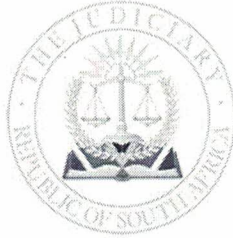


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

CASE NO: 4399/2017

DATE: 18/04/18

SIGNATURE: [Signature]

In the matter between:

MOGALAKWENA PLATINUM LTD

APPLICANT

And

GRANNY MOKHOMME & 45 OTHERS

RESPONDENTS

JUDGMENT

KGANYAGO J

[1] The applicant has been granted mining rights by the Minister of Mineral Resources on 7th September 2010 to operate an open pit platinum mine on farms Zwartfontein 818 and Overysel 815 LR. The applicant alleges

that it was granted a lease agreement over Overysel farm on the 6th October 1993 by the then Lebowa Government acting on behalf of the Langa-Mapela Tribes. With regard to Zwartfontein farm it alleges that it was granted a lease agreement by the Langa Tribe on the 12th December 2012.

- [2] The applicant denies that it is mining in Drenthe as alleged by the respondents in their counter application. According to the applicant, the electronic deeds search shows that the owner of Drenthe is the Republic of South Africa and the respondents does not appear on the endorsements as having any recognized rights on Drenthe. The applicant does not seek any relief in relation to Drenthe.
- [3] According to the applicant, on the 1st June 2017 the respondents arrived at the mine which overlap to both Zwartfontein and Overysel farms without notice and gained access to the north pit area of the mine. Thereafter they disrupted production, leading to the evacuation of the pit. The respondents also damaged the applicant's property by throwing stones at equipments, drilling machinery, motor vehicles and trucks.

[4] The Applicant further alleges that on the 12th June 2017 the respondents started building illegal housing structures at Overysel farm, 800 meters from the mine pit.

[5] These events led to the applicant launching an ex parte urgent application.

The urgent application was set down for 15th June 2017 wherein an interim relief was obtained interdicting the respondents from entering farm Zwartfontein; interfering with or disturbing the operations of the applicant; intimidating, threatening and/or assaulting the applicant's employees, contractors and/or suppliers or any other person visiting the property; damaging any property of the applicant or applicant's employees, contractors and/or suppliers or any person visiting on the property; and authorizing the South African Police Services to demolish any and all illegal structures which may be erected by the respondents on the property and to remove any of the respondents who access the property.

[6] A rule nisi was issued and served on the respondents. The respondents are opposing the applicant's application. According to the respondents, they and GaMaloka tribe are living at Drenthe farm. They allege that the applicant has encroached into their land and has been unlawfully conducting mining in their area. The respondents further alleges that the

applicant has destroyed their and GaMaloka initiations schools and ancestral graves.

- [7] The respondents further allege that on the 10th and 17th May 2017 they held discussions with the applicant regarding its encroachment on their land. The respondents' further alleges that at that meeting, the applicant had promised them job opportunities and training for those nominated for employment. The agreement was that the training was supposed to start on the 22nd May 2017 with the intention of them starting to work on the 1st June 2017.
- [8] The respondents further allege that on the 1st June 2017 they realized that the applicant had no intention of honouring their agreement. They together with GaMaloka Tribal Authority resolved to confront the applicant about its failure to honour the agreement. Approximately forty of them went to the pit that is situated in their land which the applicant was unlawfully mining on it. On arrival at the pit one van Heerden together with the security guards arrived on a water truck and without a warning sprayed them with water.

- [9] On the 11th June 2017 a community meeting was held at GaMaloka Tribal Authority where a resolution was taken to allocate land for occupation by tribal members. They identified land that is approximately 70 meters from the boundary fence dividing their land from that of the applicant. The tribal members who were allocated stands started building their homes and structures on such land from the 15th June 2017 as it is their land.
- [10] The respondents have also filed a counter application seeking an order declaring the mining license of the applicant and lease agreement it entered into with Langa Tribe not to cover their land and/or in the event that it is taken to cover their land, to declare that to be null and void. In the event the Court is not with them on that point, the respondents in the alternative are also seeking an interim interdict against the applicant pending the review application which they intend to launch within 90 days of the order. The purpose of the intended review application is to set aside the applicant's mining license and lease agreement.
- [11] The applicant is seeking confirmation of the interim relief. At the hearing of the main application the applicant applied for leave to file a supplementary affidavit. The purpose of their supplementary affidavit is

in case the interim relief is confirmed, they will be seeking that the final order be extended to farm Overysel 815 which was not included in the interim interdict. The respondents were objecting to the applicant's application. The matter was argued and the applicant was granted leave to file its supplementary affidavit. The respondents felt that it was not necessary for them to file any supplementary answering affidavit. The parties proceeded to argue the main application and counter application.

[12] The Court is called upon to decide on two issues. The first one is whether to confirm the applicant's rule nisi, and the second one is whether the respondents' counter application should be granted or not. I will first deal with the respondents' counter application. If the respondents' counterclaim is granted, it will dispose the whole matter.

[13] The applicant has raised several points *in limine*. I will first deal with the point *in limine* of non-joinder. According to the applicant, the respondents cannot seek any relief in relation to the nature, validity or constitutionality of the mining rights without joining the Minister of Mineral Resources who granted the mining rights. The applicant

therefore contends that the Minister of Mineral Resources is a necessary party to the proceedings.

[14] Secondly, the applicant submits that since the respondents are seeking to have the lease agreement declared null and void, they are supposed to join the Langa Tribe and Registrar of Deeds to the proceedings. According to the applicant, the Langa tribe is a party to the lease agreement and therefore an interested party in these proceedings.

[15] It is settled law that the test for joinder requires that a litigant must have a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court. (See **Pheko and Others v Ekurhuleni Metropolitan Municipality (No2) [2015] ZACC 10**).

[16] It is not in dispute that the Minister of Mineral Resources is responsible for granting of mining rights. In this case the Minister has granted the applicant mining rights to mine at Zwartfontein and Overysel farms. The Langa Tribe owned surface rights on the said two farms and is also a party to the lease agreement. Any order which this Court is going to

make in this matter is going to affect their rights. It is trite that an order should not be made against a party without that party not being afforded an opportunity to be heard.

[17] Under the circumstances the Court is satisfied that since the Minister of Mineral Resources is responsible for issuing of mining rights and has granted the applicant those rights at Zwartfontein and Overysel farms, the Minister is therefore having a direct and substantial interest in these proceedings and should therefore be joined as party to the respondents' counter application. With regard to Langa Tribe, they are a party to the lease agreement which the respondents seek to set aside. Their rights will not be determined without being given an opportunity to be heard. Therefore, in my view they are having direct and substantial in this matter and should therefore be a party to the proceeding.

[18] The respondents in the alternative have submitted that if the Court is not with them on declaring the mining license of the applicant and lease agreement it entered into with Langa Tribe not to cover their land and/or null and void, they are in the alternative seeking an interim interdict against the applicant for the relief as set out in their counter application.

[19] According to the applicant, Boikgantsho Platinum Mine previously held the prospecting rights to prospect for all minerals, inter alia, Drenthe. During October 2015 it ceded the prospecting rights to Rustenburg Platinum Mines ("RPM"). RPM is the applicant's sister company. The applicant further alleges that it has no surface rights at Drenthe. According to the applicant, the Government of the Republic of South Africa is the registered owner of Drenthe, as it appears from the print out of the electronic deed search. The applicant submits that in the Deeds Registry there is no reference to Ga-Maloka Tribe having rights to Drenthe whatsoever.

[20] According to the applicant, at this stage there are no mining operations taking place at Drenthe and that RPM will engage with the relevant authority to secure mining rights for Drenthe prior to the commencement of mining operations. According to the applicant at the meeting of the 17th May 2017, the respondents have raised the issue of the alleged encroachment of their mine on their land at Drenthe. The applicant further alleges that at that meeting the respondents were asked to indicate where the alleged encroachment had taken place but they could not do so. According to the applicant the respondents undertook to bring

a map that shows the alleged encroachment at their next meeting, but have failed to do so.

[21] The respondents in their replying affidavit to their counter application does not dispute that they have failed to indicate where the alleged encroachment has taken place. They have also failed to present the maps showing the alleged encroachment. The applicant on the other hand has presented aerial photographs of the area they are mining and also the boundaries that divides Drenthe and Overysel. On the aerial photographs, it clearly shows that the applicant has not encroached into Drenthe.

[22] In **City of Tshwane Metropolitan Municipality v Afriforum and Another [2016] ZACC 19** at paragraph 49 the Court said:

“To determine whether this perhaps one of those cases or the clearest of cases has been made out for the interim relief, it is necessary to examine how Afriforum met the requirements for the grant of an interim interdict. Those requirements were of course set out in Setlogelo and Webster as (i) a prima facie right that be open to doubt; (ii) a reasonable apprehension of irreparable and imminent harm to the right if the

interdict is not granted; (iii) the balance of convenience favourable to the grant of the interdict; (iv) the absence of any other adequate remedy.”

[23] The respondents are required to establish a prima facie right although it may be open to doubt. Even though the record of the Register of Deeds does not show any reference of Ga- Maloka Tribe having rights to Drenthe, the respondents alleges that Ga-Maloka Tribe is the owner of the land and have been exercising that authority over it before 1904. They therefore contend that their rights are protected in terms of the Constitution and the Interim Protection of Informal Land Rights Act. Taking into consideration the time period they have been residing at that land in question, they might be protected by the Interim Protection of Informal Land Rights Act. Therefore, I am satisfied that the respondents have established a prima facie right.

[24] The second requirement is that of irreparable harm. The respondents must show that there is a reasonable apprehension of irreparable and imminent harm should the interim relief not granted. The harm must be anticipated or ongoing, and should not have already taken place. In this case the respondents are alleging that the applicant has destroyed their initiations schools and ancestral graves. They are further alleging that

the applicant has already encroached into their land. Therefore, the act that they are complaining about has already taken place, and in my view they have failed to meet this requirement.

[25] The third requirement is that of balance of convenience. The respondents are required to show what harm they will suffer if the interim relief is not granted. In my view the respondents has failed to show that. The fourth requirement is that of adequate remedy. According to the respondents' version the act they are complaining about has already been committed by the applicant, and they can therefore sue for damages. The respondents in my view have also failed to meet the fourth requirement.

[26] Under the circumstances I am satisfied that the respondents have failed to meet the requirements for an interim interdict. For the reasons I have state above, the respondents' counter application for an interim interdict stands to fail.

[27] I turn to the applicant's application, whether its rule nisi should be confirmed or not. The requirements for a final interdict have been

formulated in the often quoted case of *Setlogelo v Setlogelo* 1914 AD 221 at 227 where the Court said:

“The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended and the absence of a similar protection by any other ordinary remedy.”

[29] According to the applicant, it is seeking a final interdict against the respondents on Zwartfontein and Overysel farms. Since it does not have mining rights at Drenthe, or conducting any operation, it is not seeking any order there.

[30] The first requirement is whether the applicant has a clear right over Zwartfontein and Overysel farms. The Minister of Mineral Resources has given it the rights to conduct mining operations at the two farms. It has signed a long term lease agreement with Langa-Mapela Tribe and Langa Tribe to enable it to mine there. It has long been conducting mining operations at Zwartfontein and Overysel farms. I am therefore satisfied that the applicant has established a clear right over Zwartfontein and Overysel farms.

[31] The second requirement is that of an injury committed or reasonably apprehended. The respondents conceded that on the 1st June 2017 they went to the pit operated by the applicant uninvited and in numbers. It is not in dispute that at the pit accessibility is restricted due to the type of operations that is been conducted. As a result of the invasion of the pit by the respondents, a scuffle ensued between the security guards of the applicant and respondents. In the process the applicant's properties were damaged, employees of the applicant were threatened by the situation. The pit had to be closed for a while whilst production was lost.

[32] The respondents in their own version state that their tribal members have cleared the land which is about 800 meters away from where applicant was blasting. The respondents are claiming that the applicant has encroached into their land and that where it is blasting is their land. However, the aerial photographs shows that the applicant has not encroached into the respondents land. I am therefore satisfied that an injury has actually been committed by the respondents against the applicant.

[33] The third requirement is whether the applicant has any other remedy. According to the applicant, it has lost about R6.5 million in the four hours

the pit was shut down. That money it has not recovered, and even if it can institute a civil claim against the respondents, the possibility of recovering that is negligible. The applicant has tried to engage the police to assist it, but alleges that it was told by the police that without the Court order they will not be able to assist it to stop the respondents from their alleged unlawful and interruptive conduct.

[34] In the circumstances, the court is satisfied that the applicant has met all the requirements for a final interdict.

[35] In the result I make the following order:

35.1 The respondents counter application is dismissed

35.2 The rule nisi issued on the 15th June 2017 is confirmed in the following varied terms:

35.2.1 The respondents are interdicted from entering farm Zwartfontein 818, registration division LR, Limpopo Province and farm Overysel 815, registration Division LR, Limpopo Province (the property”);

35.2.2 The respondents are interdicted from interfering with or disturbing the applicant's operations at the property and threatening or inciting such conduct;

35.2.3 The respondents are interdicted from intimidating, threatening and/or assaulting the applicant's employees, contractors and/or suppliers or any other person visiting the property, and from inciting such conduct.

35.2.4 The respondents are interdicted from damaging any property of the applicant or the suppliers or any other person visiting the property, and from threatening or inciting such conduct.

35.2.5 The South African Police Service are authorized and directed to demolish any and all illegal structures which may be erected by the respondents on the property and to remove any of the respondents who access the property.

35.2.6 The Respondents to pay the costs of this application including that of their counter application jointly and severally the one paying the other to be absolved.



KGANYAGO J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
LIMPOPO DIVISION,
POLOKWANE

APPEARENCES

For the applicant

Briefed by

For the respondent

Briefed by

Date of hearing

Date of judgment

: Adv Sisilana

:Edward Nathan Sonnenbergs Inc

: Adv Ram

: Denga Inc

: 12th March 2018

: 18/04/18