application is dismissed with costs including costs consequent upon the employment of senior counsel, where so employed.

   2. The applicants are ordered to pay the costs of Lore Trade and Investment (Pty) Ltd and Dulostyle (Pty) Ltd, the second and third respondents, in respect of the declaratory relief, including costs consequent upon the employment of senior counsel, jointly and severally the one paying the other to be absolved.

   3. The application to strike out is upheld in part with no order as to costs.'



Phatshoane AJP

Nxumalo J and Olivier AJ concur in the Judgment and order of Phatshoane AJP

Appearances:

For the appellants:	Adv SD Wagener SC
	Instructed by Van De Wall Inc, Kimberley.
For the respondents:	Adv J Hershensohn
	Instructed by Haarhoffs Inc, Kimberley.