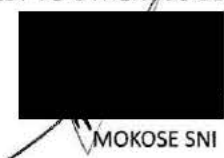


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2020/40523

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. [REDACTED]
	<u>30/1/2024</u> DATE  MOKOSE SNI

In the matter between:

GENORAH RESOURCES (PTY) LIMITED

Applicant

and

NKWE PLATINUM LIMITED

1st Respondent

NKWE PLATINUM LIMITED

2nd Respondent

NKWE PLATINUM SA (PTY) LIMITED

3rd Respondent

THE MINISTER OF MINERAL RESOURCES AND ENERGY

4th Respondent

DG: DEPARTMENT OF MINERAL RESOURCES AND ENERGY

5th Respondent

REGIONAL MANAGER: LIMPOPO REGION OF DEPARTMENT

OF MINERAL RESOURCES AND ENERGY

6th Respondent

THE GA RATOUW 282 KT COMMUNITY

DEVELOPMENT TRUST

7th Respondent

THE KONEPHUTHI SOCI ECONOMIC DEVELOPMENT

GOVERNANCE CONSOLIDATED STRUCTURE

8th Respondent

THE MABHEDLA TRIBAL AUTHORITY

9th Respondent

THE KOMANE TRIBAL AUTHORITY

10th Respondent

JUDGMENT

MOKOSE J

Introduction

[1] In the main application, the applicant who is the registered holder of an undivided minority share of a mining right, seeks declaratory and interdictory relief. The declarator sought is to the effect that:

- (i) there was a transfer or a change in control to the right to mine and recover minerals in the mining area as a result of an amalgamation agreement between the first respondent and Gold Mountains (Bermuda) Investments Limited;
- (ii) the transfer or change in control of the mining right is void as there was no consent obtained from the fourth respondent;
- (iii) as the transfer was void, the first respondent's undivided share in the mining right lapsed and that the only eligible company for the lapsed shares is the applicant.

[2] The interdictory relief sought is to interdict and restrain Nkwe as it stands post the amalgamation, from holding itself out as a holder of the undivided share in the mining right. Accordingly, the application is premised on the interpretation of the effect of the amalgamation agreement.

[3] The first and third respondents ("the respondents") oppose the application which they say is flawed since it turns upon the proper construction of the laws of Bermuda.

[4] Furthermore, the first and third respondents seek to strike out a significant portion of the founding affidavit and its annexures on the basis that the portions are inadmissible hearsay evidence or that the allegations have no bearing on the issue for determination and are accordingly irrelevant.

[5] Furthermore, the seventh and eighth respondents bring a counter-application case in similar terms as the applicant, save that an order be made declaring them to be the only eligible applicants for Nkwe's undivided share in the mining right over and above that of the applicant. However, counsel for the 7th and 8th respondents conceded that the trust could not sue in its own name and therefore withdrew his appearance on behalf of the seventh respondent for lack of *locus standi*.

[6] The court is also requested to consider the issue of costs in respect of three interlocutory applications which have subsequently become moot, due to them having been overtaken by events.

Brief facts

[7] The applicant owns an undivided 26% share in the mining right granted under the Mineral and Petroleum Resources Development Act 2002 (MPRDA) on, *inter alia*, the farm Ga Ratouw. The first respondent company which is registered in Bermuda ("Original NKP") held the remaining 74% interest in that right.

[8] On 14 March 2019, Original NKP concluded an amalgamation agreement with Gold Mountains (Bermuda) Investments Limited ("Bidco") and its two holding companies, Gold Mountains (HK) International Mining Company Limited and Zijin Mining Group Co. Limited ("Zijin"). The new company that emerged from the amalgamation was designated Nkwe Platinum Limited ("new NKP").

[9] Prior to the amalgamation Original NKP was an exempted company incorporated in Bermuda with company registration number 32747. Furthermore, it was listed on the Australian Stock Exchange and was a subsidiary of Jiang Mining Limited, which was in turn a wholly owned subsidiary of Zijin.

[10] Also prior to the amalgamation Bidco was an exempted company incorporated in Bermuda with company registration number 53596 and was a wholly owned subsidiary of Gold Mountains (HK) International Mining Company Limited.

[11] Nkwe SA was incorporated on 11 January 2002 to act as the first respondent's agent in implementing mining operations in respect of the mining right. The amalgamation resulted in the company named Nkwe Platinum Limited with the registration number 32747. The ultimate controlling shareholder of the entities involved in the amalgamation is Zijin and Nkwe was deregistered from the Australian Stock Exchange on 21 March 2019 while Zijin remains registered on the Hong Kong and Shanghai stock exchanges.

[12] A dispute had arisen between Original NKP's majority shareholders and the so-called dissenting shareholders as to whether Original NKP had lost its 74% share in the mining right considering the implementation of the amalgamation agreement. The applicant was of the view that under the amalgamation agreement Original NKP had become nothing but an empty shell. In the wake of the applicant taking that position, New NKP declared that it would proceed to exploit the mining right with or without the applicant's participation. As a result, thereof, New NKP through its shareholder Zijin, held out to the local mining community that the applicant is no longer part of the mining project and that it had been authorised by the Department of Mineral Resources and Energy ("DMRE") to execute the mining project without the applicant's participation.

[13] The applicant prays for both declaratory and interdictory relief from this court. The declaration is sought in the following terms:

- (i) that the amalgamation agreement constituted a transfer for the mining right alternatively that it constituted a change to the controlling interest in Original NKP;
- (ii) that the transfer or change in controlling interest in Original NKP is void as no consent had been obtained from the Minister of Mineral Resources and Energy as is required by Section 11 of the MPRDA;
- (iii) that the amalgamation agreement effectively resulted in the registration of the Original NKP whose mining rights lapsed under Section 56 MPRDA. Accordingly, the applicant is the only eligible applicant for Original NKP's undivided share in the mining right.

[14] The applicant also seeks, in the alternative, an interim order interdicting New NKP from holding itself out as the holder of Original NKP's undivided share in the mining right.

The Amalgamation Agreement

[15] The agreement was concluded by Nkwe Limited (the Original Nkwe) with Gold Mountains (Bermuda) known as Bidco and its holding companies, Gold Mountains (HK) and Zijin. In terms of the amalgamation agreement, Bidco and the first respondent amalgamated and became the second respondent (the new NKP). This agreement was concluded on 14 March 2019.

[16] The amalgamation agreement provides, *inter alia*, that the company shall continue as one company and that the new entity will continue business. It provides for interim arrangements as also when the first AGM will be held, its share capital, a company secretary and when the original shareholders will exit. The applicant contends that pursuant to the conclusion of the amalgamation agreement, all Original NKP's issued share were cancelled and its board of directors was dissolved.

[17] Of importance and in terms of the amalgamation agreement is that the property of each of Bidco and Original Nkwe shall become the property of the amalgamated company and that it shall continue to be liable for the obligations of each of Bidco and Nkwe. Furthermore, from the effective time of the agreement Nkwe shareholders shall cease to have any rights as shareholders of Nkwe except for the right to receive consideration pursuant to the conversion and cancellation of their shares in the respective companies, subject of the amalgamation agreement.

Applicable Legislation

[18] The objects of the MPRDA are set out in Section 2 and read as follows:

- “(a) *recognize the internationally accepted right of the state to exercise sovereignty over all the mineral and Petroleum Resources within the Republic;*
- (b) *give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;*
- (c) *promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;*
- (d) *substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and*

petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

- (e) promote economic growth and mineral and petroleum resources development in the Republic; particularly development of downstream industries through the provision of feedstock, and development of mining and petroleum inputs industries;*
- (f) promote employment and advance the social and economic welfare of all South Africans;*
- (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;*
- (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly an ecologically sustainable manner while promoting justifiable social and economic development; and*
- (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.*

[19] Section 4 of the MPRDA contains an interpretation clause which provides as follows:

- “(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.*
- (2) Insofar as the common law is inconsistent with this Act, this Act prevails.”*

[20] Section 11 of the MPRDA restricts the transfer of a controlling interest in companies that hold mining rights. It provides as follows:

- “(1) A prospecting right or mining right or any interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of a change of a controlling interest in listed companies.”*

[21] Section 56 of the MPRDA provides that:

“Any right, permit or permission granted or issued in terms of this Act shall lapse whenever-

(a)

(b)

(c) *a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of Section 11 or such permission has been refused."*

Issue

[22] The question that arises in this application is whether there has been a contravention of Section 11 of the MPRDA and in turn, the effect of the amalgamation agreement upon the Original NKP's 74% interest in the mining right. However, it must be determined whether as a fact, the Original NKP still exists as an entity.

[23] The applicant is of the view that there has been a transfer within the meaning of Section 11 in that the single control has become joint control and as such, change in control of the company. A new entity has been formed and accordingly, there has been a transfer of the rights.

Foreign Law

[24] The respondents oppose this application. They contend that the applicant was obliged to plead the provisions of Bermudan law upon which it relied as material facts required to be established to arrive at a conclusion that the amalgamation resulted in a transfer or change of control of Nkwe. It contends further that the applicant failed to prove the relevant provisions of Bermudan law, nor did it place those provisions before this court.

[25] The applicant subsequently filed an application to file a further affidavit to supplement the founding affidavit. This application was not opposed, and a further affidavit was filed, that being the expert evidence of Mr David Kessaram SC, a senior counsel in the employ of the firm Cox Hallet Wilkinson Limited in Bermuda. In his opinion, *'nothing in the amalgamation agreement suggests that Old Nkwe and Bidco maintain their separate existence and the ownership of their separate assets. Old Nkwe ceased to exist as a separate entity on amalgamation'*.

[26] Advocate Loxton SC for the respondents, admits that Section 11 effectively renders void agreements in which transfers have been effected without the consent of the minister. However, he further submits that no transfer nor deregistration of the company from a South African point of view has been effected in the matter *in casu*. The issue of amalgamation is one for the Bermudan Law and particularly to determine whether there has been a transfer in terms of that law.

[27] Our courts are not required to take judicial notice of foreign law except in limited circumstances.¹ Proof of foreign law is through evidence of properly qualified persons with expert knowledge of the applicable law.² Accordingly, no judicial notice would be taken of Bermudan law which cannot be ascertained readily and with sufficient certainty without recourse to the evidence of an expert.

[28] An expert opinion was furnished to interpret the legal position in Bermuda on the amalgamation of Bidco and Nkwe by the respondents. The opinion was sought from Mr David Chivers QC who was of the view that the amalgamation did not result in the cessation of the first respondent nor a transfer of the assets of the amalgamating companies. Consequently, it did not result in the transfer of the mining right.

[29] Mr Loxton brought to the court's attention a judgment and order handed down by the Supreme Court of Bermuda in which it was found that the provisions dealing with amalgamation of companies is set out in Sections 104 to 109 of the CAB (Companies Act of Bermuda). Those provisions are derived from Canadian legislation and the effect of the amalgamation under those provisions is that two companies continue as one with their assets and liabilities intact. Mr Loxton further submits that in consequence, the decision of the Supreme Court of Bermuda is binding on the applicant who is precluded from pursuing its claim based upon the interpretation of the law of Bermuda as interpreted by Mr Kessaram SC in these proceedings.

[30] This court is faced with two diametrically opposed constructions of the CAB by the parties' experts. It therefore falls to this court to consider the provisions of both the CAB in conjunction with

¹ Schlesinger v Commissioner for Inland Revenue 1964 (3) SA 389 (A) at 396G

² Standard Bank of South Africa v Ocean Commodities Inc and Others 1983 (1) SA 276(A) at 294G

the amalgamation agreement to determine whether as a matter of law, Original NKP has ceased to exist for the purposes of the South African statutory and regulatory regime – in particular, the MPRDA.

[31] Section 104(1) of the Companies Act provides that two or more companies which are registered in Bermuda may subject to Section 4A amalgamate and continue as one company provided that if the amalgamated company is to be a local company, it shall comply with the Third Schedule. It is evident from the plain reading of this section that Section 104 (1) envisages that the process of an amalgamation produces a single company on its completion.

[32] The applicant brought to the court's attention that the Companies Act draws and sustains a parallel between mergers and amalgamations in that the Act draws a distinction between the two. The applicant submits that the merger of companies contemplates the survival of one of the merging companies. In particular Section 104H provides as follows:

"Two or more companies which are registered in Bermuda may merge and their undertaking, property and liabilities shall vest in one of such companies as the surviving company (the 'surviving company...')

[33] The result of an amalgamation is a single company. Section 104 (1) provides that:

"Two or more companies which are registered in Bermuda, may subject to section 4A amalgamate and continue as one company: Provided that if the amalgamated company is to be local company it shall comply with the Third Schedule."

[34] From the submissions made to this court, it is evident that on the one hand it appears that the Original NKP is rendered defunct and no longer has shares and shareholders as also a board of directors. On the other hand, and in pursuance of Section 109(b) of the Companies Act of Bermuda and clause 3(b) of the Amalgamation Agreement, the property of the Original NKP became that of the amalgamated company.

[35] There has been much debate about what "controlling interest" means in relation to Section 11 of the MPRDA. In the matter of *Mogale Alloys (Pty) Limited v Nuco Chrome Bophuthatswana (Pty)*

*Limited*³ the court held that it cannot be confined to a single characteristic or criterion and could mean, in the case of a company, more than 50% of the issued share capital of the company, or more than half of the voting rights in respect of the issued share in the company, or power to either directly or indirectly appoint, remove or veto the appointment of the majority of the directors of the company without the concurrence of another.

[36] In a more recent SCA case, it was found that Section 11 must be interpreted as including both direct and indirect cessions, transfers or leases as well as other forms of changing control by means of the issue of new shares/dilution of interests in a company which directly or indirectly holds the mining right.⁴

[37] Whilst the respondents are of the view that any change in control would have to have happened at the level of Zijl Mining being Original NKP's majority shareholder, I agree with the applicant that the Original NKP has no shares as a result of the amalgamation. The amalgamation agreement must be construed through the objects of the MPRDA to circumvent a situation where mining rights are held by a *peregrinus* thereby not satisfying the objects of the MPRDA which includes the empowerment of the people of South Africa. The Act was enacted to facilitate equitable access to and sustainable development of South Africa's mineral and petroleum resources. That must always be considered. As a result, I am of the view that this has triggered Section 11 of the MPRDA and therefore the consent of the Minister would be required.

[38] Having considered these two interpretations of the Companies Act of Bermuda and having considered the opinions of the two expert witness and the amalgamation agreement, I am of the view that the amalgamation resulted in cessation of Original Nkwe as nothing in the agreement suggests that the Original Nkwe and Bidco would maintain their separate assets post the amalgamation. For this reason, I am inclined to grant the application.

[39] The next question to be determined by this court is whether the Original NKP's mining right has lapsed. The applicant is of the view that the undivided share in the mining right has lapsed based

³ 2011 (6) SA 96 (GSJ)

⁴ Vantage Goldfields SA (Pty) Ltd and Another v Argomanzi (Pty) Ltd and Others [2023] ZASCA 106

on the cancellation of the shares in the Original NKP and the dissolution of its board, resulting in its effective deregistration for the purposes of Section 56(c) of the MPRDA which provides that any right, permit or permission granted or issued in terms of this Act shall lapse whenever a company or close corporation is deregistered in terms of the relevant Acts and no application has been made for the consent in terms of Section 11 to the Minister or such permission had been refused.

[40] The respondents contend that Original Nkwe was not deregistered under the law of Bermuda and as such, Section 56 will not apply. The deregistration must be “in terms of the relevant Acts” which are interpreted as domestic legislation. The respondents are of the view that even if the amalgamation has resulted in the deregistration of the Original Nkwe, such deregistration would be in terms of a foreign law and would not be “in terms of the relevant Acts”.

[41] It is common cause that the Original Nkwe was registered under the company laws of Bermuda. However, if the court were to agree with the interpretation of the respondents, foreign registered companies would retain their mining rights in south Africa even after deregistration where there has been an amalgamation as in the matter in *casu*. As stated above, the MPRDA was constructed purposively. I agree with the applicant that its objects would not be achieved by a foreign company that has ceased to exist as a result of a deregistration under a foreign statute. Accordingly, I am of the view that this application falls to be granted.

Interdictory Relief

[42] The applicant seeks to interdict Nkwe from holding itself out as the holder of the undivided share in the mining right. An interdict may be granted where the requirements are met. The requirements are well-established in our law. They are:

- (i) that the applicant must have a clear right;
- (ii) that there must be an injury committed or a reasonable apprehension of same being committed;
- (iii) that there be no other satisfactory remedy available to the applicant; and

- (iv) that there must be a balance of convenience in favour of the applicant.⁵

[43] The applicant contends that it has a clear right and that it is entitled to protect that right from unlawful outside interference. Furthermore, the harm reasonably apprehended is that the New NKP will oust it from exploiting its share of the mining right. It has already sought to interfere with such right in the statements it has made to the Konephuti Traditional Community. The applicant further contends that there is no other satisfactory remedy available to it. It has tried unsuccessfully to resolve the issue without resorting to litigation. Accordingly, the court ought to grant the interdict.

[44] The respondents are of the view that the applicant has failed to meet the requirements for the granting of an interdict in that it is unclear from the founding affidavit and replying affidavit which clear right they seek to protect. Furthermore, no injury or potential injury has been shown. Also absent from the affidavit is a contention of an alternative remedy and as such, has failed to meet the requirements for an interdict.

[45] I disagree with the contentions of the respondents that the applicant has failed to meet the requirements of the granting of a final interdict. I am of the view that the applicant has shown the requirements for the granting of a final interdict. The applicant is entitled to the peaceful and undisturbed use of the mining right in which there is a real threat to be ousted therefrom. Accordingly, the application falls to be granted.

Counterclaim

[46] As stated above, the seventh and eighth respondents brought an application against Nkwe similar to that of the applicants in the main application. However, only the eighth respondent continues with the application as counsel representing both the seventh and eighth respondents agreed with the fact that the trust lacked *locus standi in judicio* in the counter application. The eighth respondent contends that the amalgamation constituted a transfer of the mining right alternatively, a change in the controlling interest in the Original NKP. Furthermore, it contends that they are the only

⁵ Setlogelo v Setlogelo 1914 AD 221 at 227

eligible or competent party to be awarded Nkwe's undivided share in the mining right. As such, the court should order that the mining rights be transferred to them.

[47] As I have dealt with the first issue, I will refrain from repeating the court's views about the effect of the amalgamation and deal only with the second issue being that they are the only competent or eligible party to be awarded Nkwe's undivided share in the mining right. The first and third respondents are of the view that the relief sought in the counter application to declare the applicant and the counter-applicants the only eligible applicants for the undivided share illegitimate. The applicants are of the view that the communities only have a commercial interest in the form of shares or an equity equivalent benefit in the applicant as stipulated by the mining charter under the MPRDA. As such, only the applicant is a competent applicant for the Original Nkwe's undivided share in the mining right.

[48] I am of the view that this court does not have the authority to determine who should be the successful applicant to take over the Original Nkwe's undivided share in the mining right, that being the authority of the Minister. The parties, being both the applicant and the eighth respondent must each formally apply to the Minister for the right to hold the undivided share held by the Original Nkwe.

Application to strike out

[49] The first and third respondents launched an application against the eighth respondent wherein they objected to the following paragraphs in their supplementary answering affidavit dated 29 October 2021 on the grounds that they contain inadmissible evidence contrary to a directive by Neukircher J and also for the reason that they are scandalous, vexatious and/or irrelevant:

- (i) Paragraph 2 the words *"read with the founding affidavit of Gerasimos Comninos dated 19 February 2021 (in support of the striking out)...."*
- (ii) Paragraphs 4 – 11;
- (iii) Paragraphs 13 the words *"The Fourth through to Sixth Respondents have statutory and constitutional obligation to be proactive in providing protection and respect and promoting the constitutional values which include but not limited to human dignity and right to equality. In the circumstances I submit that constitutional and statutory obligation cannot in the*

circumstances of this case reasonably be complied with in an environment where the attitude on the part of the Fourth to Sixth Respondents is to remain silent without justification.”

- (iv) Paragraphs (and related subparagraphs) 16 to 57;
- (v) Paragraph 60;
- (vi) Paragraphs (and related subparagraphs) 62 to 70;
- (vii) Paragraphs 79 to 79.7 (and related subparagraphs);
- (viii) Paragraphs commencing with “WHEREFORE” and concluding at “(3) Granting the Eighth Respondent further and alternative relief.”

[50] The applicant (first and third respondents in the main application) contends that the eighth respondent sought to address issues outside of the directive issued by Neukircher J as the presiding office in the case management process entered into by the parties to the dispute, being to afford the parties an opportunity to respond to the evidence of Mr Kessaram as sought to be introduced by the applicant in the main application. The applicant was of the view that the abovementioned clauses be struck out on the basis that they are irrelevant and cause Nkwe prejudice.

[51] I note that the allegations contained therein could not have been refuted by the applicant and are prejudicial to Nkwe. The leave of the court should have been sought to file an affidavit with the allegations. I also note that many of the allegations are irrelevant. Furthermore, I note that no condonation application was made to file such an affidavit which was filed 10 months late and contrary to the court rules. I disagree with counsel for the eighth respondent that the impugned clauses will assist the court in influencing a decision. A directive has been issued by Neukircher J and it must be respected. Accordingly, I am inclined to grant the order as sought.

Costs

[52] The normal rule pertaining to an award of costs is that costs should follow the result. The court may, in certain circumstances award punitive costs to show its displeasure for the way the litigation was conducted. An award of costs is in the discretion of the court and must be exercised

judicially.⁶ This discretion must be exercised judicially on a consideration of the circumstances and what is fair to both parties.⁷ I will deal with the costs in the main application after I have dealt with those in the interlocutory applications.

[53] There are three interlocutory applications that have been overtaken by events in respect of which this court is to decide the issue of costs. The court must have regard to all the applications including that which the applicant launched to supplement its founding affidavit. The costs in that application do not arise as the matter was unopposed. The applications in which costs must be determined are the following:

- (i) the application by the first and third respondents to strike out parts of the founding affidavit and replying affidavits of the applicant in the main application launched on 19 February 2021;
- (ii) the applicant's application under Rule 30 in respect of which the complaint was over the irregular set-down of the hearing of this application launched on 14 July 2021;
- (iii) the first and third respondents' application under Rule 30 in respect of which they complained about the late delivery of the applicant's answering affidavit in their application to strike out which was launched on 26 August 2021.

[54] The applicant contends that it is entitled to costs in respect of all the interlocutory applications in which costs remain in issue for the reason that the applications brought by the respondents were baseless and that they failed to make out a case for the relief sought. Furthermore, the respondents failed to plead prejudice suffered. This is particularly so in both applications brought by the respondents. The applicant further contends that in respect of the Rule 30 application brought by it, it had made out a proper case for the relief sought. Accordingly, it should be granted the costs.

[55] Counsel for the respondents were of the view that the costs for all the interlocutory applications be costs in the cause or in the alternative, each party to pay its own costs.

⁶ Marks v Estate Gluckman 1946 AD 289 at 314-315

⁷ Northern Assurance Co. Ltd v Somdaka 1960 (1) SA 588 (A) at 595 – 596A

[56] The applicant contends that the respondents had failed to make out a case of prejudice in their papers and had merely asserted it. Accordingly, a proper case had not been made out. The court has a wide discretion under Rule 30 and may make any order it deems fit.⁸

[57] Rule 6(15) of the Uniform Rules of Court provides that a court may on application strike out of any affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate costs order and shall not grant such an application unless it is satisfied that the applicant will be prejudiced. Prejudice must therefore be pleaded, and evidence of such evidence furnished and not merely asserted. The applicant in the first two applications contend that no prejudice has been pleaded nor evidence furnished to that effect. I note that this is so and agree with the applicant in this regard. Accordingly, I am of the view that costs should be awarded to the applicant.

[58] The costs in respect of the third application – the applicant’s Rule 30 Application was one in which the respondents complained about the fact that the applicant’s answering affidavit in the strike out application was delivered out of time. The Nkwe respondents used the incorrect form of notice of motion being that applicable to *ex parte* applications. The applicant contends that Nkwe respondents cannot complain where it chose not to indicate in its notice of motion the date upon which the applicant was due to deliver its answering affidavit.

[59] I agree with the applicant that costs in respect of this interlocutory application be awarded to it. Accordingly, the costs in the interlocutory applications are awarded to the applicant.

Costs in the counter application

[60] As stated above, costs usually follow the result in litigation matters. It was noted that counsel for seventh respondent concede that it had no *locus standi* and accordingly did not proceed with the matter on its behalf. It was brought to the court’s attention that the High Court Limpopo Division sitting at Polokwane, had already made an adverse finding against both the counter-applicant in respect of their lack of standing before a court.⁹ Accordingly, I deem it necessary for the court to show

⁸ Rabie v De Wit 2013 (5) SA 219 (WCC) at 233H-I

⁹ Ga Ratouw 282 KT Community Development Trust and Another v Nkwe Platinum Limited and 10 others Case No. 7931/2020 (heard on 29 December 2020)

its dissatisfaction to the applicants in the counter application not only in respect of the *locus standi* of the seventh applicant but also in the irrelevant submissions made to the court including Nkwe's business rescue application which was not before the court. I am of the view that counsel should be aware that a trust cannot sue in its own name and that the matter had been before the High Court Limpopo Division on exactly the same matter. This shows negligence on the part of counsel for the seventh and eighth respondents which warrant an order of costs being made to mark the court's displeasure in the conduct of counsel in the matter. Furthermore, counsel for the eighth respondent wasted the court's time by making irrelevant submissions which had nothing to do with the proceedings on hand. Accordingly, I order costs against the seventh and eighth respondents on an attorney and client scale, including the costs of two counsels.

Costs in the main application

[61] As stated above, costs will follow the result. There is no reason why this court should not follow the principle that costs should follow the result. Accordingly, I order costs against the first and third respondents, including the costs of two counsel.

Order

[62] Wherefore, the following order is granted:

- (i) the conclusion of the Amalgamation Agreement and its implementation constitute a transfer and/or change in control of the Ga Ratouw Mining Rights for the purposes and within the meaning of Section 11 of the MPRDA;
- (ii) the transfer and/or change in control in (i) above is void by virtue of the absence of the necessary consent in terms of Section 11 of the MPRDA from the Minister of Mineral Resources and Energy;
- (iii) that the first respondent has been deregistered within the meaning and for the purposes of Section 56 MPRDA following upon the conclusion and implementation of the Amalgamation Agreement;
- (iv) the undivided shares of the first respondent in the Ga Ratouw mining right have lapsed;

- (v) the undivided shares in the Ga Ratouw mining right which previously belonged to the respondents shall be referred back to the Minister or his delegate to determine who they should be granted to;
- (vi) the respondents are interdicted from holding themselves out as the holder of the undivided share in the Ga Ratouw mining right;
- (vii) the first and third respondents jointly and severally pay the costs of this application, including the costs of two counsel;
- (viii) the seventh and eighth respondents jointly and severally pay the costs of the counter application, including the costs of two counsel.


 MOKOSE J
 Judge of the High Court of
 South Africa Gauteng
 Division, PRETORIA

For the Applicant: Adv A Subel SC
 Adv JJ Meiring
 On instructions of: Malan Scholes Inc

For the first and third Respondents: Adv CDA Loxton SC
 Adv CAA Louw
 On instructions of: Edward Nathan Sonnenbergs

For the seventh and eighth Respondents: Adv TJ Magano

Date of judgment: 30 January 2024