

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 37252/2021

**DOH: 19 - 20 September
2023**

1)REPORTABLE: NO
2)OF INTEREST TO OTHER JUDGES: NO
3)REVISED.

.....28 May 2024
SIGNATUREDATE

In the matter between:

FREDERICK WILHELM AUGUST LUTZKIE	First Applicant
NEW SALT ROCK CITY (PTY) LTD	Second Applicant
ZAMIEN INVESTMENTS 102 (PTY) LTD	Third Applicant
CSHELL 80 (PTY) LTD	Fourth Applicant
And	

KILKEN PLATINUM (PTY) LTD	First Respondent
KILKEN HOLDINGS (PTY) LTD	Second Respondent
KILKEN INVESTMENTS (PTY) LTD	Third Respondent
KILKEN ENTERPRISES (PTY) LTD	Fourth Respondent
ZUNAID ABBAS MOTI	Fifth Respondent
MIKAEEL MOTI	Sixth Respondent
ASHRUF KAKA	Seventh Respondent
SALIM AHMED BOBAT	Eighth Respondent
DAVID GAVIN WILLOUGHBY	Ninth Respondent
WIID ROSSOUW	Tenth Respondent
ANGLO AMERICAN PLATINUM CORPORATION LTD	Eleventh Respondent
MAHENDREN MOODLEY	Twelfth Respondent
SEBASTIAN (KGOSI) TSHIKARE	Thirteenth Respondent
KILKEN- IMBALI JOINT VENTURE	Fourteenth Respondent

IMBANI MINERALS (PTY) LTD	Fifteenth Respondent
GLENCORE OPERATIONS SA LIMITED	Sixteenth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Seventeenth Respondent

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 27 MAY 2024

BAM J

Introduction

1. This is a motion for final relief from oppressive or prejudicial conduct in terms of Section 163 of the Companies Act¹ (the Act). The applicants seek, *inter alia*, an order for a mutual buyout among the two shareholder groupings, failing, a sale by public auction of the entire shares in the first respondent. The matter was heard during recess in September 2023, following a brief hiatus from May 2022 when the court ordered that it be removed from the roll. In terms of that court order, the applicants were called upon to pay the respondents' costs, including the costs of two counsel. Over the two days of

¹ Act 71 of 2008

argument, the court also heard three² further applications between the parties and reserved judgment in all four.

2. The applicants' case is set out in their founding affidavit and augmented in their supplementary affidavits, filed as of April and September 2023. In the main, the complaints include, *inter alia*:

2.1 The denial by the first to the fourth respondents (respondents) of free and unfettered access to the first respondent's books of accounts, and financial records.

2.2 Exclusion from managing the affairs of the first respondent. This complaint includes the respondents' refusal to accept the first applicant as director of the first respondent.

2.3 The refusal of requests or calls to hold shareholders' meetings.

2.4 The lack of probity on the part of the management and board of the first respondent.

2.5 The alleged oppressive or unfairly prejudicial manner in which the affairs of the first respondent are conducted, in disregard of the applicants' interest.

Since filing the supplementary affidavits further complaints have emerged and they include:

2.6 The discovery of further evidence of oppressive or prejudicial conduct in the form of allegedly hidden commercial transactions, namely, the KCo obligation and the Mazetti Management fees. In terms of the latter, the first respondent paid R33 million in fees in respect of

² The applications heard are: the Sec 163 application; the Rouwkoop application; the Condonation application; and the application to Strike Out.

management services. Mazetti is an entity within the Moti Group of Companies.

3. The applicants' claims were met by a defence, *in limine*, that the applicants are bound by the alternative dispute resolution clause set out in the first respondent's Shareholders' Agreement (SA). To the extent that the applicants have not made a case demonstrating good cause, submitted the respondents, they cannot escape the clause.

4. At the outset, the respondents claimed that the application was an abuse of this court's processes and that the application was not brought because the applicants are an oppressed minority in pursuit of the truth. Rather, it was brought as a stalking horse to coerce the respondents to buy out the minority shareholders at the extortionate price of R800 million, demanded by the first applicant. The application, so it is alleged, is part of a series of abusive strike litigation brought to embarrass and harass the first respondent and interfere with the commercially sensitive relationships it enjoys with its trading partners, so as to destroy value in the first respondent. The abuse, the respondents submitted, can be inferred from the applicants' decision to include various respondents, against whom the applicants make no case, and from whom they seek no relief.

5. The respondents denied the allegations of oppressive or prejudicial conduct and provided positive evidence contradicting the applicants' version. Pointing

to the myriad of irresolvable disputes of fact, they argued that the case cannot be resolved on paper.

6. The applicants, according to the respondents, had unequivocally conceded that there are material disputes of fact which cannot be resolved on the papers. That concession cannot be undone.

7. There is the further point that, the applicants exercised an election to refer the various disputes in this matter to trial. On that basis, they should not be allowed to paddle two canoes at the same time. They are bound by their election and its consequences. The respondents asked that the matter be referred to trial or be dismissed with punitive costs.

8. It is now convenient to set out a high level sketch of the background facts, but first, the parties must be introduced. Before I do so, I record this court's appreciation of the professional approach demonstrated by counsel from both sides in preparing a set of Comprehensive Heads of Argument, Index and Joint Practice Notes. The assistance is greatly appreciated.

A. Parties

9. The first applicant, Mr Frederick Wilhem Augusta Lutzkie (Lutzkie), describes himself as a businessman, a certified professional electrical engineer and director of the second applicant. He is the moving spirit behind the second to the fourth applicants. His address is set out in the papers as New Salt Rock, Salt Rock, KwaZulu Natal.

10. The second applicant is a private company duly incorporated as such in terms of South African law with its registered address set out as New Salt Rock Road, Salt Rock, KwaZulu Natal.

11. The third and fourth applicants are private companies and wholly owned subsidiaries of the second applicant. The second to the fourth applicants are referred to in the papers as the New Salt Rock City Group of companies (Salt Rock). Together, they hold a minority shareholding in the first respondent to the extent of 35.1%. For ease of reference, I refer to Mr Lutzkie as Lutzkie and to the second to the fourth applicants as simply the applicants or Salt Rock.

12. The first respondent, Kilken Platinum (Pty) Ltd, is a private company duly incorporated as such in terms of South African law. Its registered address is described in the papers as Parkmore, Sandton. The main object and sole business of the first respondent is the treatment of low grade concentrate in terms of the Sale and Treatment of Concentrate Agreement (STC) concluded between it and Rustenburg Platinum Mines, RPM, a wholly owned subsidiary of the eleventh respondent. The business of the first respondent is conducted through the Kilken-Imbani Joint Venture (JV) which comprises the first respondent and the fifteenth respondent, Imbani Minerals (Pty) Ltd.

13. The second, third, and fourth respondents are private companies. They hold the majority stake in the first respondent of 64.9%. The second to the

fourth respondents are referred to in the papers as the Newshelf Group of Companies (New Shelf).

14. The application is opposed only by the first to the fourth respondents. Thus, a reference to the respondents in this judgement refers only to them. The twelfth respondent, while not opposing the application, filed an affidavit in discharge of his professional and civic duties in order to bring to the attention of the court certain pertinent matters.

B. Background

15. The following is common cause: As at September 2020, Salt Rock held a stake of 35.1% in the first respondent for which it paid a consideration of R242 million. The purchase was made by way of a phased approach over a period of about eight months. It is common cause that in the lead up to purchasing the shares, Lutzkie had a team of qualified advisors, one of whom is the twelfth respondent. For ease of reading, the remainder of the background is arranged along the following headings: i) the Sec 345 Interdict; ii) concession and election; and iii) referral to judicial case management.

i) The Sec 345 Interdict

16. According to the respondents, the event that precipitated the present application may be traced back to a meeting held on 23 June 2021 between Lutzkie and Moti³. The meeting was held in order to find a lasting solution to the parties' problems by buying out the applicants' interest. In that meeting, Lutzkie rejected Moti's offer — without prejudice — to acquire the applicants'

³ Lutzkie represented the applicants while Moti represented the first to the fourth respondents.

shares. Lutzkie demanded that he be paid R800 million for the applicants' shares. He threatened that if his demand was not met, he would bring an application in terms of sec 163 of the Act and would '*bomb and destroy everything*'. Lutzkie proceeded to show Moti an unissued application in terms of Section 163 to demonstrate his seriousness. Lutzkie and the applicants deny the extortionate demands and the attendant threat but maintain that the price of R800 million is not out of synch with the first respondent's valuation.

17. Moti's efforts to resolve the parties' differences were a sequel to earlier events, which saw the applicants issue a demand in terms of section 345 (1) of the Companies Act⁴, during April 2021, arising from a dispute surrounding a short-paid invoice⁵ for services allegedly rendered during 2020. To prevent the applicants from winding it up, the first respondents sought an urgent interdict from the Durban High Court (the Sec 345 Interdict). The application was resolved by means of a consensual order.

ii) Concession and Election

18. The respondents refused to capitulate to the demand. The present application was issued on 23 July 2021 as semi urgent, to be heard during the court week of 31 August. The case was called on 1 September but it was not heard. It was instead, scheduled to be heard on 16 February 2022. In the lead up to the hearing in February, the parties concluded a Settlement Agreement during October 2021, resolving all their disputes. It was an express term of

⁴ Act 61 of 1973.

⁵ Invoice INA 10010 was for R18 423 000.00 and was issued in December 2020. The invoice was partially paid and a balance of R4 863 039.45 remained.

the Settlement Agreement that the parties stop litigating against one another, phrased in the parties' agreement as, '*Stop litigation now*'.

19. The record suggests that on the eve of the hearing in February 2022, the applicants sought an order referring the various disputes between the parties, including the question whether a valid settlement agreement had been concluded in October 2021, to trial. The court did not accede to this request. In its judgment delivered in May 2022, the court found that the present application had been compromised/resolved by the October 2021 settlement and ordered that it be removed from the roll.

20. It is common cause that nothing came of the Settlement Agreement. Both parties blame the other for failing to perform in terms thereof. In August 2022, following the applicants' cancellation of the Settlement Agreement in June 2022, the applicants issued papers to recover what they claim they were entitled to in terms of that agreement, as a result of the respondents' alleged failure to perform. This application is referred to between the parties as the Rouwkoop application. Two further applications were issued in August and November 2022.

iii) Referral to Judicial Case management and subsequent events

21. The parties were referred to judicial case management during or about December 2022, by which time 4 applications were pending between them⁶. Following the case management meeting of 3 April 2023, and with leave of this court, the parties filed supplementary affidavits to take into account various developments that had occurred in the matter. On 7 September 2023, the respondents sought leave to file a second supplementary affidavit with evidence pertaining to events that took place during April 2023, contending that they would be prejudiced in the event the evidence was not brought to the attention of the court. The applicants do not oppose the application and there is no prejudice in that the applicants filed a reply on 12 September. Consequently, the court grants leave for the second supplementary affidavit be admitted into the record.

22. Included in the developments is the furnishing of a large amount of records pertaining to the first respondent to the applicants. Indeed, it is the respondents' version that after furnishing the information, the applicants relayed that they were satisfied with the information and that they had no further questions.

C. Issues

23. The following, according to the parties' Joint Practice Note, must be determined, ie, whether:

⁶ They are: i) the present Sec 163 application; ii) the Rouwkoop application - issued during August 2022; iii) application to wind up the first respondent - issued during August 2022; and iv) the Delinquency application - issued in November 2022.

- a) the applicants, as a matter of law or based on the Memorandum of Incorporation Shareholders' Agreement, have a right as shareholders to free and unfettered access to the first respondent's financials records;
- b) the applicants have been excluded from the management of the first respondent and from its financial affairs;
- c) the respondents' refusal to accept Mr Lutzkie's nomination to the board has any merit;
- d) Mr Lutzkie and or anyone nominated by him was entitled to serve on the board of the first respondent;
- e) the respondents' conduct has had a result that is oppressive or unfairly prejudicial or that disregarded the interests of Salt Rock as envisaged in section 163 of the Companies Act;
- f) a mutual buy-out of shares at a fair value by the two shareholder groupings is to be ordered;
- g) the breakdown in the relationship between Mr Moti and Mr Lutzkie, who are neither shareholders nor directors in the first respondent, render the mutual buy-out of shareholding in the first respondent at fair value an appropriate order; and,
- h) the business of the first respondent is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to Salt Rock or that disregards Salt Rock's interests.

The respondents add the following as issues for determination, ie. whether:

- i) the disputes of fact between the parties render the application incapable of resolution on paper;

- j) the applicants elected to refer the matter to trial and now are bound by that election; and,
- k) the applicants' application constitutes an abuse of process.

D. The law

Disputes of facts in Motion proceedings

24. It is trite that motion proceedings are suitable for resolution of legal issues on common cause facts. They cannot be used to resolve factual disputes because they are not meant to determine probabilities.⁷ Courts, however, have to be vigilant and not allow fictitious and unmeritorious affidavit versions⁸. It is also well established that in motion proceedings where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order⁹.

Election

25. In *Sandown Travel (Pty) Ltd v Cricket South Africa*, the court had occasion to comment the doctrine of election and it said:

[31] At the bottom of the doctrine of election is the principle that no person can be allowed to take up two positions inconsistent with one another or, as is commonly expressed, to blow hot and cold, to approbate and reprobate.

[33] Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is

⁷ *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1 (SCA), paragraph 26.

⁸ *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006), paragraph 55.

⁹ footnote 7 *supra*.

entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind.¹⁰

Concession

26. The law on concession states that a party is bound by factual concessions made before a court. 'It is also trite that a party may not present argument in conflict with those facts which were common cause in the court *a quo* or with the party's common intentions of the issues before the court *a quo*.¹¹ In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others*, the court remarked:

'It is true that a concession made by counsel on a point of law may be withdrawn if the withdrawal does not cause any prejudice to the other party. However, in my view what counsel for Dengetenge did was not just to make a concession on a point of law. He effectively withdrew Dengetenge's opposition to the application....¹²

E. Referral to trial

27. Here, I discuss the basis for my conclusions to refer the matter to trial and I demonstrate by selecting only one of the issues presented by the parties for resolution.

¹⁰ *Sandown Travel (Pty) Ltd v Cricket South Africa* (42317/2011) [2012] ZAGPJHC 249; 2013 (2) SA 502 (GSJ) (7 December 2012).

¹¹ *Van Schalkwyk v Nell*; In re: *M v M* (57215/2017) [2019] ZAGPPHC 1107 (21 August 2019), paragraph 39.

¹² (CCT 39/13) [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC) (13 December 2013), paragraph 54.

Whether the applicants have been excluded from management of the affairs of the first respondent

28. The applicants complain that they have been excluded from managing the affairs of the first respondent. They further add that, notwithstanding the first applicant's nomination by the second applicant, the respondents refuse to accept the first applicant as director, as a form of preemptive strike to prevent Salt Rock from accessing the requisite financial information of the first respondent. The respondents raise several points in response.

29. Firstly, the respondents submit that the applicants are bound by the dispute resolution clause. They say, this a matter falling squarely within the parameters of the dispute resolution clause. All that Lutzkie and the applicants had to do was issue a notice of breach, followed by a referral to the five member committee in the event the complaint was not resolved. To the extent that the matter would not be resolved by the five member committee, it would have been referred to arbitration. Instead of following the dispute resolution procedure, the applicants chose to litigate. The applicants may not ignore the dispute resolution clause.

30. Secondly, in terms of the Shareholders Agreement¹³, SA, the day to day management of the affairs of the first respondent vests in the Chief Executive as delegated by the Executive Directors. The first respondent has a Chief Executive Officer and, on that basis, there can be no complaint about the applicants being excluded from managing the affairs of the first respondent.

¹³ Caselines 230, paragraph 12.1, states that this is always subject to the rights of the shareholders in terms of the SA, or in terms of common law, or in terms of the Companies Act, or the MOI.

31. Thirdly, the respondents submit that they had long extended an invitation to the applicants to nominate three suitable individuals, excluding the first applicant, to serve as directors, in line with the Shareholders Agreement. The applicants have not done so. Instead, they have opted to repeatedly raise the same complaint. I note in this regard that the respondents' stance has changed since the filing of their answering affidavit, in that they had initially resisted anyone nominated by the first applicant on the basis that they cannot trust anyone nominated by Lutzkie.

32. Fourthly, on the question of the first applicant's fitness to serve as director, the respondents submit that they are not prepared to have the first applicant as director of the first respondent based on the following:

- i) The first applicant, according to the respondents, was convicted of an offence involving dishonesty in another country. Although the respondents assert that this is the case, they suggest that the issue may require further investigation. The applicants deny that Mr Lutzkie was ever convicted of an offence involving dishonesty in any country.
- ii) The first applicant cannot be trusted with confidentiality. In this application, he has annexed the first respondent's financial statements, despite the confidentiality clause in the shareholders agreement.
- iii) The first applicant had informed Moti that he had obtained the first respondent's banks statements through 'his contacts'. He not only mentioned but demonstrated he knew what was in the bank statements.

iv) The respondents further point to Lutzkie's failed attempt to liquidate the first respondent following the Sec 345 (1) demand, the pending proceedings to wind up the first respondent and the very fact of bringing the present proceedings, instead of using the dispute resolution procedure to resolve the applicants' complaints. They assert that Lutzkie's conduct demonstrated in all these instances is inconsistent with the fiduciary duties of a director. For all these reasons, the respondents argue that they are not prepared to have the first applicant serve as a board member.

33. The first applicant is on record denying, firstly, that the applicants have no right to manage the affairs of the first respondent and secondly, that he is unfit to serve as director. He refutes the respondents' claims that he was convicted of an offence involving dishonesty in Zimbabwe or anywhere else. What emerges immediately from this brief exposition of the parties' submissions on the single issue is that there are irresolvable disputes of fact. The answering and supplementary affidavits, filed of record, demonstrate throughout that there are multiple material disputes of fact which render the matter irresolvable on paper.

F. Conclusion

34. During argument, counsel for the applicants was quick to point out that, on the undisputed facts, the relief sought in the Notice of Motion must be granted. But this cannot be and I will demonstrate why. It will be recalled that on the eve of the hearing of 16 February 2022, the applicants moved for an order referring the issues between the parties in respect of the relief claimed

in the Notice of Motion, including the question whether a valid settlement agreement had been concluded in October 2021¹⁴.

35. The respondents correctly point out that, in moving the order, the applicants made a concession that the matter cannot be resolved on motion, in light of the myriad of disputes that were confronting them. On the basis of the same conduct, the applicants exercised an election. During argument, when the question of the election was raised by the respondents' counsel, counsel for the applicants submitted that the election was concerned only with the issues surrounding the Settlement Agreement. The submission was incorrect. The draft order filed on caselines¹⁵ demonstrates that the applicants' intention was to refer all the disputes, and not only those pertaining to the Settlement Agreement. I find that the applicants are bound by their procedural election to refer the disputes of fact between the parties to trial. They are accordingly bound by that election. The concession made by the applicants too cannot be undone.

G. ORDER

1. The application is referred to trial in accordance with Section 163 (2) (I) of the Companies Act 71 of 2008 and the following arrangements shall operate:

¹⁴ Paragraph 16 of this judgment, where the wording of the draft order moved for by the applicants is captured.

¹⁵ Caselines F11.

1.1 The applicants' notice of motion dated 23 July 2021 shall stand as simple summons and the first to fourth respondents' answering affidavits and supplementary answering affidavits shall stand as notices of intention to defend.

1.2 The applicants shall deliver a declaration within 30 days of this order whereafter the Uniform Rules of court applicable to trial actions shall apply in respect of the further pleadings and the conduct of the proceedings.

2. Pending the outcome of the trial referred to in paragraph 1 above, it is ordered that:

2.1 The first respondent is to provide the second to fourth applicants with inspection of the books and records of the first respondent in accordance with clause 16.2 of the Shareholders Agreement dated 18 August 2020.

2.2 Any written requests made in accordance with clause 16.2 of the Shareholders Agreement shall be complied with within 15 (fifteen) days of the date of such request.

2.3 The second to fourth applicants shall be provided with copies of the Annual Financial Statements of the first respondent as soon as they have been completed and signed off by the first respondents' auditors but, in any event, within 180 days of the first respondent's year-end, save that the annual financial statements for the financial year ended 31 December

2022 shall be provided by 30 November 2023 (unless delayed by causes beyond the control of the first respondent, such as the delay by the first respondent's auditors).

2.4 Within 10 (ten) days of this order, the first respondent is ordered to provide the second to fourth applicants with a reconciliation of the flow of funds to shareholders since January 2020 to date hereof by way of distribution as envisaged in Section 46 of the Companies Act 71 of 2008;

2.5 The first to fourth respondents are ordered to accept the nomination by the second to fourth applicants of three directors (the applicants' nominees) to serve on the board of the first respondent, provided that the applicants' nominees may not include the first applicant.

2.6 The second to fourth respondents and the second to fourth applicants are ordered to seek agreement on the identity of a person to serve as an independent director on the board of the first respondent within 30 days of this order. Failing agreement, the President of the Institute of Directors South Africa shall nominate such person to serve as independent director on the board of the first respondent within 14 (fourteen) days of being requested to do so. The independent director shall be the chairperson of the board;

- 2.7 The seventeenth respondent is authorised and directed to amend its records to reflect the persons nominated in terms of paragraph 2.5 and 2.6 as directors of the first respondent.
3. The respondents' second supplementary answering affidavit filed on 7 September 2023 and the applicants' reply thereto are admitted as part of the record.
4. Costs are reserved for determination at trial.

BAM J
JUDGE OF THE HIGH COURT,
PRETORIA

Date of Hearing: 19 - 20 September 2023

Date of Judgment: 28 May 2024

Appearances:

Applicants' Counsel: Adv J.J Brett SC with Adv J.G
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First, Second, Third, & Fourth

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