

IN THE HIGH COURT OF LESOTHO

In the Application of :

SWISSBOURGH DIAMOND MINES(PTY)LTD  
RAMPAI DIAMONDS (PTY) LTD

1st Applicant  
2nd Applicant

vs

LESOTHO HIGHLANDS DEVELOPMENT  
AUTHORITY

Respondent

R U L I N G

Delivered by the Hon. Mr. Justice M.L. Lehohla  
on the 2nd day of December, 1991

Mr.Farber for the applicants in both CIV\APN\198\91 and CIV\APN\206\91 the interdict and contempt applications respectively, made submissions seeking to persuade this Court to admit in evidence certain video material proposed to be played for the Court as well as a certain supplementary affidavit for purposes of highlighting and amplifying the material already filed in Court in July this year.

He submitted that the applicants recognise that there is dispute of fact on papers which precludes the granting of final relief. He thus requested that any such dispute should be referred to oral evidence.

He further asked the Court to grant interim protection pending resolution relating to issues determinable at the closure of hearing oral evidence. And further that costs thus far incurred for such determination be reserved.

The respondent opposes all these brands of relief sought by the applicants.

In motivating the applicants' search for the types of relief set out above Mr. Farber laid much store on the fact that the Court won't have to resolve the dispute of facts on papers. The Court, he submitted, would see that there is bona fide dispute of fact which should properly be referred to oral evidence.

He referred the Court to the Interim Order paragraph 4.3 of which appearing at page 233 states :

"Applicants may, together with a notice of set down as contemplated in 4.1 above, enrol the matter on one week's notice for the purpose of applying for an interim interdict in terms of Prayer A(i). In such event, Applicants may deliver a reply to Respondent's existing affidavits together with such notice of set down".

In accordance with the last provision in the above paragraph the applicants filed their replying affidavits dated 18th November with the Registrar of this Court on 20-11-91 according to what is reflected on the Civil Registry date -stamp. Paragraphs f and g at page 360 aver that the work effected in July was not limited to digging a tunnel but included serious interferences with the important gravels, indicating that the respondent is presently continuing such interference, thus putting the applicants under the

necessity to seek interim relief from this Court in order to protect their rights. Paragraph "g" makes reference to the video material upon whose basis the applicants seek to show that the respondent has not been candid, but rather even after the order was granted, it continued to remove riverbed gravels which are important to the applicants.

Mr. Farber relied on the applicants' averment at page 360 in motivating the relief sought earlier and in reference to the video material and supplementary affidavit sought to be introduced that

"If further evidence can be obtained in support of the continued interference with applicants' rights, such evidence will be annexed hereto,.....".

The further evidence made mention of in the above averment, the Court was told, is the one appearing at page 374. This is the evidence that, it was pointed out, the respondent's counsel complained of. It was conceded by Mr. Farber that the evidence contained in these supplementary affidavits is out of time; having only been filed on 29th November 1991. Mr. Farber sought to draw on the Court's general appreciation of problems attendant on such matters.

He went on to illustrate that the evidence contained in these supplementary affidavits refers to two video tapes as well as a series of photographs reflective of the same matter. He referred to its use as only an amplification of matters referred to in

affidavits which were timeously filed.

Learned Counsel proceeded to assert that even though it is correct that the supplementary affidavits were late and out of time there is no prejudice to the other side. Moreover the Court is not being asked to make a definitive finding of fact based on any of these things being sought to be introduced at this late hour. The matter relating to their contents would be duly addressed at the stage of referral to oral evidence. Learned Counsel for the applicants crisply put the matter before Court as being one in which the applicants contend there was interference with their rights, while the respondent denies this. However notwithstanding the respondent's protestation Mr. Farber submitted that there is a dispute or some cognisable matter calling for resolution.

He further stated that because the respondent says there is no interference and that there would be none, the applicants thought that the supplementary replying affidavits would be welcome to the respondent.

In answer Mr. Viljoen for the respondent observed that it was argued for the applicants that the additional material does not prejudice the respondent and that the applicants don't rely on it for previous affidavits adequately bring the issues to the fore. He agreed with the submissions advanced on behalf of the applicants in that regard.

His major ground for objection was that it is undesirable that

these proceedings should be burdened with further material without any basis or preceding application for condonation being made for being out of time.

In pointing out that this is not yet an application properly so called, learned Counsel invited the Court to take a look at the Chronology of this matter.

The Court in turn observed that the applicants brought their application on 18-7-1991 and an order was granted to all intents and purposes Ex Parte. Mr. Viljoen submitted that the respondent acted promptly with the result that on 29-7-91 the interim order was discharged on that day. He stressed that this Court made that order almost four months ago but nevertheless allowed the applicants to come before it again. He demurred that just as they previously did nothing for four years, again from July this year the applicants did nothing for three months. He invited the Court to consider on the other hand that the respondent felt that this matter cannot remain hanging and nothing being done about it in the meantime. Thus the respondent in deference to paragraphs 4.1 and 4.2 page 232 submitted its supplementary affidavit on 5th November 1991. Learned Counsel pointed out that when after 3 months nothing happened after the Interim Court Order of July 29th had been granted the respondent through its deponent Sole swore an affidavit filed on 5-11-91. See page 235.

The reply thereto was filed on 19-11-91. See page 350.

Learned Counsel demurred at the fact that on Friday 29-11-91 at noon additional replying affidavit which he only saw 20 minutes before the start of this morning's Court session was received by his instructing attorney's office. He further stressed that this affidavit was filed without condonation for filing it late. Nor was there any explanation for filing it late.

He thus submitted that the respondent is prejudiced and has not had time to study this affidavit. He stated that there is no doubt that there is dispute of fact in this proceeding which the applicants must have long seen coming. He denounced the fact that the Court should be confronted 20 minutes before start of the matter with this affidavit without any good reason being furnished therefor.

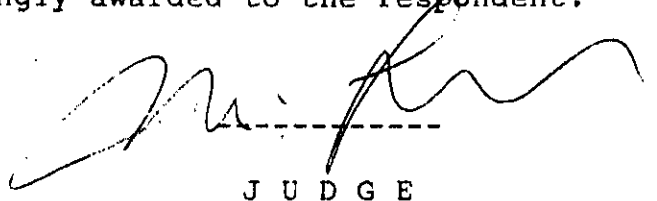
In reply Mr. Farber referred the Court to his heads of argument at page 21 paragraph 18 and advanced the contents therein as accounting for the reason why the interdict was uplifted.

He submitted that respondent only terminated negotiations on 2nd October 1991. Thus he submitted this was the catalyst that resulted in the various applications being made. Further that it cannot be factually correct to suggest that there has been a delay stretching from 29-7-91. He invited the Court to make nothing of the submission that the applicants should have foreseen there would be dispute of fact. He buttressed his submission by stating that the respondent's contention in that regard would not carry the day

in the light of the fact that only temporary relief is being sought. He reiterated that it is conceded on behalf of the respondent that there is a dispute of fact carrying no prejudice. He submitted that the rules of Court make no requirement for an application to be made for condonation of late filing of supplementary affidavit.

I have given thought to both sets of submissions in the instant matter. I have also observed that the question of the delay being crucial in this proceeding was hardly given attention to in the first place when it was the applicants' turn to address Court in motivating submissions for the relief sought. Only after respondent's Counsel highlighted its importance was there an attempt to attend to it in the reply by the applicants' Counsel at the stage when the respondent's Counsel would not respond without being out of turn.

In exercise of my discretion in regard to the issues raised I uphold the objection to the introduction of the belated supplementary affidavit including the video material. Costs of two Counsel accordingly awarded to the respondent.



J U D G E

For Applicants : Mr. Farber

For Respondent : Mr. Viljoen