



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 1333/2021

In the matter between:

**MODIKWA PLATINUM MINE,
AN UNINCORPORATED JOINT VENTURE
BETWEEN RUSTENBURG PLATINUM MINES
LIMITED AND ARM MINING CONSORTIUM LIMITED**

APPELLANT

and

NKWE PLATINUM LIMITED

FIRST RESPONDENT

GENORAH RESOURCES (PTY) LIMITED

SECOND RESPONDENT

**THE REGIONAL MANAGER, LIMPOPO
REGION, DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

THIRD RESPONDENT

**THE DIRECTOR-GENERAL: MINERAL
REGULATION, DEPARTMENT OF
MINERAL RESOURCES AND ENERGY**

FOURTH RESPONDENT

**THE MINISTER OF MINERAL RESOURCES
AND ENERGY**

FIFTH RESPONDENT

**THE MINISTER OF AGRICULTURE, LAND
REFORM AND RURAL DEVELOPMENT**

SIXTH RESPONDENT

Neutral citation: *Modikwa Platinum Mine, an unincorporated joint venture between Rustenburg Platinum Mines Limited and Arm Mining Consortium Limited v Nkwe Platinum Limited and Others* (1333/2021) [2023] ZASCA 08 (06 February 2023)

Coram: PONNAN, MOLEMELA, CARELSE, and HUGHES JJA and CHETTY AJA

Heard: 17 November 2022

Delivered: 06 February 2023

Summary: Application – disputes of fact – respondent’s version cannot be rejected on the papers – application correctly dismissed by court a *quo*.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP, sitting as a court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Carelse JA (Ponnan, Molemela, and Hughes JJA and Chetty AJA concurring):

[1] **The main issue in this appeal is whether the court *a quo* correctly dismissed an application by the appellant, Modikwa Platinum Mine (Modikwa), an unincorporated joint venture between Rustenburg Platinum Mines (Pty) Limited (RPM) and Arm Mining Consortium Limited (ARM MC)¹, against the first respondent, Nkwe Platinum Limited (Nkwe).**

[2] **On 4 June 2021, Modikwa launched an urgent application in the Limpopo Division of the High Court, Polokwane against Nkwe, and the second respondent, Genorah Resources (Pty) Limited (Genorah), in which the following relief was sought:**

'1 . . .

2 that a Mandament van Spolie is granted ordering the First and Second Respondents to restore possession to the Applicant of the spoliated area, spoliated by the First and Second Respondents from the Applicant, on the Farm Maandagshoek 254 KT, as defined on the plan marked "LM 3" annexed hereto, and the Applicant's rights in respect of the spoliated area, to the Applicant, free of any restriction or constraint, alternatively;

¹ Modikwa is made up of the following parties: RPM and ARM MC. ARM MC is further made up of the following parties: African Rainbow Minerals Platinum (Pty) Ltd, a majority black-owned company; the Mampudima Community Company Incorporated (Mampudima), a company incorporated in terms of s 21 of the Companies Act 61 of 1973; and the Matimatjatji Community Company (Matimatjatji). Mampudima comprises of several communities. Matimatjatji comprises of the Matimatjatji community under the traditional leadership of Kgoshi Joseph Nkosi. Both the Mampudima and the Matimatjatji communities reside on several farms, including Maandagshoek, where Modikwa has a mining right. Each community has five elected directors with four members from both communities who sit on the board of ARM MC and are also members of the Executive Committee of Modikwa. The ownership in Modikwa is made up as follows: RPM 50%, ARM MC 41.5%, Mampudima 6% and Matimatjatji with a 2.5% interest.

3 ejecting the First and Second Respondents and anyone occupying Maandagshoek through or under them, from Maandagshoek 254 KT and ordering them to remove all property which they may have, or have control over, on the Farm Maandagshoek 254 KT including, without limiting the generality of the foregoing, fencing, vehicles, plant and temporary structures;

4 further, alternatively to prayers 2 and 3 above, an order directing First and Second Respondents and/or their employees, agents and/or subcontractors to vacate Maandagshoek 254 KT and take down and remove from the Farm Maandagshoek 254 K[T] any property, including, without limiting the generality of the foregoing, any fencing, plant, equipment, structures and vehicles belonging to them, or any contractor under their control from the Farm Maandagshoek 254 KT; and

5 that the First and Second Respondent[s] to pay the costs of this application, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.’
The application was dismissed by Makgoba JP, who subsequently granted leave to Modikwa to appeal to this Court.

[3] The State owns farms in Limpopo Province known as Maandagshoek and Garatouw that in part share a common boundary. The State has granted Modikwa, a platinum mining company, mining rights over Maandagshoek, which is valid until 2043. Modikwa currently operates three mine shafts and employs 5 000 people. Nkwe and Genorah are ‘joint holders’ of a mining right in undivided shares (74% held by Nkwe and 26% by Genorah) in respect of several farms, including that of a farm known as the Remaining Extent of the farm Garatouw 282 KT (Garatouw), which was issued by the Minister of Mineral Resources and Energy (the fifth respondent). This right was granted in 2014, but Nkwe only commenced with the physical development of its mine at or about the beginning of 2021.

[4] By reason of the locality and available geological data, for Nkwe and Genorah to exercise their mining right, they had built infrastructure on Maandagshoek. To this end, Nkwe and Genorah sought and obtained the requisite permission from the authorities to build the necessary infrastructure on Maandagshoek, which was to be built a considerable distance away from the area where Modikwa was exercising its mining rights.

[5] **In the founding affidavit filed in support of the application, it was stated on behalf of Modikwa:**

'3 SPOILIATION, ILLEGAL AND UNLAWFUL CONDUCT OF THE FIRST AND SECOND RESPONDENTS

3.1 The First and Second Respondents have invaded and occupied Maandagshoek 254KT with equipment and fencing, having fenced off an area in extent of 89.6 hectares, and having cleared a further 321 hectares to be fenced off (the "spoliated area"), a total of approximately 411 hectares.

3.2 On Friday, 14 May 2021, through media reports (the relevant annexures are identified and marked below) the Applicant first became aware that First and Second Respondents were about to embark upon box cut mining development on Garatouw 282KT by 28 May 2021.

3.3 On Monday, 17 May 2021, Applicant saw for the first time that First and Second Respondents erected extensive fencing and certain temporary structures on Maandagshoek 254KT. That is also when Applicant became aware that these Respondents intend to use the spoliated area as a staging area for the purposes of firstly doing box operations and then, if appropriate, sinking a mine decline shaft.

. . .

3.11 It has only very recently come to the Applicant's attention that on 2 March 2021, the South African Broadcasting Company ("SABC") reported concerns raised by residents of the "Maandagshoek Community" with reference to the Maandagshoek Village and the surrounding area. The report makes reference to the "Maandagshoek Community" leaders being disgruntled because the First Respondent has fenced off a portion of their ploughing fields for purposes of establishing mining operations without consulting the "Maandagshoek Community" . . .

. . .

3.15 Mr Fan states that the mine will uplift communities, however neither First Respondent nor the Second Respondent appear to have obtained the consent of the landowner who is the Government or the relevant Community structures or Communities who reside there, to carry out any activity on the farm Maandagshoek 254KT. For this reason alone, such operations would be unlawful. . .

. . .

3.18 It is apparent from the articles referred to above that the First and Second Respondents intend on wrongfully using a portion of Maandagshoek 254KT as a staging area for the box cut development on Garatouw 282KT. The box cut it appears will traverse both farms.'

At para 5.10 in its founding affidavit, Modikwa states that:

'5.10 First and Second Respondents do not have a mining right, approved MWP, EA, SLP or any of the other consents and authorizations required under the MPRDA to commence, or carry out, mining or incidental activities on Maandagshoek 254KT.'

[6] **In its answering affidavit, Nkwe responded to those allegations as follows:**

'10.1 The contents hereof are denied. Nkwe is carrying out lawful activities as described supra.

10.2 The contents hereof constitute inadmissible hearsay evidence and if allowed, demonstrates the lack of urgency or self-created urgency in the extreme and the crux of the complaint relating to the box cut issue, which is a non-event as described *supra*.

10.3 Insofar as any of the remarks that I may have made during media briefings concur with the factual information and evidence presented herein, it is admitted, otherwise it is media reports and nothing more.

10.4 Contrary to any allegations relating to the lack of consent or consultation, respectively of and with Government and relevant community structures, irrefutable evidence, proving proper and due process and authorizations that are valid and existing are annexed.

10.5 None of the surface related activities constitute invasive mining activities such as alluded to or inferred by Modikwa.

10.6 I am advised that the MPRDA, on a proper construction of inter alia Section 1 thereof (the definitions part) distinguishes between invasive and non-invasive actions. Furthermore, the Environmental Authorization is certainly not contradictory to the provisions of the MPRDA. It will be argued, nonetheless, that the activities authorized in terms of the Environmental Authorization do not constitute invasive mining. It is carried out on virgin land (thus the de-vegetation, with the necessary permission) and far away from any of Modikwa's invasive and non-invasive activities and area where the shafts are situated, which extends to underground workings at approximately 450m and more.

10.7 Nkwe's activities and the related machinery and equipment mentioned are by its nature used for and authorized activities in terms of the Environmental Authorization and with the necessary consent by the landowner and occupiers, as evidenced *supra*.'

[7] **Nkwe further alleged in its answering affidavit that:**

'3.3 Nkwe furthermore has the consent and written permission of the landowner of Maandagshoek, the Sixth Respondent to carry out Nkwe's activities on Maandagshoek. The parties (the sixth Respondent and Nkwe) are in the process of concluding the formal land use agreement which has been agreed in principle.

The written authority and permission of the landowner is annexed hereto, marked "GF2.3(a)". The consent from informal land rights holders of the relevant land is annexed hereto, marked "GF2.3(b & c)".

Nkwe also attached a written consent from the 185 occupants of Maandagshoek agreeing to the infrastructure being built on a part of Maandagshoek. In this regard, it was stated in the answering affidavit:

'3.4 Nkwe has concluded and signed 185 compensation agreements with occupants of Maandagshoek who either reside there or conduct farming operations on the said farm.

3.4.1 In support of the above, independent supporting affidavits of Kgoshi Ralph Kgoete, Kgoshi Bethuel Mohlala and Kgoshi Emmanuel Mpuru are annexed hereto, marked "GF2.4(a-b)" and "GF2.5", who confirm the essence and substance of the contents of this affidavit).

3.4.2 These traditional leaders represent the Mamphahlane, Tswako Mohlala and Mpuru communities which are the only relevant and affected communities in respect of the area where Nkwe is carrying out activities on Maandagshoek. They confirm the relevant permissions in terms of their community structures. The permissions are aligned with the Environmental Authorization in that they relate to the fenced off and demarcated area of Maandagshoek where Nkwe's activities are carried out.

3.4.3 In support of the above, independent supporting affidavits of directors from the referred section 21 company M. Ronicah, S. Brian, P. Mpuru and M. Thami, are annexed hereto, marked "GF2.5(a-d)", who confirm the essence and substance of the contents of this affidavit). The supporting affidavit of Mr. Klaas Mpuru in his capacity of General Secretary of the Kone Phuti tribal council is also attached hereto, marked "GF2.5(e)".'

[8] **Modikwa does not dispute the documents recording the consent of the 185 occupants referred to above. It, however, states in its reply that it is surprised that they 'support the spoliation . . . and the unlawful activities of [Nkwe]'**.

[9] **As should be apparent from the relevant portions of the founding affidavit quoted above, Modikwa placed a great deal of reliance on media reports, but that, as the respondents correctly argued, was not admissible**

evidence. In any event, as stated in *National Director of Public Prosecutions v Zuma*:²

[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.'

[10] **Here, it cannot be said that a court would be justified in rejecting the version advanced in the answering affidavit, merely on the papers. It follows that the application had to fail and the court *a quo* cannot be faulted for dismissing the application.**

[11] **Insofar as costs are concerned: In its notice of motion, Modikwa sought relief against Nkwe and Genorah. On appeal it was accepted on behalf of Modikwa that no case whatsoever was made out against Genorah. Genorah was a party to the appeal. It opposed the appeal. Costs must follow the result both in this Court and the one below.**

[12] **In the result, the following order is made:**

The appeal is dismissed with costs, including those of two counsel.

² *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; [2009] 2 All SA 243 (SCA); 2009 (2) SA 277 (SCA) para 26.

Z CARELSE
JUDGE OF APPEAL

Appearances

For appellant:

T Bruinders SC with K Dewey
Cliffe Dekker Hofmeyr, Sandton
Mayet & Associates, Bloemfontein

For first respondent:

J Roux SC with L J Pretorius
Boshoff Smuts Incorporated, Centurion
Van Wyk & Preller Attorneys, Bloemfontein

For second respondent:

J Oschman
Malan Scholes Attorneys, Johannesburg
Claude Reid Attorneys, Bloemfontein