ERASMUS v AFRIKANDER PROPRIETARY MINES LTD*(1) 1976 (1) SA 950 (W)

Citation	1976 (1) SA 950 (W)
Court	Witwatersrand Local Division
Judge	Trengove J
Heard	June 6, 1975
Judgment	August 29, 1975
Annotations	

Flynote : Sleutelwoorde

Mines and minerals - Mineral rights - Co-ownership of undivided shares in - Rights in respect of - When joint ownership takes place - Application to restrain co-owner, from mining coal deposits on property - Co-owner entitled to mine his proportionate share of his rights - Applicant failing to establish detriment to his rights - Remedy of damages available to applicant if he can prove damages.

Headnote : Kopnota

The mere title to mineral rights in respect of land does not *per se* transfer the ownership of minerals not yet severed from the land to the holder or joint holders of the mineral rights, such ownership remaining in the owner of the land itself. The reservation of mineral rights entitles the holder or holders of the mineral rights to go upon the property to prospect for minerals and if they find them to sever them and take them away. Thus there can be no question of any joint ownership of minerals unless or until those minerals have actually been severed from the soil. A co-holder of an undivided share in mineral rights should not be restrained from exercising his rights on the mere ground that his other co-holders have not consented or given their authority thereto. Something more than that is required. The Court must also have regard to the effect, or the probable effect, of the exercise of his rights and the Court should not intervene unless it appears from the facts and circumstances of the particular case that the like rights of the other co-owner are being, or likely to be, adversely affected.

A co-owner of mineral rights in respect of coal had applied for an interdict restraining the other co-owner from commencing and carrying on mining operations for such mineral on the property.

Held, that the respondent had the right to mine its proportionate share of the coal deposits provided it did so without prejudice to the applicant's rights.

Held, further, that, on the facts, it had not been shown that such mining operations would

detrimentally affect the applicant's rights.

Held, further, that the applicant had another remedy available to him, viz., an action for damages. Application accordingly dismissed.

Case Information

Application for an interdict. The facts appear from the reasons for judgment. *W. H. R. Schreiner, S.C.* (with him *E. M. Wentzel*), for the applicant. *A. S. van der Spuy, S. C.* (with him *F. J. Bashall*), for the respondent.

Cur. adv. vult.

Postea (August 29).

Judgment

TRENGOVE, J.: This is a dispute concerning the exploitation by the respondent of its coal rights in respect of a property which comprises certain nine portions, measuring approximately 1 520 morgen in all, of the farm Brakfontein No. 264, situate in the district of Delmas, Transvaal. For convenience sake I shall hereafter refer to this property simply as the farm Brakfontein.

The applicant has applied, on notice of motion, for an order in the following terms, namely:

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(a) that the respondent be interdicted from commencing and carrying on mining operations on the farm Brakfontein;

(b) that the respondent be ejected from the said property; and

(c) that the respondent pay the costs of these proceedings.

The applicant is the holder, under deed of cession of mineral rights, of an undivided 1/520th share in the mineral lights in respect of the farm Brakfontein. The respondent, which is a wholly owned subsidiary of the General Mining and Finance Company, is the registered holder of an undivided 517/520th share in the coal rights in respect of the farm, and I have been advised that, since the conclusion of the hearing of this matter, the respondent has acquired a further two 1/520th undivided shares in the coal rights over the property, which were held by certain L. J. Erasmus and L. C. L. Prinsloo (born Erasmus) respectively. This means that the respondent is now in a position to become the registered holder of an undivided 519/520th share of the coal rights on Brakfontein. The respondent is also the registered holder of all the coal rights on the adjoining farm Haverklip on which its Delmas Colliery is established.

The application was precipitated by a letter, dated 15 April 1975 (annexure B to the founding affidavit), which Messrs. Ross and Jacobsz of Pretoria, purporting to act for respondent, addressed to the applicant. The letter reads as follows:

> 'U is die houer van 1/520ste aandeel in Brakfontein koolregte. Tot dusver het alle onderhandelinge tussen u en Afrikander Proprietary Mines Ltd. aangaande die verkoping van die koolregte, misluk. Afrikander Proprietary Mines Ltd. ('Afrikander Props.') verlang nou dat u met hulle 'n notariële ooreenkoms sluit waarvolgens u die houer sal word van 1/520ste aandeel in die koolregte op die plaas Brakfontein. Hierdeur sal 'n verdeling van koolregte dus bewerkstellig word waarvolgens u die selfstandige houer van 1/520ste aandeel in die koolregte sal word. Hierdie aangeleentheid is spoedeisend aangesien Afrikander Props. van voorneme is om teen 25 deser op die eiendom te begin myn. As alternatief kan u egter nog steeds u koolregte aan Afrikander Props. verkoop teen die prys reeds vasgestel. Ons sal dit waardeer om u antwoord binne tien (10) dae vanaf datum te ontvang, by gebreke waarvan by die Hooggeregshof aansoek gedoen sal word om u te vetplig om die betrokke notariële ooreenkoms met Afrikander Props. af te dwing. Indien sodanige kostes aangegaan sou word, sal dear ook by die Hooggeregshof aansoek gedoen word om u te verplig om die kostes van die aansoek te betaal.'

Upon receipt of this letter, the applicant approached his attorney, Mr. Kades, and he got into touch with Mr. Bilbrough, the respondent's attorney, who informed him that the respondent anticipated reaching the boundary of Brakfontein from its mining operations at the Delmas Colliery on the farm Haverklip on 25 April 1975 and it intended extending those operations to Brakfontein. The application was then brought before this Court on 25 April 1975 as a matter of urgency but it was postponed to 13 May 1975, after the respondent had given an undertaking not to start its mining operations on the farm before that date.

The applicant's attitude in this matter is that as long as he is the holder of an undivided 1/520th share in the mineral rights, which include the coal rights, on Brakfontein the respondent is not entitled to take any steps whatever for the exploitation of the coal rights on the farm, unless it has authority from the applicant to do so. The applicant also contended that he will suffer irreparable prejudice should the respondent commence its mining operations on Brakfontein because the respondent would then be mining and removing coal from property in respect of which the applicant is the holder

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of an undivided share. The respondent, so it was contended, would thereby, in effect, be depleting the applicant's mineral tights in the property.

Before I consider these issues I must first refer to the factual background to the dispute, and the circumstances under which the parties acquired their respective rights. The farm Brakfontein was originally the property of a certain L. J. Erasmus who, in his will, left the mineral rights in respect of the farm in undivided shares to his five children, one of whom was Helletjie Maria Erasmus, who had eight children. When she died, she bequeathed a 1/8th share of her undivided 1/5th share of the said mineral rights, to each of seven of her children, and the remaining 1/8th share she bequeathed to the 13 children of her eighth

child, the late J. L. C. Erasmus, in equal shares. The applicant was the youngest son of the said J. L. C. Erasmus and he thus became the holder of an undivided 1/520 share of the mineral rights in respect of Brakfontein.

During or about 1960 the respondent became interested in the coal rights on Brakfontein. The respondent had at that stage already established the colliery on the adjoining farm Haverklip, to which reference has just been made. The respondent then entered into negotiations with the various holders of the undivided shares in the mineral rights of Brakfontein with a view to acquiring their coal rights. In the papers before the Court the holders of the rights involved in these negotiations are collectively referred to as 'the Erasmus family' or the 'Erasmus heirs'. I shall refer to them as 'the Erasmus family'.

The members of the Erasmus family then appointed a committee, referred to in the papers as 'the Erasmus family committee' or the 'Beherende Komitee', to conduct negotiations with the respondent on their behalf, and most of these heirs, including the applicant, then signed a power of attorney in favour of the Beherende Komitee, authorising it to act on his/her behalf in this regard. In the case of the applicant, and probably also in the case of the other heirs, the power of attorney, which was dated 20 June 1960, read as follows:

'hiermee verleen ek, die ondergetekende, volmag aan die Beherende Komitee om 'n minerale hour en/of koopkontrak aan te gaan in verband met die kole van die plaas Brakfontein, op die volgende voorwaardes:

1. vry opsie van drie maande;

2. verhuur teen vier pennies per ton vir wat uitgehaal is; en

3. uitkoopprys vir alleen-koolregte'.

On 18 August 1961 the members of the Beherende Komitee entered into a prospecting contract with the respondent on behalf of certain members of the Erasmus family, including the applicant. This contract provided,. *inter alia* :

'1. Die eienaars verleen hiermee aan ole prospektant die enigste en uitsluitlike reg om vir kool te prospekteer en te soek onder die gemelde eiendom.

2. Die regte hierby verleen sal voortduur vir 'n periode van drie jaar en drie maande vadaf datum van ondertekening hiervan (hierna verwys na die prospekteerkontraktydperk')...

3. As vergoeding vir die regte hiermee verleen sal die prospektant aan die eienaars gedurende die prospekteertermyn, betaal die bedrag van sestig sent (R0,60) per morg of gedeelte daarvan per jaar, welke betaling jaarliks vooruit gemaak sal word, die eerste waarvan drie maande na ondertekening hiervan. Die partye plaas op rekord dat die prospektant die eerste drie maande geen gelde sal hoef te betaal nie en dat die regte na verwys gratis aan hom verleen word.

4. Die eienaars gee hiermee aan die prospektant die uitstuitlike reg om gedurende die prospekteertermyn hulle aandeel van die koolregte onder die eiendom te koop, onder die volgende voorwaardes:

(i) Die koopprysesal die bedrag van R40 000 bedra betaalbaar soos volg...

14. Die prospektant erken dat sekeres van die erfgename van wyle Nicolaas Stephanus Erasmus wat koolregte in die viendom het, nie partye tot hierdie ooreenkoms is nie en sal aparte ooreenkomste met hierdie persons aangaan. Die prospektant erken verder bewus te wees daarvan dat die verteenwoordiger wat hierdie ooreenkoms namens sekere familiegroepe aangegaan het, volmagte van sodanige persone ontvang het, maar dat sekere van die persone wat hulle verteenwoordig, hulle volmag ontken.. '

Some two or three years later, probably during or about 1964, the respondent exercised its option, under clause 4 of the prospecting contract, to purchase the coal rights of the parties to the agreement, and it then called upon the members of the Erasmus family on whose behalf the committee had acted, some 18 in number, to take the necessary steps to cede their respective undivided shares in the coal rights over the farm to the respondent in terms of their obligations under the contract. Only four of these heirs refused to do so, and the applicant was one of them. The applicant's attitude was that the prospecting contract, as well as the exercise of the option by the respondent in terms thereof, was not binding upon him because under the power of attorney, which he had signed in favour of the Beherende Komitee, the Beherende Komitee had no authority to grant the respondent an option extending over a period of as long as three years and three months. The applicant states in his affidavit that this has been his attitude throughout and that the respondent has at all times been aware of it. The respondent, on the other hand, denies this and avers that it had, up to the stage that the applicant refused to cede his undivided share in the coal rights, been under the firm impression that he regarded the prospecting contract, and the respondent's exercise of the option under clause 4 thereof, as valid and binding. I shall at a later stage return to this dispute of fact.

The applicant and the three other heirs, who initially refused to transfer their coal rights to the respondent, were all members of the same branch of the Erasmus family, and they each held an undivided 1/520th share of the mineral rights in respect of Brakfontein. As I have already mentioned, the applicant is presently the only one of these heirs who has not yet agreed to cede his 1/520th share of the coal rights to the respondent. However, despite the attitude of the four heirs, the respondent decided, at the time, to proceed with the transaction and it paid over an amount of R40 000 payable to the grantors of the option in terms of clause 4 (i) of the prospecting contract to the Beherende Komitee. The portions of this amount earmarked for the four heirs were at all material times held in trust, initially by the Beherende Komitee itself and, at a later stage, by its attorneys, pending the cession of their rights to the respondent. On 18 April 1975 the portion which would be payable to the applicant upon the cession of his rights to the respondent was transferred to respondent's attorneys, who are presently holding it in trust.

During or about 1973 it became apparent to the respondent that, if it wished to extend its mining operations at Haverklip to Brakfontein, it would have to be ready to commence

mining the coal deposits on Brakfontein within about 12 months' time. The respondent, therefore, instructed its attorneys to endeavour, once again, to effect registration of the remaining coal rights in Brakfontein into the name of respondent. Attempts were made by members of the Beherende Komitee, and also by its attorneys, Messrs. Ross and Jacobsz of Pretoria, to trace the applicant in order to negotiate with him, but these attempts were unsuccessful. Thereafter, on 7 March 1975, the

respondent's attorneys addressed a letter to Messrs. Ross and Jacobsz (exh. K to the answering affidavit) in the following terms:

'Our client has considered the offer referred to in your letter dated 29 January and we are instructed to inform vou that the offer is rejected. Our client has furthermore given much thought to the position of the renegades (i.e. the heirs who were not prepared to cede their coal fights to the respondent), and has requested us to make it known to the Erasmus Family Committee and the three renegades personally, its attitude in regard to the coal rights held by the renegades as follows:

1. Our client believes that the price paid by it for the coal rights over Brakfontein at the time the prospecting contract was negotiated was a very fair price in all the circumstances.

2. The renegades were party to that contract and our client sees no reason why they should receive more for their shares than the other heirs.

3. In view of the fact that the renegades have refused to cede and transfer their coal rights to our client, our client now requires the renegades to enter into a notarial agreement with our client in terms of which the coal rights will be partitioned (see sec. 73 *bis* of the Deeds Registries Act), and the renegades will each receive 1/520th divided share of the coal rights.

4. Failing agreement on partition being concluded between our client and each of the renegades within a reasonable? time our client then intends to apply to Court for the partition and will apply for costs of any such application to be paid by the renegades.

5. Our client intends mining the Brakfontein coal rights on or about 25 April 1975 and failing agreement with the renegades it shall, pending partition, mine only a portion of the exploitable reserves *pro rata* to its share of the coal rights.

6. As an alternative the renegades can still, of course, cede their coal rights to our client and receive their respective shares of the consideration therefor, which shares have been paid by our client to the Erasmus Family Committee and, we understand, are being held by the Committee in trust. Failing cession as aforesaid the Committee is requested to refund to our client the consideration held by them for the renegades.

We shall be pleased if you will accordingly cause the full import of the provisions of numbered paras. 1 to 6 above to be conveyed in senting to Mr. Venter and to each of the three renegades personally as a matter of urgency. Kindly forward to us copies of the letters written by you in each case so that we can follow up such letters by writing to the renegades direct (at this juncture their present addresses are not known to us). The results of partition will be that our client will not mine the specific areas of coal determined to represent the 1/520th shares of the renegades, which areas the renegades be entitled to dispose of or mine whenever it suits them, but our client not, interested therein. Our clients are preparing diagrams of the farm with the coal

reserves being reflected thereon so that partition can be effected and hopefully these will be available for discussion with the renegades when they respond to our client's request to negotiate the partition areas'.

At the time of the writing of this letter the indications were that the respondent's mining drive would reach the Brakfontein boundary on or about 25 April 1975. It was as a result of the receipt of this letter, that Messrs. Ross and Jacobsz sent the letter of 15 April 1975 (annexure B to the founding affidavit) to which I have already referred, to the applicant. It appears, however, that owing to delays in ascertaining the correct addresses of the three heirs referred to in exh. K, including that of the applicant, annexure B was sent at a relatively late stage having regard to the respondent's proposed developments into the coal deposits on the farm Brakfontein. It will be recalled that it was this letter, exh. B, that sparked off the application.

After the application had been postponed to 15 May 1975, by agreement, the respondent, on 1 May 1975, instituted action in the Transvaal Provincial Division, against the applicant and the remaining two heirs, who, at that

stage, had not agreed to transfer their coal rights, in which the respondent claimed:

'*(a)* An order against defendants that the coal rights in respect of the farm Brakfontein No. 264, registration district I.R., district Delmas, Transvaal Province, be partitioned in proportion to the undivided shares presently held by the parties, such coal rights namely 517/520ths to the plaintiff and 1/520th to each of the defendants.

(b) An order directing defendants to join plaintiff in effecting registration of cessions, each to the other, of their respective shares in the aforesaid coal rights (including all requirements necessary to effect such cessions).

(c) An order directing and indicating the method by means of which the aforesaid coal rights are to be divided between the plaintiff and the defendants *inter se*.

(d) Alternative relief.

(e) Costs against those defendants, jointly and severally, who opposed this action.'

As far as the applicant and the respondent are concerned, this action is presently pending in the Transvaal Provincial Division. So much for the background of the dispute, I now turn to consider the merits of the application.

Counsel for the applicant contended that, although the applicant was the holder of no more than a 1/520th undivided share in the coal rights in Brakfontein and the respondent the holder of a 517/520th undivided share, they were nevertheless co-holders of undivided shares in the coal rights, and consequently no coal mining operations could be carried on by any one of them unless they both agree, for any such operations would inevitably constitute an infringement of the rights of the other. The mining or removal of a single cobble of coal

by the respondent from the property, so the argument went, would amount to a misappropriation of the applicant's property because the applicant had a 1/520th undivided share in every cobble of coal mined at Brakfontein. The respondent, it was argued, was not entitled to interfere with or to prejudice the applicant's rights without his consent, no matter

SA 45 (O) at p. 56). It is common cause that the applicant is still the registered holder of a 1/520th undivided share in the mineral rights, including the coal rights, on Brakfontein. The title to mineral rights confers real rights upon the holder thereof because it entitles him to go upon the property, to which they relate, to search for minerals and, if he finds any, to sever them and take them away. Mineral rights, it has been said, constitute a class of real rights *sui juris* (cf. *Van Vuuren and Others* v. *Registrar of Deeds*, 1907 T. S. 289; *Lazarus and Jackson* v. *Wessels and Others*, 1903 T.S. 499 at p. 510; *Gluckman* v. *Solomon*, 1921 T.P.D. 335 at p. 338; *Ex parte Pierce and Others*, 1950 (3) SA 628 (O) at p. 633). But counsel for the respondent has contended that, as between the parties, the applicant has no such right because, although he may still be the registered holder of the right, he is, as against the respondent, in the position of a grantor of the right and, until the period of extinctive prescription of 30 years has been completed, he remains bound by the grant. In support of this argument counsel for the respondent relied upon the evidence relating to the circumstances under which the prospecting contract was concluded and the option, under clause 4 thereof, was exercised, by the respondent. He contended that this evidence shows not only that the prospecting contract and the exercise of the option were binding upon the applicant but also that he initially accepted this to be the position. The evidence of the applicant's conduct at the time certainly seems to support this view. There is evidence that the applicant received and accepted option moneys, payable under the contract, from the respondent and it appears from correspondence, between the respondent's attorneys and the applicant, that when he was approached to sign a power of attorney authorising the cession of his fights to respondent, pursuant to the exercise of the option, he did not initially indicate any unwillingness to do so. The applicant's initial response is contained in a letter dated 17 November 1964 which reads as follows:

> 'I.s. prospekteerkontrak aangegaan tussen Afrikander Props. en Erasmus Familiekomitee. Met verwysing na bogenoemde sal ek dit waardeer indien u my 'n afskrif

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> van die prospekteerkontrak laat kry alvorens ek die prokurasie teken aangesien daar 'n paar punte is wat ek graag wil helderheid oor verkry.'

And then, during or about April 1965, after a copy of the contract had been forwarded to him in terms of his request, the applicant, in an undated letter written to the respondent's attorneys, said the following:

> 'I.s. Brakfontein Steenkoolregte. Graag verneem ek as mede-erfgenaam in die bogenoemde of die eerste helfte van die koopprys al aan die Familie-komitee uitbetaal is aangesien ek nog niks van hulle verneem het nie.'

Although the applicant has stated, as I have mentioned, that the respondent has at all times been aware of the fact that he did not regard the prospecting contract and the exercise of the option as binding upon him, he has not explained why, if this were so, he had accepted

payment of his share of the option moneys under the contract, nor has he given any explanation of his attitude as reflected in the correspondence to which reference has just been made. In my view, the probabilities are that the applicant initially regarded the prospecting contract and the exercise of the option as valid and binding, but that, for some reason or another, he later changed his attitude in this regard. The question of whether the prospecting contract and the exercise of the option were indeed binding upon the applicant, has, however, not been fully canvassed in the affidavits before the Court and, consequently, I am not in a position to come to any definite conclusions on this aspect. But this does not really matter for, whatever the true legal position may have been, it is common cause that the respondent never took any steps to enforce the contract or the exercise of its option against the applicant and any such contractual rights which the respondent may have had have since become prescribed and are no longer enforceable against the applicant.

Counsel for the respondent based his argument, on this aspect, on the principles enunciated in *Webb* v. *Beaver Investments (Pty.) Ltd and Another*, 1954 (1) SA 13 (T) at pp. 21 - 26, and *Ex parte Marchini*, 1964 (1) SA 147 (T) pp. 149 - 151, but these authorities do not in my view support the submissions advanced on behalf of the respondent. The distinguishing feature, in my view, is that in the instant case the respondent, on its own version, did not at any stage have more than a contractual right to a cession from the applicant of the undivided share in the mineral rights. There was no notarial grant or cession of these rights to the respondent. On the other hand, in the two cases quoted by counsel for the respondent, the Court considered what the position of the parties was where there had been a formal grant of mineral rights but the grant had not been registered. In the circumstances, I cannot accept the argument advanced on behalf of the respondent on this particular issue, and I proceed to consider the application on the basis that the applicant has satisfied the first requirement, namely, that he has a clear fight.

The applicant must also establish a reasonable apprehension of an infringement of his mineral rights and, in this regard, it is necessary to consider whether the respondent's intended mining operations on Brakfontein would constitute an interference with the applicant's rights. Counsel for the applicant has contended, as I have mentioned, that, as long as the applicant is the registered holder of a 1/520th undivided share in the mineral rights in respect of Brakfontein, the respondent cannot, without his consent, embark upon any mining operations on the farm, because this would inevitably constitute an infringement of his rights, no matter how relatively insignificant those rights may appear to be.

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The contention, in effect, was that pending partition, the applicant virtually had the right to veto any attempt by the respondent to exploit its coal rights on Brakfontein. On the other hand, the respondent's contention was that it was fully entitled to mine its proportionate share of the coal deposits on Brakfontein, whether or not the applicant agreed, provided it

did not in any way prejudice the applicant's prospects in the outcome of the pending partition suit. By embarking on the proposed mining operations, so it was argued, the respondent would simply be utilising its rights for the very purpose for which they were granted.

Thus, the very interesting problem of the respective fights and obligations of co-holders of mineral rights in undivided shares, *inter se*, arises for consideration. The grant of mineral rights to different persons in undivided shares creates a state of affairs, as the present dispute clearly illustrates, in which the exercise of their respective rights by the holders thereof could give rise to a conflict of interests and the question for consideration is what principles should be applied in reconciling such a conflict. Should the Court adopt the very rigid view of the applicant or rather follow the more flexible and practical approach of the respondent?

As far as I am aware this particular problem has not hitherto been considered in our Courts. I was not referred to any decisions directly in point but counsel cited numerous common law authorities and decided cases dealing with problems such as the conflicting interests of co-owners, in undivided shares, of immovable property and the respective rights and obligations of the owners of immovable property and the holders of mineral fights in respect thereof; it was suggested that the principles enunciated in these authorities could be applied, by way of analogy, to the present dispute. Some guidance on how to approach the question of reconciling the conflicting interests of the holders, in undivided shares, of mineral fights can certainly be obtained from these authorities, particularly those dealing with the many problems arising out of the joint-ownership of immovable property. I refer, briefly, to some of the cases quoted by counsel.

In *Pretorius* v. *Nefdt and Glas*, 1908 T.S. 854, the common rights of use of immovable property by co-owners in undivided shares arose for consideration and MASON, J., made the following observations in this regard at p. 857:

> 'The authorities with reference to the common fights of use by co-proprietors in undivided shares are not very numerous because, as it is laid down, the proper remedy in case of dispute is to have a division ... Sir HENRY DE VILLIERS in *Oosthuizen* v. *Du Plessis and Another*, 5 S.C. 69, lays down that the owner of an undivided share is entitled to make a reasonable use of the farms, proportionate to his interests therein, having the same rights of in ress and egress as to any house not in the actual occupation of co-proprietors, the right to departure any number of cattle to an extent that would not be disproportionate to his share, and to the use of a reasonable quantity of wood and water for domestic purposes. The petitioner's counsel contended very strongly that a co-owner had an absolute fight of veto on any use of the farms at all, citing *Voet*, 10.3.7, but this passage refers, I think, to the right which a co-owner has to prevent any innovation or change in the nature of the occupation of the land. The case in which the rights of co-owners *inter se* has been most fully discussed seems to be that of *De Beers Consolidated Mines, Ltd.* v. *McKay*, 16 C.L.J. 12, where the Court of the late Republic laid down the general law with reference to this subject. There was no difference as to the principles, though one of the Judges dissented as to their application. Each owner, it was said, could use the common property in accordance with the use to which its was intended to be put, but must refrain from any acts by which the like right of user of the others might be infringed.'

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And, in *Sauerman and Another* v. *Schultz*, 1950 (4) SA 455 (O) , DE BEER, J.P., summed up the effect of the decisions of our Courts on this topic as follows, at p. 460:

> 'Na oorwegin van bogenoemde en ander aangehaalde beslissings is ek van mening dat 'n juiste weergawe van die regsposisie in Wille, *Principles of South African Law*, 3de uitg , bl 203, uiteengesit is: 'Each joint owner is entitled to reasonable use of the property, proportionate to his interest, in accordance with the object for which the property is intended to be used. He is not entitled, however, to appropriate any portion of the property for himself."

(Cf. also *Payn* v. *Rennie and Another*, 1960 (4) SA 261 (N)).

I am quite satisfied that the rigid view of the rights and obligations of co-owners, *inter se*, which counsel for the applicant urged me to adopt in the present dispute, is not in accordance with the principles of our law. According to the decisions of our Courts, it is clear that if the property is, for example, a farm a co-owner is entitled to conduct normal farming operations thereon provided he does so with due regard to the limitations mentioned in the passage quoted above from the judgment of DE BEER, J.P., in *Sauerman and Another* v. *Schultz, supra* ; subject to these limitations, the co-owner of a farm is entitled, for instance, to allow cattle to graze on the farm, to plough and cultivate lands, to raise and reap crops, to take care of orchards and to harvest fruit for his own benefit; and, in the event of any dispute about the conduct of a co-owner and the manner in which he has made use of the joint property, the Court would have to consider whether the conduct complained of constitutes an unreasonable user, inconsistent with the user to which the property was destined and to the detriment of the rights of the other co-owner; and, unless a co-owner's user of the joint property can be so described, interdict proceedings against him will not succeed. Before leaving this subject, I must still refer to two cases on which counsel for the applicant relied very strongly, namely, *Botha, Smit and Others* v. *Kinnear*, (1880) 3 Kotze 215, and *Oosthuysen v Muller*, 1877 Buch. 129. In my view these cases do not support the proposition advanced on behalf of the applicant. In the case of *Botha, Smit and Others* v. *Kinnear, supra*, the plaintiffs, co-owners of a farm, sought a perpetual interdict against the defendant, who was also one of the co-owners, restraining him from ploughing and sowing upon the pasture land of the farms and from cutting wood on the farm. The evidence showed that the defendant ploughed up and cultivated the best, if not the only, winter pasturage on the farm, and that he did so to a very large extent; also that he erected new buildings upon the pasture land of the farm and indiscriminately cut down old and young trees, so much so, that one witness stated that there were no more large trees on the farm.

In his judgment at p. 219, KOTZÉ, J., said:

> 'These are acts which a joint owner is not justified in doing upon land held in common and he may be prevented from doing so by any one of the joint proprietors... From the evidence it appears that some time before the summons was issued the new lands were already made by the defendant and the buildings on the

pasturage completed. I cannot, therefore, order the defendant to remove the buildings already erected, nor to abandon the lands already under cultivation; but the defendant must be restrained by interdict from continuing to convert pasture land into arable land, and from building or placing other obstructions on the asturage of the farm Witrand. With reference to the cutting of trees, the defendant and his servants must be restrained from cutting the trees on the said farm in a manner or to an extent, injuring the plaintiffs in their rights as joint-proprietors.'

Now it is clear that in this case the interdict was granted because it was

proved that the defendant was using the property in an unreasonable manner and to the detriment of the other co-owners. This is not the position in the present instance. The other case is that of *Oosthuysen* v. *Muller*, 1877 Buch. 129. In this case the applicant sought and obtained a rule restraining the respondent, the co-owner of the farm, Matjesdrift, from entering the applicants enclosure on the farm and cutting and breaking the ground within the enclosure or interfering therewith, pending an action for damages and for the sub-division of the ground. According to the affidavits that were filed the farm in question was held by the applicant, the respondent and another in undivided shares. There had been negotiations for its sub-division but without result. The applicant alleged that he had made dams and had enclosed a portion of the farm and that the respondent had entered this enclosure and proceeded to make a kiln of bricks from the soil using water from the dams. In confirming the rule, DE VILLIERS, C.J., observed:

'There is no doubt that where a co-owner appropriates part of the soil to his own use for the purpose of making bricks, whether to be used on the place or not, the consent of his co-proprietors must be obtained In the absence of such consent, the person breaking the soil may be interdicted (*Voet*, 10 3 7.) The person complaining is quite justified in immediately taking steps to prevent misappropriation of the soil.'

Voet, 10.3.7 (*Gane's* translation) reads as follows:

'Moreover no new step can be taken in regard to common property by one partner against the wish of another. The position of him who forbids it is the stronger, so much so that if some new step has been taken by one partner or a mandate given for it against the wish of the other, the one can be forced to put the matter back into its original position.'

Thus, in this case, the application for an interdict succeeded because the respondent sought to introduce an innovation or change in the nature of the occupation of the land, namely, the establishment of the brick kiln, and for this he required the consent of his co-owners. However, in the present instance it cannot be said that in exploiting its mineral rights, the respondent was taking any new step in connection with the rights held in undivided shares, because the rights were granted for that very purpose for which they were being exercised.

I do not consider it necessary to refer specifically to any of the other decisions cited by counsel on the subject of the legal relationship of co-owners of immovable property, *inter se*. The broad principles are well established and the question of whether the acts of one

co-owner constitute an infringement of the rights of the other must, in the ultimate result, be determined by the facts of the particular case. It is also important to bear in mind that, although the decisions dealing with the relationship of co-owners, *inter se*, can serve as a useful guide on how to approach the problem of deciding between the conflicting interests of the joint-holders of mineral rights, they do not really offer a true or a complete analogy. I say this because it is clear from the authorities that the mere title to mineral rights in respect of land, does not *per se* transfer the ownership in minerals not yet severed from the land, to the holder or joint-holders of the mineral fights, such ownership remaining in the owner of the land itself (*Gluckman v Solomon*, 1921 T.P. D. 335 at p. 338; *Nolte* v. *Johannesburg Consolidated Investment Co. Ltd.*, 1943 AD 293 at p. 315; *Ex parte Pierce and Others*, 1950 (3) SA 628 (O) at pp. 633 - 634). The joint holders of mineral rights are not the joint owners of the minerals not yet severed from the land. The reservation of mineral rights, entitles the holder or holders of the mineral rights, as I have already mentioned, to go upon the property, to prospect for

minerals and, if they find them, to sever them and take them away. Thus, as far as joint-holders of mineral rights are concerned can be no question of any joint-ownership of minerals unless or until, those minerals have been severed from the soil.

This brings me to the crucial issue, namely, whether the applicant has established that his rights as the holder of a 1/520th undivided share of the mineral rights in respect of Brakfontein would be affected detrimentally by the coal-mining operations which the respondent has in mind. The main submissions on behalf of the applicant, as I have mentioned before, was that any coal-mining operations conducted on Brakfontein by the respondent would amount to an infringement of the applicant's rights. Now, in view of the general principles governing the relationship of co-owners of undivided shares in immovable property, *inter se*, as enunciated in the decisions quoted above, I am of the opinion that a co-holder of an undivided share in mineral rights, should not be restrained from exercising his rights on the mere ground that his other co-holders have not consented or given their authority thereto. Something more than that is required. The Court must also have regard to the effect, or the probable effect, of the exercise of the rights and, in my view, the Court should not intervene unless it appears from the facts and circumstances of the particular case, that the like rights of the other co-owners are being, or are likely to be, adversely affected. On this basis I now proceed to consider what effect the respondent's exercise of its rights is likely to have on the applicant's rights.

It is not the applicant's case, as I understand it, that the mining operations, which the respondent has in mind, will prejudicially affect his right to go onto Brakfontein and to prospect for minerals, nor does he say, in so many words, that his right to mine coal will be adversely affected. There is no evidence whatever that in the past the applicant prospected

for coal or carried on any coal mining operations on Brakfontein nor is there any evidence that he intends or contemplates doing so at some future time. The applicant himself makes no claims in this regard; and, what is more, it can be inferred from the evidence of Mr. Ferguson, the respondent's mine manager at the Delmas Colliery, about the extent and value of the coal reserves on Brakfontein and the cost of establishing a coal mine there, that there is no reasonable prospect that the applicant or any member in title would ever consider embarking on coal mining operations in respect of his 1/520th share in the coal rights on the farm.

Mr. Ferguson's evidence is briefly as follows. He stated that the coal reserves in respect of Brakfontein have been established as being:

(a) No. 2 seam	
In situ reserves	8 783 351 tons
Mineable reserves	5 094 343 tons
Saleable reserves	3 793 588 tons
(b) No. 4 seam	
In situ reserves	3 548 743 tons
Mineable reserves	2 547 997 tons
Saleable reserves	1 987 438 tons

He also dealt with the economic feasibility of exploiting these reserves. The coal in No. 4 seam, he said, was of extremely low grade and there was very little prospect of this seam ever being mined at all. On this basis, the value of the coal reserves in this seam could not be regarded as being anything but

nominal, The coal reserves in the No. 2 seam, on the other hand, were considered to be economically exploitable but this was the position only if the reserves were mined through the existing infra-structure at the respondent's Delmas Colliery. According to Mr. Ferguson the capital expenditure involved in establishing a new mine solely for the purpose of mining the coal reserves on Brakfontein has been conservatively estimated at about R17 600 000 and he said that it would not be possible for such a mine to recover this amount solely from its mining operations on Brakfontein. Thus, if the coal fights in respect of Brakfontein are considered in isolation, they cannot be regarded as being practically viable or as having any independent economic value. But, in the case of the respondent, it will, of course, not be necessary to go to the expense of establishing a new mine in order to exploit the coal deposits on Brakfontein. The respondent, it will be recalled, is the holder of all the coal rights on the adjoining farm Haverklip and its mine development at the Delmas Colliery, on Haverklip, has designedly been planned and directed so as to allow access to the

Brakfontein coal reserves and, it is only because of the availability of this infra-structure at the Delmas Colliery, that the respondent is in a position, according to Mr. Ferguson, to exploit the coal deposits on Brakfontein economically, whereas it would not be feasible for the applicant or anyone else, not enjoying this particular advantage, to do so.

The applicant did not really challenge or dispute Mr. Ferguson's evidence. In his replying affidavit he simply dealt with this evidence as follows:

> 'The respondent as far as I am presently aware holds all the coal rights on the adjoining farm Haverklip, on which its Delmas Colliery is established, but I am not at present, able to comment further upon the respondent's contentions concerning the economics of mining operations on Brakfontein and I do not admit them.'

However, I have no reason to doubt Mr. Ferguson's evidence and I am quite satisfied that there is no reasonable prospect that the applicant will ever really want to actually exercise his right to mine his proportionate share of the coal deposits on Brakfontein and, in my view, no one else, but the respondent, would ever seriously consider acquiring the applicant's 1/520th undivided share in the mineral rights, for that particular purpose. There is, therefore, no reasonable possibility that the mining operations contemplated by the respondent would, in reality, interfere with or have any prejudicial effect upon the applicant's right to actually mine his proportionate share of the coal reserves.

But, the applicant's main complaint is that if the respondent were to extend its coal mining operations to Brakfontein, he will suffer irreparable prejudice in that, as he puts it in para. 7 of his founding affidavit,

> 'the respondent will be mining coal on property over which I have an undivided share of the mineral rights and will be removing coal therefrom, thereby depleting my rights in the property'.

I have already said that, in my view, the respondent has the right to mine its proportionate share of the Brakfontein coal deposits, provided it can do so without prejudice to the rights of the applicant. Now, the applicant has not alleged that the respondent intends mining more than its proportionate share of the coal, or that he has any grounds for fearing that it will do so. There is, in fact no evidence that the respondent has any such intentions.

Mr. Van Eeden, the commercial manager of the coal division of the General Mining and Finance Corporation Ltd., has stated in the answering affidavit on behalf of the respondent that, pending partition, the respondent's

mining operations will be restricted to mining no more than its proportionate share of the coal deposits. The applicant's reaction to this statement, in his replying affidavit, was simply that it was not practically possible for the respondent to so restrict its mining operations, but he gave no reasons for saying so. Now, whatever the position might be in other instances or

in regard to the mining of other kinds of mineral substances, the evidence in the instant case is that the approximate extent, quality and value of the coal deposits have already been determined and there seems to me to be no reason why I should not accept Mr. Van Eeden's statement that it would be practically possible for the respondent to carry on its mining operations in such a way as to ensure that it does not in any way interfere with the applicant's *aliquot* share in the coal rights; for, as Mr. Van Eeden has explained, the respondent keeps full records of all its mining activities and detailed particulars of the volume and value of the coal actually mined are always available. I mentioned, earlier on, that, the respondent has instituted proceedings for partition of the coal rights. Although the applicant had the right to sue for partition, if he was dissatisfied with the manner in which the respondent exercised its right, he never did so. However, it has not been contended, on behalf of the applicant, that his position in the pending partition suit will, in any way, be jeopardised by the respondent's mining activities in the interim and, on the evidence before me, there is no risk whatever of the applicant's rights being adversely affected. In partition proceedings, the Court has a very wide discretion and the law as to the rights of a co-owner in this regard, has been stated, as follows, by BROOME, J., in *Scheffermann and Others* v. *Davies, N. O.*, 1944 N. P. D. 20 at p. 21:

> 'He cannot be compelled to remain a co-owner against his will. Failing an amicable agreement he is entitled to a partition, but if a partition would lead to loss or injustice some other form of relief may he substituted (*Badenhorst* v. *Marks*, 1911 T.P.D. 144 at p. 147). He has the right to partition at any time and can claim that it be effected by agreement or by the Court (*Ex parte Geldenhuys*, 1926 O. P. D. 155 at p. 164). His right to claim partition is subject to exceptions, one being that where the partition is impracticable or inequitable the Court has a wide discretion to make such order as justice or equity may require, e.g. by ordering a sale by public auction (*Estate Rother* v. *Estate Sandig*, 1943 AD 47 at p. 53). It is clear that the applicants cannot be compelled to remain co-owners and the only question is how co-ownership is to be put to an end. Mutual agreement is obviously the best method; sale by public auction is the final method if all else fails. But between these two extremes the Court may direct any method as justice or equity require.'

One cannot, of course, say what the outcome of the partition proceedings in the present instance will be, as there are a number of possible methods of partition which may have to be considered; the Court may, for instance, consider making an actual physical division of the coal rights of the parties, in proportion to the undivided shares presently held by them, but it is extremely unlikely that the applicant would support this mode of partitioning, for, as I have already indicated, the actual exploitation of a mere 1/520th divided share of the Brakfontein coal deposits would not be a practicable or economically feasible undertaking; the Court may also consider following the course adopted in *Estate Rother* v. *Estate Sandig*, 1943 AD 47, namely, directing a sale by public auction of the totality of the coal fights and a division of the nett proceeds on a *pro rata* basis, but, once again, I do not believe that the applicant would he in favour of this particular method of division because, in the event of such a public auction, the respondent would have a clear advantage over any other potential bidders,

by reason of its already predominant share in the coal rights and its mining activities on Haverklip; another mode of division which would probably also be considered was that adopted in *Badenhorst* v. *Marks*, 1911 T.P.D. 144, where the Court directed that the undivided shares should all be taken over by one of the co-proprietors, subject to the payment of compensation, and the plaintiff was given the first choice; the applicant would probably consider this to be the most advantageous mode of division, from his point of view, even though the first choice might then, in accordance with the views of some of our Roman-Dutch writers, have to be awarded to the respondent as being the holder of the predominant share of the coal rights in respect of Brakfontein and of all the coal rights on the adjoining Haverklip (*De Groot*, 3.28.8; Groenewegen, *ad Grotius*, 3.28.8; *Voet*, 10.3.3).

But, whatever mode of division the Court, in the partition proceedings, may eventually decide to adopt, I am quite satisfied that the applicant will not be prejudicially affected by the respondent's mining activities because, in the interim, his *pro rata* share of the coal reserves will be left intact. According to Mr. Ferguson, the respondent's mining operations on Brakfontein are expected to last for about four years, and, as the applicant's *pro rata* share in the coal deposits is, comparatively, so small his right to a partition could not really be adversely affected by the respondent's mining activities until the stage is reached that the coal reserves are nearly exhausted by which time the partition proceedings would, in all probability, already have been finally concluded. I am satisfied that there is no evidence before the Court that the mining operations contemplated by the respondent would in any way be prejudicial to the applicant's rights on partition.

But, it was also argued on behalf of the applicant, that the respondent's mining activities would, in any event, infringe upon his rights in another respect. The respondent, it was said, would in the course of its mining activities, and as part thereof, be removing and disposing of a certain quantity of coal in which the applicant had an interest to the extent of a 1/520th share. The coal which the respondent would be mining, so it was argued, would upon its severance from the soil become the joint property of the applicant and the respondent in proportion to their respective shares in the coal rights and consequently the appropriation thereof by the respondent would constitute a *pro tanto* infringement of the applicant's rights.

I have already said that, in my view, a joint holder of mineral rights, in undivided shares, is entitled to exercise his rights provided that, in so doing, he does not infringe upon the like rights of other joint holders. Whether there is any risk of prejudice to the rights of other joint holders, would, in every instance, have to be determined according to the facts and circumstances of the particular case. Now, as far as the present case is concerned, if the respondent were to commence its coal mining activities, it would simply be exercising a right which it undoubtedly has. The respondent would be using its right for the very purpose for which it was obviously intended. And, as I have already explained, there is no danger of the applicant being prejudicially affected by the actual mining operations as such, because the

respondent does not intend mining more than its *pro rata* share of the coal deposits in the interim.

However, I shall, for the present purposes, accept that, even if the respondent were to restrict its mining operations to its proportionate share of the coal deposits, the coal actually mined would, as a result of its severance

TRENGOVE J

from the soil, nevertheless become the common property of the parties, in proportion to their undivided share in the coal rights. But, despite this, the respondent would, in my opinion, still be entitled to dispose of its *pro rata* share of the coal actually mined. The only restriction upon the respondent's request to dispose the coal actually severed from the land would be that it should not appropriate and dispose of more than its proportionate share of such coal. On this basis, the applicant would be entitled to a 1/520th share of the coal actually mined; he would, therefore, have the light to call upon the respondent to account for its mining operations and he would also be entitled to claim his *pro rata* share of the coal actually mined against tender of his proportionate share of the mining costs, or alternatively, the reasonable value of his share of that coal, making due allowance for the mining costs.

But these particular issues were neither pertinently raised nor argued in the present proceedings. It was not the applicant's case, as I understand it, that his right to claim a *pro rata* share of any coal which would actually be mined, would be affected prejudicially by the respondent's mining activities. However, even if that were his complaint he would not, in my judgment, on that account be entitled to an interdict in the form insisted upon in the present proceedings, namely, an interdict restraining the respondent from commencing and carrying on mining operations on Brakfontein. The appropriate remedy in such a case, would be an application for an interdict, *pendente lite*, to safeguard any interest the applicant may have in coal actually mined at Brakfontein.

I have, in the result, come to the conclusion that the applicant has not established on a balance of probabilities that there are any grounds for a reasonable apprehension on his part that his rights would be detrimentally affected by the mining activities contemplated by the respondent. The application for a permanent interdict cannot, therefore, be granted.

But there is a second reason why the application cannot succeed. The applicant has not, in my view, succeeded in establishing the third element for a final interdict, namely, that no other adequate remedy is available to him. He has, in fact, not even endeavoured to do so. This particular issue is pertinently raised by the respondent in para. 7 of the answering affidavit, where Mr. Van Eden points out that the applicant

> 'does not set out that he has, even if the alleged interference were admitted, no other alternative remedy at all'.

The applicant's response to this statement is set out in para. 7 *(a)* of the replying affidavit which reads as follows:

> 'in the light of the fact that the respondent has no right whatsoever to mine, I deny that I am obliged to aver that I have no alternative remedy save that of an interdict.'

I cannot accept this proposition. There is no evidence that the respondent is either a spoliator or a trespasser as far as the applicant's rights are concerned. And, therefore, the applicant cannot insist upon a permanent interdict, as he in fact does, unless he not only alleges but also establishes, on a balance of probabilities, that he has no adequate alternative legal remedy. (*Prinsloo* v. *Luipaardsvlei Estates & G.M. Co. Ltd.*, 193 3 W. L. D. 6 at pp. 24 - 25; *Free State Gold Areas Ltd.* v. *Merriespruit (O.F.S.) GM. Co. Ltd. and Another, supra; Lubbe* v. *Die Administrateur, Oranje Vrystaat*, 1968 (1) SA 111 (O)). In *Lubbe* v. *Die Administrateur, Oranje Vrystaat, supra*, DE VILLIERS, J., dismissed an application for a permanent

interdict on the grounds that this requirement had not been satisfied and in the course of his judgment he said at pp. 113 - 115:

> 'Voordat die aangevraagde permanente interdik toegestaan kan word moet applikant ondermeer bewys op 'n oorwig van waarskynlikhede dat dear geen ander gewone en doeltreffende regsmiddel tot sy beskikking is om sy regte te beskerm nie... Daar is geen bewyslas op 'n respondent om enige feit of feite te bewys om applikant se reg tot 'n interdik te weerlê nie. En in 'n geval soos die onderhawige waar 'n permanente interdik aangevra word by wyse van mosie - te nieer waar applikant nie gevra het dat feite wat in geskil is by wyse van *viva voce* getuienis opgelos moet word nie - kan die aansoek slegs toegestaan word indien die feite soos uiteengesit in respondent se verklarings, tesame met feite in applikant se verklarings wat deur respondent erken word, die aansoek regverdig... Die enigste ander regsmiddel wat hier ter sprake is is 'n aksie vir skadevergoeding en die vraag ontstaan of applikant op 'n oorwig van waarskynlikhede bewys het dat so 'n aksie, in die omstandighede van hierdie saak, nie voldoende is om sy regte te beskerm nie. Uit die staanspoor moet dear op gewys word dat applikant in sê oorspronklike verklaring ter ondersteuning van sy aansoek geen bewering gemaak het dat dear geen ander gewone regsmiddel is om sy regte te beskerm nie.'

Then, after referring to the affidavits, the learned Judge proceeded:

> 'Na my mening het die applikant nie op 'n oorwig van waarskynlikhede bewys dat 'n aksie vir skadevergoeding nie voldoende sal wees om sy regte te beskerm nie. Inteendeel dit wil my voorkom of die oorwig van waarskynlikhede in die teenoorgestelde rioting dui.'

And, after referring to the evidence on the question of damages, the learned Judge proceeded to deal with the Court's discretion in matters of this nature and he made the following observations in his regard at p. 115:

> 'In sover die Hof 'n diskresie het in 'n saak soos die onderhawige (nl. *Free State Gold Areas Ltd.* v. *Merriespruit (O.F.S.) Gold Mining Co. Ltd. and Another, supra* te bl. 524) meen ek dat die Hof geregtig is om sy diskresie teen die applikant uit te oefen. Gewoonlik word 'n permanente interdik by wyse van 'n aksie geëis en uit die aard van die saak word dear dan behoorlik voorberei om getuienis in te win om, ondermeer,

die waarde van die minerale regte wat beskerm moet word, nader te bepaal. Hier is dit nie gedoen nie. Dear is oorhaastig Hof toe gekom sonder behoorlike voorbereiding en dear is nie volhard met 'n tydelike interdik nie. Daarby kom nog die feit dat die waarskynlikhede daarop dui dat die skade wat die applikant mag nie aansienlik sal wees nie en dat die respondent, wat besig is met 'n belang ememing, aansienlike skade en ongerief aangedoen sal word indien om die nodige pad-materiaal elders uit te grawe. Daar is geen gevaar dat applikant enige skade wat hom mag toekom, nie teen die respondent sal kan verhaal nie, en, indien applikant nou of in die toekoms enige onderneming wil aanpak om die kalkneerslag te ontgin en te herwerk of verwerk, daar nog 'n bale groot area daarvan tot sy beskikking is.'

Some of these comments and observations also apply to the circumstances of the present case.

The applicant, as I have mentioned, has made no attempt to show that there is no other adequate legal remedy available to him. On the evidence before the Court, I am quite satisfied that the applicant's interests would be adequately safeguarded by an action for damages. There is no evidence that he is interested in actually mining his proportionate share of the coal reserves; what evidence there is, is to the contrary, namely that it will not be practicable or economically feasible for him to do so; the evidence also shows that the applicant is primarily interested in the monetary value of his share of the coal rights; and that he would be prepared to sell his rights to the respondent provided he is adequately compensated; the applicant himself has, however, placed no evaluation on his *pro rata* share of the coal deposits, but the respondent has done so; according to the respondent's witnesses the applicant, if he were a prospective seller, could not expect to receive more than an average price for his coal fights from a properly

informed purchaser and in the Delmas district the average price is R75 per h.a. On this basis a 1/520th share of the Brakfontein coal rights would be worth about R188 and the respondent has submitted that on any reasonable basis of valuation of the applicant's share of the coal rights, a value of less than R500 would be arrived at; the applicant did not specifically deal with this evidence in his replying affidavit; he merely referred to a price of R2 000 which the respondent had allegedly aid to a Mr. J. F. Barnard in respect of his 1/520th share of the Brakfontein coal rights, but it is common cause that this is not correct and that the true position is that the respondent obtained an option in 1964 to purchase Mr. Barnard's 1/520th undivided share in all the mineral rights on the farm, and not just his share of the coal rights, for R500. From the evidence as a whole it appears that the value of the applicant's interest in the coal rights is approximately R500; but, even if it were considerably higher, there is nothing before me to suggest that the assessment of the value of the applicant's interest or of any damages, which he may suffer as a result of the respondent's mining operations, would present any real difficulties; and whatever the extent of his damages, if any, may eventually prove to be, there is no danger whatsoever that the applicant would not be able to recover the amount from the respondent.

This, in my view, is clearly a case in which the applicant can be adequately compensated by a relatively small payment of money for any infringement of his rights.

The applicant has, in my judgment, failed in two respects to satisfy the requirements for a permanent interdict. I have not dealt specifically with the claim for an ejectment order. Counsel for the applicant did not address any argument to the Court in respect of this claim and, in my view, the applicant has not made out any case whatsoever for an ejectment order against the respondent.

The application is accordingly dismissed with costs, which include the costs of two counsel.

Applicant's Attorney: *Norman Kades*. Respondent's Attorneys: *Cliffe, Dekker & Todd*.

APPENDIX

DIGEST OF CASES ON APPEAL

Endnotes

1 (Popup - Popup)

The appeal which had been noted was not proceeded with - EDS.