REPORTABLE

CASE NO.: I 844/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ROSTOCK CC **FIRST APPLICANT**
LA PLATA FARMING (PTY) LTD **SECOND APPLICANT**

and

A J VAN BILJON **RESPONDENT**

CORAM: **HEATHCOTE, A.J**

DELIVERED ON: **14 JUNE 2011**
REASONS ON: **05 AUGUST 2011**

REASONS

HEATHCOTE, A.J: .

[1] On 14 June 2011, I granted the following order against the respondent in favour of the first applicant:

> **"Pending the final determination of the action in the High Court of Namibia in case no I 844/2010 ("the main action"), the Respondent is interdicted from removing any stone of whatsoever nature from the farm Rostock North 393, registration division K, district of Windhoek, north of the C26 road and east of the C14 road, personally or through employees or any person on his behalf."**

[2] I said that I would provide reasons. They follow.

[3] The first applicant's ("applicant") farm is pristine land. Words cannot describe it, but a photograph can;

(The image available in the PDF version of the judgment)

[4] It is in respect of this property which applicant instituted action for eviction against the respondent, who continued to mine on the property, despite the fact that applicant allegedly cancelled the surface agreement in terms of which respondent originally obtained the right to mine on the property. After pleadings closed, applicant brought this interlocutory or incidental application to procure the land pending the outcome of the action.

[5] The right to mine has as its principle element the *"ius abutendi"*. In Drimiotis v Du Toit 1969(1) SA 631(T) it was stated that the *ius abutendi* includes;

“the right to destroy or use up the res all together during the term of the “lease””

[6] Article 100 of the Namibian Constitution provides as follows;

“Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned”.

[7] The Minerals (Prospecting and Mining) Act 33 of 1992, (“the Act”) provides as follows in section 2;

“Subject to any right conferred under any provision of this Act, any right in relation to the reconnaissance or prospecting for, and the mining and sale or disposal of, and the exercise of control over, any mineral or group of minerals vests, notwithstanding any right of ownership of any person in relation to any land in, on or under which any such mineral or group of minerals is found, in the State.

[8] It is often said that the State owns all mineral rights. In other words, the concept **“belonging”** as used in article 100 of the Constitution, is understood to mean the same as private ownership. With respect, I cannot agree with such a statement.

[9] Article 100 should be read subject to the provisions of the Constitution, particularly Article 1(2) thereof which provides that;

> **"All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State."**

[10] In my view, the State does not own mineral rights in the sense that it can be equated with the rights of a private owner. The natural resources referred to in article 100 of the Constitution, belong to the people. Belonging is not necessarily the same as owning. The Namibian minerals are either *res publicae* or *res omnium communes*. It is simply administered by the State on behalf of the Namibian people.

[11] The debate about what belonging means, in this context, is ancient;

> **"According to Gaius in Digesta 1.8.1 pr: *nullius in bonis esse creduntur*. These things belonged to no one in ownership (*nullius in bonis esse creduntur*), but were those of the whole world (*ipsius enim universitatis esse creduntur*). In the discussion of the things belonging to the whole world no reference was made to the concept ownership. This could have created the indication that these goods were *res omnium communes*. It was therefore not the property of a person or common property of all persons. It was, at the most, available for common use (*universitates*)."**[1]

[1] Water Law, Hubert Thompson; page 17 vn 2.

[12] In Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others 2004 NR 194(SC)(at page 219 par G), the following was stated;

> **"In respect of the rights of a license holder to mine "before a license holder can begin to exercise any of his rights he must enter into a written agreement with the owner of the land which must contain terms and conditions relating to the payment of compensation to the owner."**

[13] Accordingly, for any person to mine lawfully, a contract to do so should be entered into with the surface owner. In the absence of such contract, no right to mine can be exercised.[2]

[14] In this matter, the respondent indeed entered into such an agreement ("the surface agreement") with the applicant. The agreement was entered into in terms of section 52 of the Minerals (Prospecting and Mining) Act 33 of 1992 ("the Act"). The relevant clauses, for purposes of this judgment, provide as follows;

"AGREEMENT

between

ROSTOCK CC Registration Number CC 2003/1743

[2] The only other process to obtain such a right is dealt with in section 110(4) of the Minerals (Prospecting Mining) Act 33 of 1992, which is not relevant in this case.

Herein represented by CHRISTOFFEL LOMBARD DE JAGER and ALAN BURNS LOUW hereinafter referred to as ROSTOCK

and

***ALBERTUS JACOBUS VAN BILJON** herein after referred to as ("Van Biljon")*

1. ***PREAMBLE***

1.1 *Van Biljon has, per Annexure "A" hereto, under registered numbers 66637-66641 on the 13th of June 2007, acquired mining claims in terms of Section 36(1)(d) of the Minerals (Prospecting and Mining) Act, 33 of 1992 on the farm ROSTOCK NO 393 which is the registered property of ROSTOCK CC under Deed of Transfer No T2484/1972.*

1.2 *Van Biljon acknowledges that he acquired the same claim numbers from the previous holder, FJP van Biljon and declares he is aware of the fact that the latter van Biljon:*

1.2.1 *Failed to enter into a written agreement with ROSTOCK as required by law;*
1.2.2 *Failed to compensate ROSTOCK as required by law;*
1.2.3 *Failed to rehabilitate the claims worked by him as required by law.*

1.2 ***THEREFORE:*** *ALBERTUS JACOBUS VAN BILJON as signatory to this Agreement in order to indemnify F P J van Biljon from claims by ROSTOCK resulting from the breaches as set out in paragraph 1.2.1, 1.2.2 and 1.2.3 above and also to comply with the provisions of the Mining Act referred to in paragraph 1.1 above, hereby enters into a written agreement with ROSTOCK as required by Act 33/1992 as follows:*

2.

2.1 *ALBERTUS JACOBUS VAN BILJON acknowledges that he is responsible for rehabilitation of the claims aforesaid resulting from exploitation of the claims by his predecessor and also rehabilitation resulting from exploitation of the claims conducted by himself.*

2.2 *Van Biljon agrees that he is not entitled to exercise his rights in terms of the legislation aforesaid until such time as he has entered into a written agreement with ROSTOCK CC as owners of the farm.*

2.3 ROSTCOK CC as owners of the farm ROSTOCK NO 393 acknowledges that they are the servient tenement under the mining claims aforesaid.

2.

2.4.1 For the present Van Biljon will only work Claims No 3 and 7 and will in the process rehabilitate Claims Numbers 4 and 5 under a schedule of rehabilitation to be presented to ROSTOCK at call from ROSTOCK.

2.4.2 *Once rehabilitation of Claim No 5 has taken place, Van Biljon shall be entitled to work and exploit such claim.*

2.5 In exercising his claim rights referred to in paragraph 1.1 above, Van Biljon will:

2.5.13 *provide –*

- *suitable accommodation*
- *recreational facilities*
- *sufficient food reserves*

for his employees.

6.1 Van Biljon will within one month after the signing of this agreement submit to ROSTOCK a written proposal regarding the rehabilitation of the area of the claims referred to in paragraph 1 above.

6.2 Van Biljon will comply with Section 130 of the Act in respect of rehabilitation.

8. Any non-compliance with the terms of this agreement will constitute a breach of this agreement resulting in the termination of this Agreement."

[15] It is clear from clause 8 of the agreement, that the parties agreed, in essence, that all terms of the agreement are regarded as material terms. A breach thereof may, without further ado, lead to cancellation.

[16] In due course and after the mining agreement was entered into, the applicant cancelled the agreement, claiming that the respondent breached

various terms of the agreement. It is not necessary to deal with all the allegations concerning the respondents' alleged breaches.

[17] The applicant alleged that the respondent, amongst others, breached the following obligations;

[17.1] the respondent failed to rehabilitate the land.

[17.2] the respondent failed to provide suitable accommodation to his employees.

[18] I now deal with the allegations that the respondent was failing to comply with his rehabilitation obligation. The agreement is quite clear on this aspect. Rehabilitation had to start immediately. This is what applicant said in it's founding affidavit;

"The defendant failed to rehabilitate the land in conflict with clauses 1.2.3, 1.2, 2.1, 2.4.1, 2.4.2, 6.1, 6.2 of the agreement I have quoted above.

[19] To this respondent replied:

"I have no rehabilitation obligation yet. My activities are ongoing; and

> **"For the event that I am unable to prove that I have complied with this term and other similar terms, I have instructed my legal practitioners to amend my plea so as to provide for an alternative plea of waiver of this provision on the part of 1st applicant."**

[20] In my view, these general denial contained in the respondent's affidavit, can only be described as shocking. There is a fundamental difference between pleadings and filling of affidavits. This should also be remembered by legal practitioners drafting affidavits. There is no such thing as a **"tactical denial under oath"**, or the **"right to make inconsistent allegations in the alternative"**. That much has been resolved as far back as 1949 in Room Hire Co (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd 1949 (3) SA 1155, when Murray AJP, said the following at page 1165;

> ***"any tactical advantage which a respondent might have had in the event of the institution of a trial action – e.g. the right to make tactical denials to force his opponent into the witness box, the right to make inconsistent allegation, must perforce yield to applicant's recognized right to the more expeditious and less expensive method of enforcing a claim by motion".***

[21] As far as the accommodation of employees is concerned, the applicant alleged;

“In breach of clause 2.5.13 of annexure ‘1’ (the surface agreement quoted above) **the defendant failed:**

(a) to provide suitable accommodation to his employees;

(b) to provide sufficient food and water to his employees;

(c) to provide recreational facilities to his employees

Annexures “20” and “23” depict the accommodation of the respondent’s employees. <u>There are no windows or ventilation in a very hot climate. The structure is of tin and accommodates six persons</u>. This is in conflict with the agreement which requires the respondent to provide suitable accommodation to employees.”

[22] In support of allegations that respondent was in breach of the material obligation to provide suitable accommodation, (i.e. not properly ventilated at all), the applicant produced these photographs;

(The images available in the PDF version of the judgment)

[23] To this, respondent replied:

“The structures are properly ventilated.”

[24] The response just quoted is bizarre. It is also patently false. Those who make it their business to strive for riches by reaping the fruits of minerals, (which belong to the people), should not be allowed to have their employees living in cages like animals.

[25] It is not necessary to quote the well known principles applicable to interim interdicts. Suffice it to say, that I am satisfied, given the respondents bizarre replies to the two aspects (rehabilitation and accommodation) that applicant has a very strong case that the agreement was validly cancelled.

[26] Given the fact that the very purpose of mining is to abuse or to “use up” the applicant’s land, I have no difficulty in concluding that the balance of convenience (even if it were to be applicable) favours the applicant and that applicant has no alternative remedy but to procure and protect its asset pending the outcome of the main action.

[27] I was accordingly prepared to grant the interim relief on the merits. But there is a further reason why I was prepared to grant the relief set out in paragraph 1 of this judgment; *Res Litigiosa*.

[28] In Coronel v Gordon Estate and G.M. Co 1902(TS)(95), Innes CJ dealt with an application for an interdict to restrain the respondent from alienating or encumbering a certain mijnpacht which was registered in respondent's name. The respondent entered into an agreement to sell the mijnpacht to a third party after the applicant issued summons against the respondent for transfer of the mijnpacht to it. The interdict application was lodged after applicant issued summons against respondent, but before pleadings were closed. The applicant contended that it was entitled to the interdict on two grounds. Firstly, on the merits (where the normal interdictory relief principles would find application); and secondly, on the basis that the matter was *res litigiosa*, and therefore, applicant was entitled to secure its rights pending the finalization of action the pending action.

[29] The court held that, on the merits of the case, the application could not succeed. Innes C.J. , then went on to consider the issue of *res litigiosa.* He confirmed that, under Roman Law, any right which was *res litigiosa* could not be alienated. With reference to Roman Dutch Law, he held that the weight of the authority pointed towards a conclusion that *res litigiosa* could be alienated, provided that, if an applicant (such as in that case) was successful in his action, its rights could be enforced against the third party to whom the *res litigiosa* was alienated. As to exactly when the *res* forming the subject matter of the dispute in the action becomes *res litigiosa*, he held that the exact moment would be *litis contestatio* (i.e. in our law, the moment the pleadings closed).

[30] As the pleadings in the matter before Innes C.J. were not closed, the doctrine of *res litigiosa* did not find application. The applicant's interim interdict was accordingly refused.

[31] Although Innes; C.J. was sitting alone in the Coronel-case, it comes as no surprise that, what he said, was regarded as quite authoritative for many years to follow.

[32] In Blue Cliff Investments (Pty) Ltd and Another v Griesel and Others 1971(3)SA (CPD) 93, Watermeyer, J; also dealt with the principles applicable when there is an alienation of *res litigiosa*. The farm Stofbergsfontein had approximately 20 co-owners in various undivided shares. Applicant, the largest undivided share holder, instituted action against his co-owners for the partitioning of the farm. Some co-owners filed pleas while others abided the decision of the court. Two parties entered into an agreement with some of the co-owners to purchase their undivided shares. The agreements became effective after summons was issued, but prior to the close of pleadings in the action. Two parties who entered into the agreements to purchase undivided shares from current co-owners, then applied to intervene in the pending action.

[33] The court, Watermeyer; J, had no difficulty in holding that the applicants (for intervention) had a direct and substantial interest in the partitioning suit, and they would, under normal circumstances be allowed to join. The question which arose however, was whether the substantive law regarding the principles of *res litigiosa* allowed such intervention.

[34] In essence, I understand the question which Watermeyer; J, had to decide as follows; if the principles of *res litigiosa* as explained by Innes C.J. in the Corronel-case found application as from the moment the pleadings were closed, then, there would be no need (as a matter of substantive law) to join the two parties who sought intervention. However, if the principles of *res litigiosa* found application from the moment of citation, then the joinder application would be successful.

[35] After referring to various old authorities, Watermeyer; J, concluded that the *actio communi dividundo* (i.e. the partitioning proceedings instituted in the pending action) was not an action *in rem* in the ordinary sense of the term. Rather in an action for *communi dividundo*, the rule with regard to personal, rather than real actions applied. As the authorities were clear to the learned judge, he held that the principles of the *res litigiosa* doctrine, find application in personal actions from the moment the pleadings were closed whereas, in actions *in rem*; the principles of the *res litigiosa* doctrine find application as from the moment of citation (i.e. summons was issued). As a result, the joinder application succeeded.

[36] On my reading of the Blue Cliff Investments-case, and the many authorities referred to therein, a number of legal principles become apparent;

[36.1] Firstly, Watermeyer; J, agreed with Innes C.J. that the effect of the *res litigiosa* principle is that; in our law a defendant may alienate

res litigiosa, but the rule is subject thereto that the rights of the plaintiff should not be prejudiced as a result of the alienation. In other words, should the alienation itself prejudice the plaintiff in the pending action, an interdict may be obtained. If the plaintiff is not prejudiced by the alienation, he does not have to obtain an interdict, but if he is successful in the action against the defendant, he may obtain the res (which formed the subject matter of the dispute) from the third party without issuing a fresh suit.

[36.2] Secondly, and without expressly saying so, Watermeyer; J, did not agree with Innes C.J. that the determinative moment (in an action *in rem*) as from which the *res litigiosa* doctrine would find application is at *litis contestation*. Rather, it is quite clear from Watermeyer; J's, reasoning that the determinative moment in actions *in rem* is the moment of citation (serving of summons); while in actions in personam, it is the moment of *litis contestation* (close of pleadings).

[37] Approximately 80 years after Innes C.J. handed down the Corronel-judgment, the case of Opera House (Grand Parade) Restaurant v Cape Town City Council 1968(2) SA 656 (CPD) served before Berman J. It is necessary to re-state the facts for proper comprehension. The respondent ("the City") expropriated applicants land. The City's intention was to develop a luxurious beach front hotel in the sought after Camps Bay area. The City took possession of the site, and demolishing of existing buildings started. This happened when

applicant was still busy with a pending action against the City in term of which applicant sought relief for the expropriation by the City to be declared invalid, and that applicant be declared to have remained the owner of the land despite the expropriation.

[38] Applicant then approached the court for interdictory relief to prevent the City from encumbering, alienating, developing, or dealing with the property.

[39] The applicant moved for the interdictory relief on two grounds. Firstly, on the merits; and secondly on the principles of *res litigiosa*.

[40] Dealing with the issue of *res litigiosa* Berman J, with thorough reference to old authorities, held the following;

> [40.1] Firstly, the pending action was an action *in rem* as it concerned a dispute about ownership of the land; secondly, he held that Innes C.J. , was wrong in the Corronel-case, when he (Innes C.J.) held that in actions *in rem*, the principles of *res litigiosa* find application as from the moment the pleadings were closed. Rather, those principles should find application form the moment of citation (or service of summons). Here he agreed with what was held by Watermeyer; J, in the Blue Cliff Investment-case; thirdly, he found that applicant would indeed be prejudiced if the city was allowed to deal with the land pending the outcome of the action. Accordingly, applicant was entitled to the interdict it sought.

[41] What is important for me to decide the case before me, is how prejudice should be determined. I agree with what Berman J, said at page 661J-662A;

> **"Much it seems to me, depends on what happens to the res on or after alienation, for if it is altered beyond restoration to its former state or condition, or if it is so altered that it would be inconvenient or costly to restore it, this would without a doubt constitute sufficient prejudice to warrant interdicting the alienation".**

[42] Applying the principle applicable to the doctrine of *res litigiosa*, I venture to suggest that the state of the Namibian Law can be summarized as follows;

[42.1] The *res litigiosa* doctrine is well and alive in Namibia.

[42.2] Where the pending action concerns an action *in rem,* the doctrine will find application as from the moment summons is served. In actions in personam, the doctrine finds application as from the moment of *litis contestatio*.

[42.3] The effect of the doctrine is that *res litigiosa* may be alienated, provided that the plaintiff in the pending action is not prejudiced by such an alienation.

[42.4] In circumstances where alienation takes place (i.e. after the doctrine becomes applicable) the third party receives such rights

subject to the outcome of the action. If the plaintiff succeeds in the action, and the *res* has been alienated, the plaintiff may, without issuing new proceedings, enforce his rights against the third party who obtained the *res litigiosa.*

[42.5] If, as a result of the alienation, the plaintiff is prejudiced, he may obtain an interdict to prohibit the alienation of the property, as of right, and without it being necessary to comply with the usual requirement applicable to interim interdicts.

[43] Applying these principles to the facts of this matter, the following become apparent;

[43.1] The applicant instituted action against respondent in the pending action for the return of his property (eviction). The action is clearly an action *in rem*.

[43.2] The defendant continued to mine despite the fact that summons was served and the pleadings have been closed. On both scores, the property under consideration is *res litigiosa.*

[44] However, respondent has not alienated the land. He is, as I have pointed out, exercising an alleged right of *ius abutendi* (using up or abusing the land).

[45] The question which arises is, what is the meaning of alienation as used by the common law writers.

[46] Professor Zeffert, in the S.A.L.J 1971 at page 405, convincingly argues that the concept “alienation” when used in our common law in conjunction with a “prohibition against alienations” included the prohibition of encumbrance by way of pledge, servitude, or emphyteusis. He states the following;

> **“In common parlance alienation means making a thing another man’s property (In re Gaskell & Walter’s Contract [1906] 2CH 1 at 10), but at civil law a prohibition against alienation often includes a prohibition of acts which do not amount to transactions which transfer property in a thing. Thus C4.51.7 specifically enacts that such a prohibition includes a prohibition against the encumbrance of property by way of pledge, servitude or emphyteusis. (See as well Voet 27.9.4). That a prohibition on alienation includes a prohibition on pledge has been recognized in South Africa: Trustees of the Insolvent Estate of Foley alias Melville v Natal Bank (1883) 4 NLR 20.”**

[47] Of course, in our law, an emphyteusis is the encumbrance of a property through a lease for ever, or in perpetuity. (LAWSA Volume 14(2), Second Edition, par 4).

[48] I have no difficulty to hold that a right to mine (which is, as I have pointed out, the right to **“use up”** or **“abuse”** the property) comfortably falls within the

meaning of **“alienating property”** as envisaged by the common law doctrine of res litigiosa.

[49] In this case, the respondent’s obstinacy to comply with his rehabilitation obligations, almost guarantees prejudice to the applicant if the mining continues, but the plaintiff is eventually successful in the main action (i.e. that the surface agreement to mine entered into between applicant and respondent was validly cancelled and that respondent should be evicted). Moreover, it is not only applicant which will suffer prejudice if mining continues. The Namibian people, to whom the minerals belong, will also suffer prejudice.

[50] But for one exception, the common law principles of *res litigiosa* are applicable to this case. The summons was issued, the pleadings closed, and the applicant would suffer inevitable prejudice if the mining continues. Based on the normal common law principles of res litigiosa, the applicant is entitled, as of right, to its interdict.

[51] However, as I have pointed out, the State, as custodian of the minerals in Namibia is also involved. Accordingly, the common law principle in relation to res litigiosa was tempered by the provisions of the Minerals Act. But only to a limited extend. In other words, while a valid contract to mine is in existence, the plaintiff in a pending action for delivery of the *res*, would not automatically become entitled to an interdict against the miner. Something more needs to be shown; that is that the mining agreement has been validly cancelled. For an applicant to do so in interlocutory or incidental proceedings (such as the case here) it would

be sufficient for the applicant to show what is required in the usual Webster v Mitchell test. That is;

> *"In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain a final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on a balance of convenience".*

[52] Where the subject matter is *res litigiosa,* and the first leg of Webster v Mitchell has been complied with by the applicant (even if it is open to some doubt that the mining agreement was validly cancelled) the applicant becomes entitled to an interdict (with no need to comply with the further requirement to obtain an interim interdict). Such a result is in compliance with the common law principles applicable to *res litigiosa,* as tempered by mining legislation in Namibia.

[53] Applying the principles of res *litigiosa* as discussed above, I am satisfied, for these reasons as well, that the applicant was entitled to the relief I granted.

_____
HEATHCOTE, A.J

ON BEHALF OF THE APPLICANTS:
Instructing Counsel for applicant: Fisher, Quarmby & Pfeiffer
Instructed Counsel for applicant: Adv. R. Tötemeyer S.C.
and Adv. H. Schneider

ON BEHALF OF THE RESPONDENT:
Instructing Counsel for respondents: Van Der Merwe-Greeff Incorporated
Instructed Counsel for respondents: Adv. P. Barnard