

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no **1387/2023**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

In the matter between:

HARMONY GOLD MINING COMPANY LTD

1st Applicant

AVGOLD LTD

2nd Applicant

FREEGOLD (HARMONY) (PTY) LTD

3rd Applicant

LORAINÉ GOLD MINES LTD

4th Applicant

and

**THE RESIDENTS OF THE MASILONYANA &
MATJHABENG DISTRICTS & SURROUNDS
INVOLVED AND/OR PARTAKING IN THE
INTERDICTED ACTIVITIES**

1st Respondent

**LEJWELEPUTSWA MINING COMMUNITY
AND DEVELOPMENT FORUM (LMCDF)**

2nd Respondent

WELLINGTON MAHLOANE

3rd Respondent

DIKELEDI TAEI

4th Respondent

SIYABONGA TWAWALA

5th Respondent

CORUM: JP DAFFUE J

HEARD ON: 03 AUGUST 2023

DELIVERED ON: 10 AUGUST 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 10 AUGUST 2023.

ORDER

1. The 2nd respondent's name is amended to read as follows: 'Lejweleputswa Mining Community and Development Forum (LMCDF)'
2. The rule *nisi* issued on 19 March 2023 is confirmed in respect of 1st, 2nd and 5th respondents pertaining to paragraph 1.1, including sub-paragraphs 1.1.1 to 1.1.7 and sub-paragraph 1.2.1.
3. The rule *nisi* issued on 19 March 2023 is confirmed in respect of 3rd and 4th respondents only in respect of paragraph 1.2.1 thereof.
4. Each party shall pay their own costs in respect of the application.

JUDGMENT

Introduction

[1] This is the extended return date of a rule *nisi* issued on an urgent and ex parte basis on Sunday afternoon, 19 March 2023. The applicants – four mining houses - sought protection from the court against unlawful unrest and protest actions near and surrounding their operations. They also feared that the unlawfulness would escalate if the court did not intervene. The killing of a specific individual and the

setting alight of taxis transporting employees to and from the mines were advocated by members of the community.

The parties

[2] The four applicants are well-known mining companies in the Free State Goldfields. They are Harmony, Avgold, Freegold and Loraine Gold. It is not necessary to quote their full names and registration details. Harmony is the employer of about 22 000 individuals at the various mining operations of the applicants within the Free State Goldfields.

[3] The respondents are cited as follows:

3.1 The first respondent is cited as the residents of the Masilonyana and Matjhabeng districts and surrounds involved and/or partaking in the interdicted activities. These residents are further described as natural persons within the areas and it is made clear that relief is only sought against those individuals who have acted unlawfully or threatened to further act unlawfully with the intention to forcefully halt business operations at the applicants' mining operations. The applicants made it clear that they were unable to more precisely define who these persons were as they were mostly unknown to them.

3.2 The second respondent was initially cited as Lejweleputswa Community Development Forum (LCDF), an unincorporated entity and community forum consisting of various individuals from the townships and communities surrounding the applicants' various mining operations. I shall later herein refer to the alleged misnomer of the second respondent and the amendment sought.

3.3 The third respondent is cited as Mr Wellington Mahloane (Mahloane), a major male person, cited in his personal capacity, he being a representative and/or member of the LCDF.

3.4 The fourth respondent is cited as Ms Dikeledi Taeli (Taeli) in her personal capacity, she being a major female representative and/or member of the LCDF.

3.5 The fifth respondent is cited as Mr Siyabonga Twawala (Twawala), a major male person.

The relief obtained

[4] I do not intend to quote the rule *nisi* issued on 19 March 2023 which consists of four pages.¹ A summary will suffice. The applicants obtained relief which operated as an interim order with immediate effect against all the respondents. A prohibitory interdict was obtained as is apparent from sub-paragraph 1.1 of the order. First, from causing damage to *inter alia* employees and contractors of the applicants. Second, from inciting or encouraging anyone to cause harm to the property of applicants, as well as *inter alia* their employees and contractors. Third, from threatening to cause harm to the person or property of the applicants and/or their employees and contractors. Fourth, from preventing or discouraging applicants' employers and contractors from discharging their duties. Fifth, from publishing or communicating allegations against the applicants and/or their employees and contractors. Sixth, from blockading entrances to applicants' mining operations. Seventh, from interfering with applicants' operations. Eighth, from accessing applicants' mines and making commercial demands. Furthermore, in terms of the mandatory interdict contained in sub-paragraph 1.2, the respondents were ordered to take all reasonable steps to ensure that their affiliates, associates, members and/or any other third parties refrain from engaging in any of the interdicted activities.

[5] The application is opposed by the third and fourth respondents only. They filed their answering affidavits a week before the initial return date, to wit 18 May 2023, causing the application to be postponed and the return date extended to 3 August 2023 in order to allow the applicants an opportunity to file their replying affidavit and the parties to file heads of argument.

¹ Record: pp 122 – 126.

Application for amendment of the second respondent's name

[6] As mentioned, the second respondent was cited as the Lejweleputswa Community Development Forum (LCDF). Throughout the founding affidavit it was referred to as such. Both the third and fourth respondents pointed out in their answering affidavits that they were not members of the LCDF as alleged, but of the Lejweleputswa Mining Community and Development Forum (LMCDF). The third respondent referred in his answering affidavit to a meeting that he had with Harmony's legal representatives, Webber Wentzel, in Johannesburg on 9 February 2023. He participated in the meeting as 'an advisor/strategist of the LMDCF'. The correct name of the forum is also apparent from the letters relied upon by the third respondent.² In fact, the third respondent referred to these two letters as correspondence between his legal representatives, Messrs MB Nkonoane Inc and Webber Wentzel, the legal representatives of Harmony. Clearly, the LMCDF and Harmony's legal representatives were in communication with each other. These two respondents averred that they had no connection with the second respondent as cited, but that they were members of the LMCDF. Consequently, they submitted that a misjoinder had occurred and that the application should be dismissed for this reason only.

[7] In the replying affidavit, the applicants' deponent conceded that they omitted the word 'Mining' in the description of the second respondent, but that this was a mere misnomer. She gave notice that the applicants would move for an amendment of the notice of motion and case headings where applicable. At the onset of the proceedings before me, Mr South handed to me a notice to amend in terms of rule 28 of the Uniform Rules of Court from the bar in terms whereof the applicants sought an amendment of the second respondent's name to include the word 'Mining'. According to the notice the applicants also sought amendments of the founding affidavit to reflect the correct name. It is trite, as stated in rule 28(1) that a court shall not amend a party's affidavit. It is for the party to explain the mistake in a further affidavit. This was done as is apparent from the replying affidavit.

² Record: Annexures AA1 & AA2, pp 159 – 162.

[8] The following dictum in *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another*³ is applicable to the present scenario:

‘As I see it, the focus should therefore immediately be directed at the substitution application. The settled approach to matters of this kind follows the considerations in applications for amendments of pleadings. Broadly stated, it means that, in the absence of any prejudice to the other side, these applications are usually granted (see, for example, *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* (supra) at 369F - I; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D - H). As is pointed out in *Devonia Shipping* at 369H, the risk of prejudice will usually be less in the case where the correct party has been incorrectly named and the amendment is sought to correct the misnomer, than in the case where it is sought to substitute a different party. But the criterion remains the same: will the substitution cause prejudice to the other side, which cannot be remedied by an order for costs or some other suitable order, such as a postponement?’

[9] Although Mr Lubbe did not have instructions to appear on behalf of the second respondent, he did not object to the amendment. He appeared for the third and fourth respondents and made submissions in his heads of argument about the negotiations between the attorneys of the parties and the fact that the third respondent was representing the second respondent at the time. He submitted that the applicants’ failure to refer thereto in their founding affidavit meant that the test of utmost good faith was not complied with. I shall return to this aspect later. I considered granting the amendment and postpone the matter to grant the second respondent as properly cited an opportunity to oppose the application. This would really be a waste of time. There cannot be any prejudice to the second respondent, especially bearing in mind the costs order I intend to make. Consequently, the name of the second respondent wherever it appears in the headings of the documents and the notice of motion stands to be amended to read Lejweleputswa Mining Community and Development Forum (LMCDF).

Second respondent’s lack of locus standi

³ (705/08) [2009] ZASCA 143; [2010] 3 All SA 36 (SCA); 2011 (1) SA 35 (SCA) (25 November 2009) at para 14.

[10] Although not having instructions to appear for the second respondent, Mr Lubbe submitted that it lacked *locus standi* and that no order could be made against it. Mr Lubbe relied on *Commtech Comprehensive School and School Governing Body Ano v MUCCP Community Working Group of Mangaung Township*.⁴ In that case the full bench concluded that ‘the individuals allegedly affected by being assaulted and ejected from the MUCPP property should have brought the application instead of an entity that has no *locus standi*.’⁵

[11] Insofar as the second respondent may be described as an unincorporated body of persons, rule 14(1) of the Uniform Rules of Court stipulates: ‘**Association**’ means any unincorporated body of persons, not being a partnership’. Although in terms of the common law an association of persons which does not have their own legal personality cannot as a general rule, sue or be sued in its own name, rule 14(2) now governs the situation. It reads as follows:

‘A partnership, a firm or an association may sue or be sued in its name.’

This sub-rule must be read with sub-rule 14(9) which I do not intend to deal with any further. I do not agree with Mr Lubbe. The applicants were fully entitled to institute application proceedings against the second respondent.

The undisputed facts

[12] No case has been made out against the third and the fourth respondents for prohibitory relief. There is no evidence that they participated in any unlawful action and/or instigated any unlawful action. Their involvement in the unrest has not been proved.⁶ The applicants’ response in reply to the versions of these two respondents does not take the case any further.

⁴ (A71/2020) [2020] ZAFSHC 177 (5 November 2020).

⁵ *Ibid* para 28.

⁶ Record: third respondent’s answering affidavit, p 157 at para 6 and fourth respondent’s answering affidavit, pp 166 & 167 at paras 2 & 4, read with replying affidavit, p 180 at para 12.

[13] The case against the fifth respondent is clear and undisputed. On 14 March 2023 he posted on his facebook page that Harmony would be shut down completely by 15 March 2023 and that taxi drivers taking employees to work 'would be burnt by petrol bombs'. He also made it clear that Mr Mgotywa, a senior employee of Harmony, must fall. He made a further posting indicating that 'the children of Kutloanong are angry and they will close Harmony's operations until the CEO and Mgotywa leaves Harmony.' He concluded with the following remark 'let the war begin'.⁷ These were serious threats which entitled the applicants to an interdict.

[14] The applicants also relied on voice notes published on a community whatsapp group, indicating that 'the forum' was busy closing roads and that they were going to burn tyres and blockade roads in certain areas as from the 16th of March 2023.⁸ Although this is hearsay, Daniso J who heard the urgent application, could not ignore the information, bearing in mind that protest action had already been embarked upon when the voice notes were published and further illegal action continued on 16 March 2023 as anticipated. None of the respondents tried to show afterwards that these voice messages were false.

[15] On 16 March 2023 various unrest and protest actions occurred near and surrounding the applicants' operations whilst the South African Police Service was reluctant to interfere without a court order. The applicants feared that the unrest would escalate in accordance with the recorded voice notes.⁹ The point was made that the intended unlawful shutdown would be anything but peaceful and that there was a belief that protestors were planning to assassinate Mr Mgotywa.¹⁰

[16] On 12 March 2023 a representative of the applicants was informed of threats and unhappiness within the community. The fourth respondent was contacted. Her response as set out in the founding affidavit is corroborated by the email relied upon by her in her answering affidavit. According to the applicants the fourth respondent 'confirmed that something was brewing in the community and the Forum.' She also

⁷ Record: founding affidavit, pp 24 & 25 at paras 30 & 31 as well as annexures FA 7 and FA 8, pp 115 – 117.

⁸ Record: pp 25 & 26 at paras 32 - 37 read with annexure FA 9, pp 119 & 120.

⁹ Record: founding affidavit, p 26 at paras 39 & 40.

¹⁰ Record: founding affidavit, p 31 at paras 56 & 57.

said that 'she would try and stop the developments but cannot provide any assurance that this would be successful'.¹¹ Fourth Respondent confirmed that she had sent an email to representatives of Harmony on 12 March 2023, under the heading 'Awareness of protest by Unsatisfied communities members.' The email is annexed as annexure AA4 to her answering affidavit.¹² In this email she stated *inter alia* the following:

'The situation now is out of our hands. This is the position that is on the ground the communities are saying they are revolting tomorrow. So have caught wind that there's been some movement and they are being excluded from. Hence they are revolting. ... Given this background, we request Harmony to assist us and address these frustrations (sic).

Your assistance will be highly appreciated.'

She ended off this email as follows: 'DK TAEI - Coordinator LMCDF'.

Evaluation of the evidence and the submissions of the parties

[17] The requirements for the granting of a final interdict are trite. An applicant for such an order must show (a) a clear right, (b) an injury actually committed or reasonably apprehended and (c) the absence of another satisfactory remedy. Once these requirements have been met, the scope, if any, for refusing relief is limited.¹³ Even if I believe that constructive negotiations between the parties and their attorneys prior to the launching of the interdict proceedings might have had a positive effect to prevent any harm, I am mindful of the fact that the purpose of the interdict as in all other cases, was to put an end to the unlawful conduct in breach of the applicants' rights. Any proposed alternative remedy must provide a similar protection. In *casu*, there is really nothing and Mr Lubbe did not suggest that anything could have been done to stop any unlawful action. In the final instance, an

¹¹ Record: founding affidavit, pp 30 and 31 at para 53.

¹² Record: p 169.

¹³ See *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) (20 October 2016) para 29.

alternative remedy must be a legal remedy, a remedy that a court may grant and could be enforced. I can think of nothing in this regard.

[18] In the absence of opposition by first, second and fifth respondents and the third and fourth respondents' neglect to deal with the material averments made by the applicants, there is no need for a detailed discussion of the evidence tendered and whether or not the requirements for a final interdict have been met. I shall constrain myself to a brief discussion. Every person is free to conduct any lawful trade or business. This common law right has been entrenched in s 22 of the Constitution which provides that '[e]very citizen has the right to choose their trade, occupation or profession freely.' The right to trade extends to juristic persons as well who are entitled to conduct their businesses to the overall benefit of all their stakeholders, including employees, consumers and investors. The applicants have established a clear right worthy of protection.

[19] The second requirement has been met as well. Even accepting for the moment that no injury had actually been committed at the time when the interdict was obtained, which is doubtful, there can be no doubt that there was a reasonable apprehension of injury at that stage. The test is objective. It is unnecessary to repeat the undisputed facts referred to above. As mentioned, the applicants failed to prove that the third and fourth respondents were participants in the protest action. However, at no stage did they give an undertaking that they would not unlawfully interfere with the applicants' mining operations in future. They also failed to actively disassociate themselves with the aforesaid actions and/or they failed to take any reasonable steps to ensure that their colleagues and co-members refrain from engaging in unlawful activities. I would have expected the second and third respondents to give an appropriate undertaking in the letter of their attorneys to Webber Wentzel dated 27 March 2023, annexed as annexure AA3.¹⁴ In the absence of any undertaking from any of the respondents not to repeat the undisputed conduct referred to above, the applicants had a reasonable apprehension that unless an interdict was granted, the unlawful actions would continue in breach of the applicants' rights.

¹⁴ Record: pp 163 & 164.

[20] I shall deal hereunder with my view as to how the applicants should have approached the litigation, but my suggestion does not make any difference to the third requirement of final interdicts. It is apparent that the protest actions were initiated from Sunday the 12th of March 2023 and flared up during the week to the extent that the protest escalated into violence. Various unrest and protest actions took place near and surrounding the applicants' operations on Thursday, 16 March 2023. The threats to blockade entrances to the applicants' premises and to set taxis transporting employees alight could not be disregarded at all.

[21] When perusing the papers before I heard oral argument, I noticed that there was no proof of service of the court order on the fifth respondent. I pointed this out to Mr South during argument. He confirmed that service was properly effected on fifth respondent's facebook page in line with the court order and undertook, with my leave, to present proof after the hearing. I received proof of service and am satisfied that the fifth respondent was duly notified.

[22] Having dealt with the undisputed evidence as well as the requirements for a final interdict, I am satisfied that a proper case has been made out in respect of first, second and fifth respondents for the rule *nisi* as issued to be confirmed, save for the aspect of costs to which I will return later. Although sub-paragraph 1.1 of the rule *nisi* pertaining to the prohibitory interdict should not be confirmed the third and fourth respondents for the reasons advanced herein. I am satisfied that the rule *nisi* should be confirmed against them pertaining to sub-paragraph 1.2. Mr South submitted that these two respondents were leaders of the second respondent. I do not fully agree. However, they are on their own versions not ordinary members. The third respondent referred to himself as 'an advisor/strategist of the LMCDF' whilst the point was made that the firm of attorneys communicating on behalf of LMCDF with Harmony's attorneys were regarded as his legal representatives. The mere fact that he represented the LMCDF in Johannesburg during the meeting with Harmony's attorneys is indicative of his senior position in the LMCDF. Fourth respondent is also not an ordinary member of the LMCDF as is apparent from annexure AA4 to her answering affidavit, indicating that she is a coordinator of the LMCDF. No extraordinary or unreasonably high standard is required from these two respondents

if sub-paragraph 1.2 of the rule *nisi* is to be confirmed against them. They would merely be ordered to take all reasonable steps to ensure that their colleagues and others do not engage in the interdicted activities.

[23] Mr Lubbe submitted that the applicants brought the *ex parte* application on the ground of alleged urgency whilst failing to comply with the test of utmost good faith. They failed to put all relevant facts before the court. According to him they failed to inform the court that the LMCDF and Harmony were in negotiations with each other through their respective attorneys. Also the applicants indicated that they were not aware of the full and further particulars of the third and fourth respondents whilst they were aware of their contact details. In *Schlesinger v Schlesinger*¹⁵ the court stated that applicants launching an *ex parte* application must make full disclosure of all material facts which might have an effect on the granting or otherwise of an *ex parte* order. If it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which might have influenced the decision of the court, the court has a discretion to set aside the order with costs on the ground of non-disclosure. I seriously considered the issue. However, I am satisfied that there was no failure to make a full disclosure. There will often be room for debate whether facts are material or not. It should not be practically impossible to apply for urgent relief *ex parte*. In their founding affidavit the applicants set out the history between the parties and the initial good working relationship which became strained during the latter parts of 2022. This strained relationship also appears from annexure AA2 to the third respondent's answering affidavit, being the letter of Webber Wentzel dated 14 March 2023. The fourth respondent's version was also properly dealt with in the founding affidavit. I am satisfied, having considered these aspects thoroughly, that the correspondence referred to was not wilfully or negligently kept away from the court. Neither the letters relied upon by the third and fourth respondents, nor any other information needed to be pleaded in the founding affidavit.

Costs

¹⁵ 1979 (4) SA 342 (W) at p 348 E – H. See also *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma and Another v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 102.

[24] Mr South submitted that the respondents should pay the applicants' costs, including the costs of two counsel. This was a straight-forward application that did not require the appointment of two counsel. Mr Lubbe submitted that the rule *nisi* against his clients should be discharged with a punitive costs order on the attorney and own client scale. The applicants as the successful parties vis-à-vis the first, second and fifth respondents would generally be entitled to their costs of the application on an unopposed basis. Although the applicants have achieved some success against the third and fourth respondents, I am of the view that these two respondents were entitled to oppose the application bearing in mind the dearth of evidence presented against them pertaining to the prohibitory interdict. Although not relevant to the requirements for an interdict or urgency, I am satisfied that the applicants should not be awarded costs against any of the respondents. Their attorneys were in negotiations with the LMCDF's attorneys who should have been alerted of the intention to bring an interdict if the illegalities were not stopped. Instead, the applicants decided to use a different firm of attorneys which firm apparently had nothing to do with the ongoing negotiations. Finally, in exercising my discretion and considering fairness to all the parties, I am of the view that each of the parties shall pay their own costs.

Order

[25] The following orders are issued:

1. The 2nd respondent's name is amended to read as follows:
'Lejweleputswa Mining Community and Development Forum (LMCDF)'
2. The rule *nisi* issued on 19 March 2023 is confirmed in respect of 1st, 2nd and 5th respondents pertaining to paragraph 1.1, including sub-paragraphs 1.1.1 to 1.1.7 and sub-paragraph 1.2.1.
3. The rule *nisi* issued on 19 March 2023 is confirmed in respect of 3rd and 4th respondents only in respect of paragraph 1.2.1 thereof.
4. Each party shall pay their own costs in respect of the application.

JP DAFFUE J

Counsel on behalf of the applicants:

Advv South SC and Le Roux
Edward Nathan Sonnenbergs

Inc

c/o Lovius Block
BLOEMFONTEIN

Counsel on behalf of the 1st and 2nd respondents: No appearance

Counsel on behalf of the 3rd and 4th respondents: Adv J Lubbe SC
MD Nkonoane Inc
c/o Finger Attorneys
BLOEMFONTEIN