

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1488/17

Heard on: 28/11/2017

Delivered on: 20/04/2018

In the matter between

DE BEERS CONSOLIDATED MINES (PTY) LTD

Applicant

And

LUCKY SEEKOEI

1st Respondent

VICTOR TAKU

2nd Respondent

PIETER MOKITINI

3rd Respondent

GODFREY MOTLOTENG

4th Respondent

ELISA LOUW

5th Respondent

THE UNIDENTIFIED ILLEGAL MINERS

6th Respondent

THE MEC OF ENVIRONMENTAL

7th Respondent

AFFAIRS & NATURE CONSERVATION

THE MEC OF THE CO-OPERATIVE GOVERNANCE

8th Respondent

HUMAN SETTLEMENTS & TRADITIONAL AFFAIRS

MEC OF THE DEPARTMENT OF TRANSPORT,

9th Respondent

SAFETY AND LIASON

THE MINISTER OF MINERAL RESOURCES

10th Respondent

THE MINISTER OF POLICE

11th Respondent

THE MINISTER OF HOME AFFAIRS

12th Respondent

THE NORTHERN CAPE PROVINCIAL

13th Respondent

JUDGMENT

PAKATI J

- [1] On 07 July 2017 the applicant, De Beers Consolidated Mines (Pty) Ltd (“De Beers”), approached this Court seeking a final interdict restraining Lucky Seekoei, John Motshwanaesi, Tebogo Taku, Godfrey Motloteng, Elisa Louw and the unidentified illegal miners, the first to sixth respondents respectively (“the respondents”), from unlawfully;
- (a) entering into or being on the immovable properties and/or areas situated upon the Remaining Extent of the Farm Kenilworth Estate 71 in the extent of 6037.5817 hectares and the Remaining Extent of the Farm Dorstfontein 77, in the extent of 132, 767 hectares (“the properties”);
 - (b) Illegally disturbing and/or processing and/or removing any of the materials from the said farms; and
 - (c) Mining or prospecting for diamonds or conducting any related activities, and disturbing and/or processing and/or removing any materials situated on the properties. The respondents are a group of people known as illegal Artisanal Small Scale Miners (“artisanal miners”) who conduct mining activities on the properties owned by De Beers.
- [2] The MECs of the following departments: (i) Environmental Affairs and Nature Conservation, (ii) Co-operative Governance, Human Settlements and Traditional Affairs, and (iii) Transport, Safety and Liaison and the following Ministers; (iv) Mineral Resources; (v) Police; (vi) Home Affairs; and (vii) the Northern Cape Provincial Commissioner, the seventh to thirteenth respondents respectively, are cited to the extent that their departments would have an interest in the relief sought. No relief is sought against the fourteenth respondent, Ekapa Minerals (Pty) Ltd (“Ekapa Minerals”), a company with limited liability and duly incorporated and registered in accordance with the company laws of the Republic of South Africa with its registered office situated at 2nd Floor, Profsen Building 3 York Street, Kimberley, Northern

Cape. It is also cited for any interest that it may have in the matter. Only the first to sixth respondents oppose the application.

- [3] The artisanal miners do not dispute that they mine the '*abandoned floors*' on De Beers' Farms. Their opposition is based on tacit and express consent allegedly given by De Beers and Ekapa Minerals which they claim has not been validly terminated.
- [4] It is common cause that De Beers is a holder of a mining right under Number 29/2010 pursuant to the Mineral and Petroleum Resources Development Act¹ read with the Mining Titles Registration Act². It is also the registered owner of the Farms on which the Reserve is situated as described in para 1 (a) *supra*. On 30 November 2015 De Beers entered into a Sale of Business Agreement ("the Agreement") with the twelfth respondent, the Minister of Home Affairs, which consists, *inter alia*, the processing of Tailing Mineral Resources ("TMRs") at Kimberley Mines (Annexure "DBI"). This refers to one TMR dump sold to Ekapa Minerals and the Kimberley Ekapa Minerals Joint Venture ("KEM JV") for the purposes of retreating of tailing mineral resources pursuant to the agreement. Besides the dump known as Kenilworth Retreat situated on Kenilworth Farm operated by KEM JV the remaining portions of the immovable properties are run by De Beers for farming and as agricultural land.
- [5] It is worth mentioning that TMRs are made up of the floors and the tailing dumps. De Beers alleges that the presence of the artisanal miners on the Farms is unauthorised. It alleges further that the respondents are involved in illegal mining and trading in diamondiferous material (valuable material contained in the TMRs) on the floors which has begun to be a profitable business.
- [6] De Beers state that during May 2016 it experienced a significant increase in trespassing and illegal mining activities including other crimes on the Buffalo Camp and the Reserve by the artisanal miners. Other crimes include intimidation, trespassing, theft of copper cables, and malicious damage to property, and housebreaking. They state that this conduct started long before May 2016 and was concentrated to the South of the Kenilworth Tailing Mineral Resources haul road, the BKB Grain Company Lease Area, the South Western Portion of the Reserve known as Buffalo Camp and the properties disposed of through sale to KEM JV. Buffalo

¹ Act 28 of 2002

² Act 16 of 1967

Camp was used for breeding disease free buffalos in compliance with the veterinary regulations. It is also specifically constructed and preserved for the needs of the buffalos including isolation requirements. De Beers has a game farm managed by De Beers' Ecology Division which attracts tourists. It also has, amongst others, employees' accommodation, a conference venue and six self-catering chalets. There is birdlife and is a home to a breeding colony of White-Backed Vultures stocked with herds of eland, kudu, duiker, blue wildebeest, red hartebeest, springbok, zebra, roan, buffalos, impala and sable.

- [7] De Beers expresses dissatisfaction in terms of which the respondents disturb the ecology. They gain entry by ripping the fence apart, use bicycles, walk on foot and/or use privately owned vehicles and park them on the border and inside the Farms. They dig trenches causing damage to the infrastructure on the Farms. They scan the area, choose a patch of land and carry buckets, shovels, wheel barrows and any other instruments that assist them to mine illegally. They leave trails of several dug-out trenches, which run several kilometres across the area. Significantly, this conduct takes place during the day but lately it has also escalated to the night. De Beers also complains that the respondents steal steel pipes and cables which affect water pumping, staff fridges and guests' comfort as a result of which it runs at a loss on its operational capacity and effectiveness.
- [8] De Beers alleges further that due to the influx of the artisanal miners on the Farms it experiences a threat to the safety and well-being of tourists, students, animals, employees and the future sustainability of the Reserve. It also suffers significant financial losses which forced it to relocate roans and buffalos from the buffalo camp to unsuitable camps which led to the death of two pregnant buffalos, a roan calf and a roan bull. It also experiences loss of power supply due to the theft of copper cables and perimeter fence support structure. De Beers complains that the respondents unearth redundant water pipelines and electrical cables and make firewood. It states that some of the game gets missing due to the fact that the gates are left open. De Beers had to increase the frequency of security inspections and patrols for the following reasons:

8.1 To preserve its agricultural, environmental and commercial interests in the properties;

8.2 To protect and preserve biodiversity, game and ecology; and

8.3 To promote and safeguard the safety and well-being of its employees, security personnel, guests and the community surrounding the properties. Before Ekapa Minerals acquired the mine dumps on the Reserve, De Beers tried to combat the illegal mining activities by laying criminal charges against the culprits but some would receive warnings by the members of the South African Police Services (“SAPS”) and other matters would be withdrawn.

- [9] The respondents deny that they process the TMRs but a thin layer of kimberlite that remains after the tailings have been removed. To get to the ‘*so called abandoned floors*’ the respondents state that they scratch the top layer of the soil and floors would be easily seen. In paras 12.1 to 12.5 of the Answering Affidavit the respondents describe how they mine the abandoned floors as follows:

“12.1 We scan the area for the patches of kimberlite.

12.2 When appropriate patch is found, an individual or group of individuals claim this patch. We all recognise this person’s exclusive right to the claim.

12.3 Two or three people usually work the claim. The first step is to scrape off the thin layer of kimberlite, usually around six inches deep, with a pick and shovel.

12.3 The kimberlite is then sorted on a sieve to screen out large rocks. It is then run through a finer sieve.

12.5 What is left on top of the sieve after this sorting is laid out on a tarp and picked through.”

- [10] The respondents deny making trenches as shown in photos “DB 7”-“DB21” but admit that when there is a pipe while digging they make 30cm diggings. S 24 (1) of the National Environmental Management Act³ provides:

“24. (1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on –

(a) the environment;

(b) socio-economic conditions; and

- (c) the cultural heritage, of activities that require authorisation or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by*

³ Act 19 of 1998

law with authorizing, permitting, or otherwise allowing the implementation of an activity.”

- [11] The respondents allege that De Beers’ mining is large scale mining of diamonds and iron ore with massive machinery. They state that large-scale mining leaves behind massive mine dump with diamondiferous material which is economically viable. They contend that they have been mining side by side the large scale miners next to Kenilworth and Dorstfontein.
- [12] De Beers argues that the unauthorised presence of the artisanal miners and their illegal mining activities on the Farms resulted in Ekapa Minerals successfully bringing an application to this Court under Case Number 2057/2016 seeking an interdict restraining them from trespassing and mining. De Beers argues further that the order obtained by Ekapa Minerals dated 13 January 2017 is limited to the areas situated on its Farms where Ekapa Minerals conducts retreating of tailing resources pursuant to the sale agreement. Notably, about five of the identified miners in the said Ekapa Minerals case, including the unidentified illegal miners, are respondents *in casu*.
- [13] The respondents allege that they were in the process of regularising their conduct with the Minister of Mineral Resources as it will be clear later in this judgment. In opposing the application they record a number of defences which are summarised as follows:
- 13.1 That the relief sought is *lis pendens*;
- 13.2 That they have express and/or tacit consent to mine on the immovable properties and that such consent has not been validly terminated;
- 13.3 That they live on the Farm and that if the interdict would be granted it would amount to eviction;
- 13.4 That the Department of Mineral Resources (“DMR”) gave them permission to mine on 10 hectares of land on one of the farms and that they have a right to make a living;
- 13.5 That Ekapa Minerals has no license to mine and is therefore mining in conflict of the MPRDA;

13.6 That the citation of the sixth respondent is impermissible and that the order sought is unenforceable;

13.7 That De Beers has failed to engage with them with the purpose of finding a solution; and

13.8 That the requirements for an interdict have not been met.

LIS PENDENS AND EVICTION

[14] The respondents allege that prior to this application there were other two pending cases brought by De Beers against them, namely:

14.1 The application for eviction which is currently the subject of an appeal to the Full Bench of this Court, '*Swedish International v Lucky Seekoei & Others under Case Number 2086/2016*'; and

14.2 *Ekapa Mining Company & Others v Lucky Seekoei & Others under Case Number 2057/2016*' referred to as the Ekapa Mining interdict.

[15] The respondents allege further that the parties *in casu* and the relief sought in the Ekapa Minerals interdict are identical and, so is the cause of action. The High Court judgment (High Court Case Number 2057/2016 delivered on 13 January 2017) is the subject of an appeal to the Constitutional Court under Case Number CCT 195/17. The respondents contend further that if the Constitutional Court dismisses the said application the matter would be *res judicata*.

[16] De Beers asserts that the immovable properties over which Ekapa Minerals obtained an interdict under Case Number 2057/2016 are unrelated to the ones forming part of this application. It contends that Ekapa Minerals asserted and/or protected its rights as the owner and/or having the contractual rights of possession in respect of some of the immovable properties upon which the TMRs are situated. Its primary concern, so it argues, was to interdict the respondents from, *inter alia*, mining the TMRs from which it generates income and the respondents had become '*its competitor*.'

[17] In **HASSAN & ANOTHER v BERRANGE NO⁴** Zulman JA expressed the requirements of the defence of *lis pendens* thus:

⁴ 2012 (6) SA 329 (SCA) para 19

"Fundamental to the plea of lis pendens is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause."

(See also **NESTLE (SOUTH AFRICA) PTY LTD v MARS INC**⁵)

- [18] Mr Janis Grivainis, a land surveyor and the deponent to the affidavit attached to the applicant's Founding Papers, averred that on 09 November 2016, in the company of Mr Eben van Heerden, he, at the request of De Beers, conducted an air reconnaissance and inspected De Beers' immovable properties which are subject of this application while in a Robinson R66 Helicopter as pointed out to him by Mr Peter John Hohne. The purpose of the inspection was to establish boundaries of the Farms and whether there were informal settlements erected thereon. He found none. Mr van Heerden's confirmatory affidavit is attached as Annexure "JV2".
- [19] Mr Grivainis also confirmed that on Portion 12 of the Farm Kenilworth Estate he noticed about 40 to 50 shacks situated thereon. However, he established that they were not located on the remaining extent of De Beers' Farms which forms part of this application but on Erf 33134, immovable property owned by Sol Plaatje Municipality. Copies of the Windeed printouts of Portion 12 and Erf 33134 with the relevant surveyor general diagrams for each immovable property are attached to the Founding Affidavit as Annexures "JV6", "JV7", "JV8", "JV9" and "JV10".
- [20] On Samaria Road Camp (Boshof Road Camp) Mr Grivainis states that he found approximately 150 to 200 informal dwellings. This immovable property is registered in the name of the South African Swedish International Housing Company as shown in Windeed Printout (Annexure "JV5") and De Beers.
- [21] Mr Grivainis also found about 30 to 40 shacks situated on another portion of Portion 12 which is referred to as Informal Settlement Beef Master Camp. However, this area is also owned by the Local Municipality as shown in Annexures "JV8", "JV9" and "JV10". The respondents, on their own version, state that on the remaining extents of Farm Kenilworth Estate 71 and Farm Dorstfontein 77 there are three informal settlements, Samaria Camp (Boshof Road Camp), The Beef Master Camp and the Kenilworth Camp). However, Mr Grivianis concluded that there were no shacks erected on any of De Beers' Farms.

⁵ 2001 (4) SA 542 (SCA)

[22] It is evident that *in casu*, the properties over which Ekapa Minerals obtained the interdict are unrelated to the ones forming the subject of this application. Moreover, the parties before this court are not the same parties as those in the Ekapa Minerals and Swedish International matters. I therefore find it unnecessary to deal with the defence of eviction taking into consideration that the surveyor general diagrams show no informal settlements on De Beers' immovable properties. Clearly, these informal settlements are not the subject matter of this application.

[23] De Beers assert that the relief sought does not include or affect the following immovable properties:

23.1 The Sol Plaatje Municipality;

23.2 The South African Swedish International Housing Company; and

23.3 Ekapa as per the Court order dated 13 January 2017 as amended by the Notice of Abandonment of Portion of a judgment dated 14 September 2017.

[24] The relief sought only seeks to cover the Farm Kenilworth Estate 71, in the extent of 6037.5817 hectares of the total 6315.8873 and the Farm Doortfontein 77 in the extent of 132.7672 hectares of the total extent of 132.7672. It is so that De Beers' Farms are set out as mentioned above and depicted on Plan 1 (Annexure "JV3"). Significantly, De Beers refers to the properties that it retains upon finalisation of the transferred property to Ekapa Minerals which forms part of the application *in casu*. An aerial two dimensional photo-colour map ("the 2D colour map") and linear dimensional map ("the linear map") Annexures "DB24" and "DB25" clearly sets out the co-ordinates and the boundaries of the farms forming the subject matter of this application as against those covered by the court order granted in favour of Ekapa Minerals Case Number 2057/2016. From the maps it is clear that the order granted in favour of Ekapa Minerals resulted in the migration of the respondents into the remaining areas on the Reserve and onto the Buffalo Camp which falls outside the purview of the court order which is the large area on De Beers' Farms. It is also evident from the maps that there is an informal settlement located on a portion of Portion 12 of the Farm Kenilworth Estate 71, marked on the 2D colour map as '*Informal Settlement Kenilworth Camp*' consisting of about forty to fifty shacks.

- [25] De Beers' case has always been that, save for the dump known as the Kenilworth Retreat situated on the Kenilworth Farm operated by Ekapa, the remaining portions of Kenilworth 71 and Doorstfontein 77, the immovable properties used by De Beers for farming and as agricultural land. The objection by De Beers is that the respondents gain access on its properties described above and dig trenches as shown on Annexures "DB7" to "DB21", in search of Kimberlite. In my view these defences cannot succeed.

**EXPRESS AND/OR TACIT CONSENT TO MINE AND PERMISSION FROM
THE DEPARTMENT OF MINERAL RESOURCES**

- [26] In paras 20.1 to 20.9 in its Answering Affidavit the artisanal miners' allegations can be summarised as follows:

26.1 They have been mining alongside Ekapa Minerals' large-scale mining for almost a decade on Kenilworth Farm and five years on Dorstfontein with the co-operation of Ekapa Minerals and knowledge of De Beers;

26.2 The drivers of excavators discussed their business of the day with the artisanal miners. The yellow cones were used to demarcate where the large-scale miners would mine and where the artisanal miners would be safe to also mine;

26.3 The large-scale miners would make sure it did not lift the floors with the TMRs giving the artisanal miners an opportunity to mine the floors;

26.4 In September 2016 the artisanal miners' tools that were damaged by the excavator were replaced; and

26.5 In June 2017 they were introduced to the new head of security, Mr Francois.

- [27] The respondents state that the said tacit consent by Ekapa Minerals and De Beers was given at a meeting held in June 2016 which later turned into verbal consent when Mr Hohne, the Surface Mining Manager of Ekapa Minerals, gave them express consent to mine the floors and not the dumps. They state that at the time Ekapa Minerals was De Beers' subcontractor. They claim further that they also had consent from the DMR which had earlier assisted them. Mr Brink, the Security Manager of Ekapa Minerals, also offered to assist them whenever they experienced problems and gave them his contact number, the argument goes.

- [29] De Beers contends that the allegation that tacit consent to mine the floors was not terminated is unfounded. It contends further that at the conclusion of the meeting held in June 2016 by De Beers and Ekapa Minerals the artisanal miners were in no uncertain terms warned to stop mining the floors. This is uncontroverted. At paras 41, 42 and 43 of the Answering Affidavit Ms Elisa Louw states:

“41. The second instance, in June 2016 there was a meeting called by DMR. DMR met with De Beers and Ekapa in another room for two hours whilst we waited outside. At the conclusion of the meeting, De Beers and Ekapa said that we must stop mining the floors. They refused to engage with us. To our frustration, this was a complete reversal from our earlier agreement.

42. Mr Seekoei raised the issue with Mr Brink. Mr Brink returned and said that Ekapa was not mining the floors. Whilst Mr Seekoei was apprehensive about this, it did seem like business as usual after this as we continued to mine the floors, Ekapa the TMR’s.

43 Artisanal miners have been mining in the area for several decades, since 1999. We have been left in peace by De Beers and have worked side-by-side with Ekapa’s large scale miners for several years. When there are breaches, like these two instances, they are resolved and the practice returns to normal.” (Emphasis added)

- [30] The respondents argue that even if the warning to stop mining the floors could be interpreted as the termination of consent, it could not be seen as valid termination. Even though Mr Seekoei, the chairperson of a committee seeking to resolve the dispute, conveyed the warning to other artisanal miners, not all artisanal miners were members of the committee; hence the warning would not be effective notice to several of them but Mr Seekoei. This argument, in my view, cannot hold water because Mr Seekoei is the respondents’ representative and/or mouthpiece.
- [31] Notably, the regularisation of the artisanal miners’ operations did not materialise as they are still unable to produce a permit or a license to mine. Though they paid the registration fee in compliance with the mining permit, on their own version, they still have no permission to mine. The GPS co-ordinates of the 10 hectares on Kenilworth, Annexures “L”, “M” and “N,” that the respondents allege they were allowed to mine on, do not change anything or give them permission to mine.
- [32] Regarding 10 hectares on Kenilworth, De Beers contends that the allegation by the respondents that they have permission to mine on this piece of land pending receipt of formal documentation from the Department of Mineral Resources (“DMR”) is, land

that belongs to Sol Plaatje Municipality which is clearly not affected by the relief sought.

RIGHT TO MAKE A LIVING AND DISCRETION

- [33] The respondents submit that they live on the Farms in order to make a living owing to the current economic climate. They would therefore be unable to fend for themselves and their families as they are unable to secure employment, if the interdict is granted. In their own version there are three informal settlements, namely, Kenilworth Camp, the Beef Master Camp and the Samaria Camp also known as Boshof Road Camp. They state that several hundreds of people (approximately 3000) live on Samaria Farm which falls on both Doorsfontein and Kenilworth Farms, the very same farms that form part of the interdict which is a home for many of them. They state that even if the informal settlements were not part of the affected area it would be impossible for them not to trespass as the settlements are unfenced. Therefore the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act⁶ is applicable, so they argue. The respondents confirm though that there are about two hundred shacks in the affected area and they live there in order to conduct mining activities.
- [34] Annexure “DB24” shows that the areas upon which the informal settlements are situated on the farms are, according to the applicant, registered in the name of a Swedish Company and Sol Plaatje Municipality. This assertion was undisputed. Annexure “DB25” shows the boundary lines of the remaining extent of the farms on which De Beers seeks relief.
- [35] The respondents allege that they have a right to be on the property by virtue of express or tacit consent given to it by De Beers and Ekapa. They assert that if the miners are evicted their right to dignity would be infringed because they make a living in socio-economic context which disallows them to make a living. They state that mining the floors is done out of desperation to live, have water, electricity and most importantly fend for their families living in shacks. This is so because they could not find employment. The respondents relied on **MINISTER OF HOME AFFAIRS AND OTHERS v WATCHENUKA AND OTHERS**⁷ where it was held:

⁶ Act 19 of 1998

⁷ [2004] 1 All SA 21 (SCA) at para 27

“The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents’ counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.”

- [36] The respondents allege further that their rights should be weighed against De Beers’ rights to its properties. They rely on article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) ratified by South Africa on 12 January 2015 which states:

“Article 6

- 1. The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
- 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”*

- [37] S 7 (1) and (3) of the Constitution⁸ provide that the Bill of Rights is a cornerstone of democracy in South Africa and enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The rights in the Bill of Rights though are subject to the limitations contained in s 36. It is common cause that the respondents do not have the required licence or permit to conduct mining activities on the farms as specified. Taking into account that the regularisation of the conduct of the artisanal miners was in vain, the respondents cannot expect that their involvement in illegal activities would be condoned no matter how much I may feel for their unfortunate situation. It is the opportune time for DMR to step in since it appears that it did not fulfil its promise.

EKAPA MINING WITHOUT A LICENCE

- [38] The respondents allege that Ekapa Minerals is currently mining the TMRs in Kenilworth as a subcontractor for De Beers without the necessary permit or licence in contravention of the MPRDA. They allege further that the said mining is not limited

⁸ Act 108 of 1996

to the TMRs but also the floors. Taking into account the fact that *'all the minerals are managed by the State and may not be sold, exploited or otherwise dealt with, save with the authorisation of the State'* neither De Beers nor Ekapa Minerals are authorised to exploit these sources without the State's authorisation, the argument goes. The respondents allege that the tailing mineral resources are residue stockpile which falls within the definition of mineral (s 1 of the MPRDA).

[39] **In terms of s 1 of the MPRDA residue stockpile means:**

"Residue stockpile" means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right."

[40] S 3 (1) and (2) (a) of the Mineral and Petroleum Resources Development Act⁹ ("MPRDA") provides:

"3. Custodianship of nation's mineral and petroleum resources. –

(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may –

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right."

[41] It is important to note that the MPRDA does not define mining but s 1 defines mineral as follows:

"[M]ineral means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits but excludes –

- (a) water, other than water taken from land or sea for the extraction of any mineral from such water;*
- (b) petroleum; or*
- (c) peat."*

⁹ Act 28 of 2002

- [42] **In DE BEERS CONSOLIDATED MINES LTD v ATAQUA MINING (PTY) LTD AND OTHERS**¹⁰ Bekeley J (Kruger J concurring) interpreted the phrase “*occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process*” thus:

“Transfer of ownership of minerals is impeded by the fact that they form part of the land. As soon as the ore containing the minerals is severed from the land, a new object (movables res) is created which is the object of separate ownership.”

The Court added at para 68:

“The tailings dumps are movable and the diamonds occurring in them do not occur ‘naturally in or on the earth’;

Tailings dumps do not occur naturally. They are formed by the placement of processed and partly processed materials, to be re-worked in future years when technology improves...; and

The tailings dumps have been owned by applicant since 1973. Applicant’s ownership of the tailings dumps is not in dispute. Applicant has spent money and labour and time on these tailings dumps... ”

- [43] **In EKAPA MINERALS (PTY) LTD AND OTHERS v LUCKY SEEKOEI AND OTHERS**¹¹ Williams J held:

“24. The TMRs in casu therefore do not fall under the definition of “mineral” in the MPRDA. Its reprocessing would therefore not require a mining right and since the MPRDA does not apply to TMRs there can be no prohibition against it being sold. The view I take of the TMRs not falling under the provisions of the MPRDA is bolstered by the fact that the MPRDA has tabled a Bill (The Mineral and Petroleum Resources Amendment Bill), which seeks to further amend the definition in the MPRDA of “residue stockpile” to include “historic mines and dumps created before the implementation of the Act.” Such an amendment and the concomitant transitional arrangements also included in the Bill would be unnecessary if the existing definition of residue stockpile (and by extension “mineral”) already includes historic dumps such as the TMRs in issue. That being the case I do not have to deal any further with the respondents’ allegations of the applicant not approaching Court with clean hands since they themselves do not have a mining right over the relevant properties.”

I agree with my sister Williams J in this regard. It is therefore unnecessary for me to deal with this point any further. This defence can also not be sustained.

¹⁰ (3215/06) [2007] ZAFSHC 74 (13 December 2007) at para 53

¹¹ An unreported Judgment: Case No. 2057/2016 delivered on 13/01/2017 para 24

CITATION OF THE SIXTH RESPONDENTS AS UNIDENTIFIED ILLEGAL MINERS IMPERMISSIBLE AND THE ORDER SOUGHT UNENFORCEABLE (VAGUENESS)

- [44] This respondents' objection concerns an order that a court grants against a group of people who are unidentifiable and no cause of action has been made out against them. The respondents object to the description of the sixth respondents who are referred to as "*the Unidentified Illegal Miners*" alleging that it is 'at odds with our jurisprudence'. Ms de Vos, on behalf of the first to sixth respondents, relied on **KAYAMNANDI TOWN COMMITTEE v MKHWASO**¹² where Conradie J held:

"A notification to persons in general or to a group of individuals by way of a rule nisi that the Court is about to pronounce upon a suit between parties is, of course, permissible. It is a procedure frequently adopted in order to give interested parties an opportunity of joining in the litigation. But it does not by itself make them parties to the litigation and they do not merely by virtue of having been notified of the litigation become liable to be punished for contempt of Court for failure to comply with any order which is eventually made. A failure to identify defendants or respondents would seem to me to be destructive of the notion that a Court order operates only inter partes, not to mention questions of locus standi in iudicio. An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have generalised effect typical of legislation. It would be a decree and not a Court order at all."

- [45] The reasons why the respondents state that granting an order against a group of unidentified people is problematic can be summarised as follows:

45.1 It breaches the principle that courts do not grant relief in circumstances that there is no reasonable certainty about what that order means or to whom it applies;

45.2 It breaches the principle that the parties in legal proceedings must be clearly identified;

45.3 It creates a reversal of *onus* at the stage of contempt proceedings which runs counter to every notion of criminal justice and the *onus* of proof;

¹² 1991 (2) SA 630 (C) p634F-635F; City of Cape Town v Yawa and Others [2004] 2 All SA 281 (C) at 634F-I; Ex parte Consolidated Fine Spinners & Weavers Ltd & Another in re Consolidated Fine Spinners & Weavers Ltd & Another v Govender and Others (1987) 8 ILJ 97 (D)

45.4 It allows the granting of vague relief against unidentified respondents. The implementation of such vague relief effectively amounts to self-help which violates s 1 (c) of the Constitution;

45.5 It breaches the well-established principle in our law that a litigant is not entitled to an order where no cause of action is being made calling upon that person to desist from some unlawful action; and

45.6 It has a generalised effect typical of legislation.

- [46] The Constitutional Court in **OCCUPIERS OF PORTION R25 OF THE FARM MOOIPLAATS 335 JR v GOLDEN THREAD AND OTHERS**¹³ had this to say regarding the citation of the respondents:

“It is necessary, before addressing the issue at the crux of this case, to refer to a matter that is cause for considerable concern. Golden Thread cited two groups of respondents before the High Court. The applicants before us were the second group of respondents before the High Court. The first two respondents joined in the case before the High Court were cited respectively as ‘[t]he people who intend invading Portion 25 of the Farm Mooiplaats 355/JR, Tshwane, Gauteng’ and ‘[t]he people who invaded Portion 25 of the Farm Mooiplaats 355/JR, Tshwane, Gauteng’. This description of human beings is less than satisfactory and cannot pass without comment. It detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers. This form of citation should not be resorted to. A more neutral appellation like ‘occupiers’ might well be more appropriate.” (Emphasis added)

- [47] The Courts have generally refused to grant orders against a group of unidentifiable people like in the case of student protest¹⁴. In **RHODES UNIVERSITY v STUDENT REPRESENTATIVE COUNCIL OF RHODES UNIVERSITY AND OTHERS**¹⁵ the Court found that interdicts against unidentifiable groups raise problems.
- [48] In the instant case Ms Louw attached to the Answering Affidavit a list of 836 names of artisanal miners besides the first to fifth respondents (Annexure “X”/ “EMR5”) whose details were initially unknown to the applicant. They are alleged to have also conducted mining operations complained of by the applicant. That makes the sixth respondents identifiable. Though they were not joined *in casu* as the respondents, the

¹³ 2012 (4) BCLR 372 (CC) at para 4

¹⁴ Durban University of Technology v Zulu and Others [2016] ZAKZPHC 58 (27 June 2016) at para 2;

¹⁵ (1937/2016) [2016] ZAECGHC 141; [2017] 1 All SA 617 (ECG) (1 December 2016)

order that would be granted by the court would, in my view, not be prejudicial and therefore enforceable against them. It would bind them considering **MEIKLE v SOUTH AFRICAN TRANSPORTATION SOCIETY AND TRUST COMPANY**¹⁶. The order can therefore not be said to be vague or unenforceable as its service would be directed by the Court as it seems meet against the names appearing on the said list. Importantly, on the version of the respondents Mr Seekoei was at a meeting attended by about 200 artisanal miners at Samaria Camp, appointed as Chairperson of the committee and Ms Louw, as the secretary and the second to fourth respondents, as representatives.

RIGHT TO ENGAGE MEANINGFULLY

- [49] The respondents contend that De Beers was required to engage meaningfully with them. For this contention Ms Irene de Vos, for the respondents relies on **JUMA MUSJID PRIMARY SCHOOL & OTHERS v ESSAY N.O. AND OTHERS**¹⁷ where the Constitutional Court on appeal held:

“The provisional order setting aside the eviction order by the High Court was intended to enable the MEC, the Trustees and the SGB to engage meaningfully with one another, consider various options regarding the conclusion of an agreement in terms of section 14 (1) of the Act and take steps to secure alternative placement for the learners in accordance with their right to a basic education.”

- [50] Ms de Vos contends that meaningful engagement between the parties would assist them to come to a meaningful solution. She relied on **MINISTER OF HOME AFFAIRS AND OTHERS v WATCHENUKA AND OTHERS**¹⁸. In this matter the Supreme Court of Appeal held that to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity. The failure to engage with the respondents renders the interdict unenforceable, the argument goes.
- [51] The respondents rely on sections 38 and 172 (1) of the Constitution which set out the court’s powers to grant remedies for infringements of the constitutional rights. They relied on **PORT ELIZABETH MUNICIPALITY v VARIOUS OCCUPIERS**¹⁹. In this case the Constitutional Court focused on the importance of engagement as a vital

¹⁶ 1904 TS 94 at ...the Court held...(Innes CJWessels and Curlewis concurring).

¹⁷ 2011 (8) BCLR 761 (CC) para 74 delivered on 11 April 2011

¹⁸ [2004] 1 All SA 21 (SCA) para 27 delivered on 28 November 2003

¹⁹ 2005 (1) SA 217 (CC) paras 39 to 47

legal mechanism in eviction proceedings, and housing policy more broadly. According to the respondents mediation encourages the humanisation of the other parties to a dispute in order to engage with each other as bearers of rights and dignity.²⁰ This is so because it would not be just and equitable to order eviction. Ms De Vos submitted that the parties could reach an agreement that would allow the miners to mine the floors without accessing De Beers' Reserve.

- [52] The requisites for the right to claim an interdict is well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.²¹

CLEAR RIGHT

- [53] The respondents deny that the applicant has established a clear right. They insist that they had a tacit and/or express agreement to mine the floors and the applicant was aware of their presence on the farm. They claim that it is the DMR which is authorised to interdict them and not De Beers.
- [54] De Beers, on the other hand, alleges that as the owner of the property it is subject to lawful limitations of the use and enjoyment of its properties. It alleges further that its exclusive use and enjoyment of its farms has been diminished by the unlawful presence of the respondents on the properties in the following ways:
- 541 They remain on the Farms despite warnings not to and continue to violate the applicant's right of ownership of the properties;
- 54.2 They have no right or permission to be on the properties to either prospect or mine diamond or any related material from the floors;
- [55] As alluded to earlier the uncontroverted evidence is that De Beers is the registered owner of the properties against which the relief is sought. Its right to ownership is absolute subject to the provisions of the MPRDA and it is therefore entitled to the enjoyment and exercise such right over its properties without having the respondents gaining access without its permission and conduct illegal mining. That is, in my view, sufficient to establish a clear right for the final interdict. The respondents' assertion that they would be without a livelihood if the interdict would be granted cannot allow them to engage in illegal activities on De Beers' properties without its permission.

²⁰ PE Municipality para 41

²¹ Setlogelo v Setlogelo 1914 AD 221 at 227

IRREPARABLE HARM

- [56] De Beers states that it suffers irreparable harm in that its entire operations on the Farms are adversely affected. The breeding camps have become sterile and unusable. This is as a result of the degradation of the agricultural land and the violation of the ecology. There is a possibility of closing down its business on the Reserve due to the shortage of space for the game if the interdict is not granted.
- [57] The respondents deny that De Beers established harm justifying the granting of the relief sought. They contend that the allegations that De Beers suffered harm are vague because no dates, times and places or even people are referred to. They contend further that there is no detail of the infrastructural damage suffered or how the future **development would be impeded.**
- [58] The respondents deny that the trenches depicted in photos DB7 to DB21 were caused by their mining. Yet Ms Louw states that she knows that there were artisanal miners especially those that mine for gold and that they *'dig deep trenches and tunnels.'*

NO ALTERNATIVE REMEDY

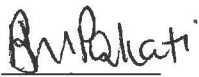
- [59] The respondents insist that De Beers has failed to show that it has exhausted all alternative remedies. They state that it sought criminal remedies which have proved unsuccessful due to the vague complaints it filed the police could not solve. De Beers has also failed to lay criminal charges against the first to the sixth respondents but sought a final interdict and should the interdict be granted the respondents would be unable *'to challenge the constitutionality of the criminalisation of their livelihoods'*, the argument goes.
- [60] De Beers maintains that it has laid criminal charges against the wrongdoers with the South African Police Services, forwarded letters to the South African Diamond and Precious Metals Regulator and the Head of Department and Director, Northern Cape with no success.
- [61] Notably, De Beers cited the sixth respondent without furnishing details of the parties because it was not in possession of the said details until the respondent attached Annexure "X" to the Answering Affidavit. Be that as it may, there is no guarantee that De Beers would succeed against more than 800 artisanal miners without experiencing delays and at the end of the day be prejudiced because the remedy would

not serve the purpose. In my view, De Beers has no option but to seek the relief to protect its interests. The application has to succeed.

- [62] Regarding costs the Mr Motau, for De Beers, indicated that the applicant seeks no costs order against the respondents because they misunderstood the description of the land which the interdict refers to. The applicant also understands that this was a bona fide mistake.

In the circumstances I grant the following order:

1. The first to sixth respondents including the names of persons listed on Annexure “X” hereto are interdicted and restrained from entering into or being on the immovable properties and/or areas situated upon the following immovable properties:
 - 1.1 The remaining extent of the Farm Kenilworth Estate 71, in the extent 6037.5817 hectares; and
 - 1.2 The remaining extent of the Farm Dorstfontein 77, in the extent of 132.767 hectares.
2. The first to sixth respondents including the names of persons listed on Annexure “X” hereto are interdicted and restrained from mining or prospecting or conducting any related activity on the immovable properties described in paragraph 1 *supra*.
3. The first to sixth respondents including the names of persons listed on Annexure “X” hereto are interdicted and restrained from disturbing and/or processing and/or removing any of the materials which are situated upon the immovable properties described in paragraph 1 *supra*.
4. The Sheriff of this Court is authorised and directed to remove any of the first to sixth respondents including the names of persons listed on Annexure “X” hereto who are present upon the immovable properties referred to in paragraph 1 *supra*.
5. No order as to costs.



BM PAKATI
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION, KIMBERLEY

For the applicant: ADV MOTAU (SC) & JUNIOR COUNSEL, ADV LINDA
Instructed by: VAN DE WALL INC.

For the respondents: ADV DE VOS (1-6 respondents)
Instructed by: P JOUBERT INC.