IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: YES.

(3) REVISED.

DATE **SIGNATURE**

27 October 2023

Case Number: 30712/2023
Case heard: 25 October 2023
Judgment delivered 27 October 2023

In the matter between:

NKWE PLATINUM LIMITED Applicant

and

GENORAH RESOURCES (PTY) LTD 1st Respondent

MINISTER OF MINERAL RESOURCES AND ENERGY 2nd Respondent

DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY 3rd Respondent

THE REGIONAL MANAGER: LIMPOPO REGION OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY 4th Respondent

THE KONEPHUTI SOCIO ECONOMIC CONSOLIDATED STRUCTURE	5th Respondent
THE MABEDHLA TRIBAL AUTHORITY	6th Respondent
THE KOMANE TRIBAL AUTHORITY	7th Respondent

JUDGMENT

VAN DEN BOGERT AJ:

1. The issue in this application is whether a Bermudan court issuing an interdict by default against a South African company (one of the defendants in the Bermudan Court), who was at no stage present in Bermuda, and did not submit to its jurisdiction, did have jurisdiction to entertain the case against such company according to the principles recognised by the South African law insofar as it concerns the jurisdiction of foreign courts.

2. The present application is for the recognition and enforcement of only one paragraph, being the interdictory portion of an order that was handed down by the Supreme Court of Bermuda under case number 2020: No: 275 on 29 October 2021. The Bermudan court delivered its judgment/reasons for the order on 12 November 2021. I shall revert to the order and judgment.

3. Although the dispute is not relevant for the purposes of the adjudication of this application, the first respondent contends that there are two companies with the name of the applicant “Nkwe Platinum Limited”. The first or original company has registration number 32747. It is a company registered in Bermuda.

4. The said company together with the first respondent are the registered co-holders of an undivided share in a mining right granted under the Mineral and Petroleum Resources Development Act, 28 of 2002 ("the MPRDA"). The mining right is held over the farm De Kom 252 KT, Hoepkrantz 291 KT and Portion 1 of the Remaining Extent of Garatouw 282 KT in the Republic of South Africa (herein "the mining right"). The original Nkwe holds 74% of the mining right and the first respondent 26% of the mining right.

5. The original Nkwe concluded an amalgamation agreement, dated 16 August 2018 with Gold Mountains (Bermuda) Investments Limited and its holding companies being Gold Mountains (HK) International Mining Company Limited and Zijin Mining Group Co Ltd. The amalgamation was effective from 14 March 2019. The amalgamation occurred in accordance with the Companies Act of Bermuda.

6. The amalgamating companies formed one amalgamated company, also known as Nkwe Platinum Limited (the new Nkwe) with registration number 53596. It appears as if the applicant contends that the latter company somehow remained the same company. The first respondent, on the other hand regards the amalgamated company as the "new Nkwe". That issue, as indicated, has no relevance in this application.

7. It is the contention of the first respondent that the amalgamation caused the original Nkwe to become defunct. It argues that its shares were cancelled, and its board was dissolved because of the amalgamation. Whether the first respondent is correct or not, constitutes the subject of another application that is pending before this court wherein the applicant and the first respondent are

awaiting judgment. I shall revert to that application. I do not concern myself in this judgment with the disputes that will be adjudicated upon in the other pending application.

8. It is apposite to deal with the underlying reason or motive for the ongoing pending litigation between these two parties. Section 11(1) of the MPRDA stipulates as follows:

> "*(1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies."*

9. On 20 August 2020, and under case number 40523/20 the first respondent as the applicant issued an application in this court. It seeks relief against Nkwe Platinum Limited (cited twice as the old and the new Nkwe Platinum Limited), wherein it seeks the following declarator:

9.1. that the conclusion of the amalgamation agreement constitutes a transfer and/or change in control of the Garatouw mining right for the purposes and within the meaning of section 11 of the MPRDA.

9.2. that that transfer and/or change in control is void by virtue of the absence of the consent therefore by the Minister of Mineral Resources and Energy.

9.3. that the old Nkwe Platinum Limited has been deregistered with as envisaged in section 56 of the MPRDA.

9.4. that its undivided shares in the Garatouw mining right have consequently lapsed.

9.5. that the first respondent (the applicant in that application), is the only eligible applicant for the undivided share in the mining right.

(herein “the MPRDA application”).

10. Ownership of the full mining right is the commercial interest in the underlying dispute between the parties. The first respondent sees itself as the only rightful contender the 74% shares in the mining right.

11. Naturally, the applicant contends that the first applicant is incorrect, and that it errs in its views on the effect of the amalgamation. The applicant says that on a proper interpretation of Bermudan law the amalgamation did not have the effect as propagated by the first respondent. To bolster its version, the applicant on 21 August 2020 instituted action against the first respondent and a company known as Glendina (Pty) Ltd in the Supreme Court of Bermuda, seeking a declarator as to the legal effect of the amalgamation agreement under sections 104 to 109 of the Companies Act of Bermuda.

12. The applicant’s summons was issued on 21 August 2020, and it was served on *inter alia* the first respondent in South Africa on 24 September 2020. The Supreme Court of Bermuda issued the following declaratory order which I quote:

"*It is declared that:*

1 *The nature of an amalgamation of Bermuda companies under Bermuda law pursuant to those sections of the Companies Act 1981 relating to amalgamation in particular sections 104 to section 109 is such that:*

(i) *The amalgamating companies continued to exist following the amalgamation as one amalgamated company;*

(ii) *Upon the issuance of a certificate of amalgamation, the property of each amalgamating company becomes the property of the amalgamated company and accordingly assets that were held by one of the amalgamating companies prior to the amalgamation become the property of the amalgamated company by operation of law and not by way of transfer or by operation of contract;*

(iii) *The assets of Nkwe prior to the Amalgamation continued to be its assets notwithstanding the Amalgamation.*

And it is ordered that:

2 *The Defendants be prohibited from representing to the Department of Mineral Resources and Energy (in South Africa) or any other third party that the effect of the amalgamation was that there was a transfer or disposal of the Mining Right or otherwise make*

representations to any party which are contrary to the true effect of amalgamation under Bermuda law, as determined by this Court.

3 The Defendants to pay the Plaintiff's costs which are to be the subject of detailed assessment if not agreed."

13. A written judgment in support of the order was delivered on 12 November 2021, by the Supreme Court of Bermuda.

14. The Bermudan Supreme Court in the initial paragraphs sets out the dispute between the applicant and the first respondent that exists in South Africa. Relevant for purposes of this judgment is paragraph 26 of the Bermudan Court's judgment which states that:

"*By letter dated 18 November 2020, Malan Scholes (South African attorneys for the Second Defendant) notified the Plaintiff's Bermuda attorneys that the Second Defendant "...will not enter an appearance to defend the purely academic and unenforceable proceedings instituted by Nkwe Respondents in the Supreme Court of Bermuda and will oppose any court proceedings instituted by Nkwe in South Africa to enforce any Judgment handed down by the Supreme Court of Bermuda."*

15. The second defendant in the Bermuda proceedings is the first respondent herein. It is thus common cause between the parties that the first respondent did not submit to the jurisdiction of the Bermuda Supreme Court. The applicant only seeks to enforce paragraph 2 of the order granted by the Bermuda court, which I quoted in paragraph 12 supra.

16. In this respect the relief sought by the applicant is that the judgment of the Supreme Court of Bermuda, under case number 2020-No: 275, delivered on 12 November 2021, is recognised and enforced namely that the first respondent be prohibited from representing to the South African Department of Mineral Resources and Energy or any other third party that the effect of the amalgamation was that there was a transfer or disposal of the mining right or to otherwise make representations to any party which are contrary to the true effect of the amalgamation under Bermuda law, as determined by the Bermudan Court.

17. The applicant seeks to have recognised and enforced an interdict issued by a foreign court.

18. Relying on the case of *Jones v Krok 1995 (1) SA 677 (A) at 685 B – C*, the applicant claims that the judgment meets all the common law criteria for the enforcement of foreign judgments in that it was granted by a competent court with jurisdiction; that it was final and conclusive in its effect; that the recognition and enforcement of the judgment is not contrary to South African public policy; that the judgment was not obtained by fraudulent means; that it does not involve the enforcement of a penal revenue law of a foreign state and it is not precluded by the Protection of Businesses Act, 99 of 1978.

19. The first respondent's grounds of opposition which it claims justify the dismissal of the application are:

    19.1. that in making the Bermuda order the Supreme Court of Bermuda lacked jurisdiction over the first respondent, which is a South African

company that is neither registered, nor resident in Bermuda. It also did not submit to the jurisdiction of the Supreme Court of Bermuda.

19.2. since the dispute pertains to South African property being a mining right only a South African court can adjudicate upon the dispute.

19.3. thirdly, seeking to enforce only the interdictory part of the order the applicant effectively impermissibly tries to obtain a declaration about the meaning of the mining right and the rights of the parties.

19.4. the enforcement of a Bermuda order concerns a transaction relating to the mining of raw materials which is prohibited by the Protection of Businesses Act, and

19.5. for various reasons enforcing the Bermuda order is against South African public policy.

19.6. In the alternative to all the above, the issues are *lis pendens* in the pending MPRDA application where the parties are awaiting judgment.

20. I pause to mention that the MPRDA application was heard from 31 January to 2 February 2023 in the third court and the parties are awaiting judgment in that application, which judgment had, as at the time of the arguing of this application, not yet been delivered.

21. As a result of my findings hereunder, I do not need to concern myself with most of the grounds of opposition raised by the first respondent. I therefore

refrain from expressing any views on the remainder of the issues raised not dealt with herein.

22. I deal with the question whether the Supreme Court of Bermuda had jurisdiction to issue the interdictory relief, and whether the interdict issued by the Supreme Court of Bermuda offends public policy. I further need not concern myself with whether it could have issued the relief in paragraph 1 of the Bermudan order, since the applicant elected not to seek a recognition or enforcement of that part of the order.

Jurisdiction:

23. Both parties referred me to the case of *Richman v Ben-Tovim 2007 (2) SA 283 (SCA)*. In that case the question was raised whether an English court which granted a judgment against the respondent who was physically present in England when the initiating process was served upon him, had jurisdiction to adjudicate the matter.

24. In dealing with the relevant issues, the Supreme Court of Appeal repeats a few of the requirements as set out in *Jones v Krock supra* at 685 B – D where it was stated:

"*The present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); … (iii) that the recognition and*

enforcement of the judgment by our courts would not be contrary to public policy'… (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Business Act 99 of 1978, as amended."

25. This case concerns itself with the questions in i) and iii) of the quoted extract.

26. The Supreme Court of Appeal in Richman confirmed that the view expressed by Pollak which was quoted by Van Dijkhorst J, in the case of *Reiss*[1] ought to be followed (see p 289 B – E of the Richman judgment). In paragraph 7 of Richman (p 286), the Supreme Court of Appeal incorporated the relevant portion of the Reiss case:

"*7 The fact that the English Court had jurisdiction according to English Law is not enough. The matter must also be decided according to the principles recognised by South African domestic law. Van Dijkhorst J put the matter as follows in Reiss Engineering Co Ltd v Insamcor (Pty) Ltd:*

> *'The fact that the English Court may have had jurisdiction in terms of its own law does not entitle its judgment to be recognised and enforced in South Africa. It must have had jurisdiction according to the principles recognised by our law with reference to the jurisdiction of foreign courts.*
>
> *The South African conflict of law rules to the present action are clear. I quote from Pollak (the South African Law of Jurisdiction 1937 at 219 (the first edition of Pollak)):*

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1 *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd 1983 (1) SA 1033 (W)*

'A foreign court has jurisdiction to entertain an action for a judgment sounding in money against a defendant who is a natural person in the following cases:

(1) If at the time of the commencement of the action the defendant is physically present within the State to which the court belongs.

(2) If at the time of the commencement of the action the defendant, although not physically present, within such State, is either (a) domiciled, or (b) resident with such State;

(3) If the defendant has submitted to the jurisdiction of the court.

There are no other grounds for jurisdiction.'"

27. It is apparent that this exposition is accepted in respect of judgments issued by foreign courts "*sounding in money*". In this respect the applicant argues that the approved statement is confined to judgments sounding in money and that there is no authority which deals with the position where the judgment sought to be enforced in a South African court does not sound in money. Because of that, it was argued that this court is free to devise its own test for jurisdiction in the present case.

28. With reference to the case of *Fick*[2] where the Constitutional Court developed the common law to allow the enforcement of orders made by international tribunals, the applicant sought to argue that I ought to develop the common law to establish as a requirement (or an additional requirement) that a foreign court would have jurisdiction if there is "an adequate connection" between the respondent before the South African court and the judgment to be enforced.

29. In its argument the applicant relied particularly on *inter alia* paragraphs 56 to 57 of the Constitutional Court judgment, where it referred to Richman v Ben-Tovim, namely that a foreign judgment ought to be enforced because of what is required by the "*exigencies of international trade and commerce*" and because "*not to do so might allow certain persons habitually to avoid jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions as decided in the case of Richman*.

30. And further:

> "*56 Other reasons are: (i) the principle of comity, which requires that a state should generally defer to the interests of foreign states – with due regard to the interests of its own citizens and the interests of foreigners under its jurisdiction – in order to foster international cooperation; and (ii) the principle of reciprocity, the import of which is that courts of a particular country should enforce judgment of foreign courts in the expectation that foreign courts would reciprocate.*
>
> *57 Another important factor is that certain provisions of the Constitution facilitate the alignment of our law with foreign and international law.*

[2] *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC)

This promotes comity, reciprocity and the orderly conduct of international trade, which is central to the enforcement of positions of foreign courts."

31. The above quoted noble principles have, in my view, no bearing upon the question before me. The Constitutional Court did not deal with the issue of default orders to be enforced and/or whether the tribunal had original jurisdiction to adjudicate upon its award.

32. The issue is this. The Supreme Court of Bermuda decided to grant an interdict against a foreigner *ad personam*. It is a personal interdict, which it decided should operate against the first respondent in circumstances where it is common cause that the first respondent did not participate in the proceedings and did not submit itself to the jurisdiction of that court; the first respondent is not resident within Bermuda and was not physically present in Bermuda when the action was commenced with.

33. Bearing this in mind, it is an unconvincing argument to give recognition to a foreign order, granted by default because "an adequate connection" between the respondent before the South African court and the judgment to be enforced exists. There will always be a connection between the judgment that is sought to be enforced against a respondent and the respondent. The applicant's argument is premised on these allegations:

33.1. the first respondent brought the MPRDA application with the core of its case the interpretation of the amalgamation agreement, and the conduct of the parties to it in Bermuda.

33.2. the first respondent contended in the MPDRA application that according to the interpretation of the Bermudan law, Nkwe lost its undivided share in the mining right.

33.3. as such the first respondent engaged Bermudan law and therefore the jurisdiction of the courts of Bermuda, being the appropriate courts to decide the issues.

33.4. as such the applicant approach the Bermuda court for a declarator on the interpretation of its Companies Act and the amalgamation agreement, with the interdict sought to be imposed being an incidence of the declarator.

33.5. the above factors, so the argument went, are allegedly the sufficient connection between the first respondent and Bermuda since only the Bermudan Court, so it was alleged, could interpret the amalgamation agreement and its effect under the Bermudan law.

34. How the interdict is a mere incidence of the declarator is not explained. How the above factors would provide for the notion of “adequate connection” to establish foreign jurisdiction over the person of the first respondent, who did deliberately not partake in the proceedings so that it did not submit to jurisdiction, escapes the mind. The concept of “adequate connection” constitutes a vague and arbitrary factor that is open for abuse. Why the existing confirmed jurisdictional requirements, are inadequate, is also not addressed.

35. There should in my view in principle be no difference whatsoever between the requisites that apply to a foreign judgment sounding in money and/or an interdict. As such, the principles as set out in the case of *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd*[3], are not only persuasive but also make common sense.

36. Our courts do, in appropriate circumstances, recognise and enforce foreign interdicts. See in this regard *International Fruit Genetics LLC v Redelinghuys and Others NNO 2019 (4) SA 174 (WCC)*. The interdict was enforced, however, in circumstances where the subject of the interdict was the American company's right to various proprietary varieties of table grapes, which the South African company was licenced to plant, grow and market. The agreement was cancelled due to the breach of the SA company. A Californian court granted inter alia an interdict requiring the SA company to destroy organic material (which the American company held proprietary rights in) in its possession. The interdict was enforced. There are distinct differences between this case and the Fruit Genetics case, but the important differentiating factor is that the action was defended by the SA company in California.

37. I do not believe that the principles expressed by Pollak as confirmed in Reiss and Richman *supra* only apply to judgments sounding in money (i.e., where a person must pay something). In my view it also applies where a person must do something. These are both orders *ad personam*.

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[3] 1983 (1) SA 1033 (W) at 1037 G - h

38. Even if I am wrong in my view that those principles do not only apply to judgments sounding in money, I find that there is no basis why the same well-founded and established principles of our law should not also find application where interdictory relief is granted. These are legal concepts that have a sound basis in law and should apply also where persons are ordered to do something.

39. On this basis I find that the Supreme Court of Bermuda had no so-called "international jurisdiction" to entertain the interdictory relief or to issue what it called the injunction against the first respondent. Therefore, this court cannot enforce paragraph 2 of the order of the Supreme Court of Bermuda. The application falls to be dismissed on this ground alone already.

Order against public policy:

40. The interdict sought to be enforced has far-reaching consequences. It prohibits the first respondent from representing to the Department of Mineral Resources and Energy or any other third party, that the effect of the amalgamation is that there was a transfer of the disposal of the mining right, or to otherwise make representations to any party which are contrary to the effect of the amalgamation as expressed by the Supreme Court of Bermuda.

41. Bearing in mind that on a proper consideration of the judgment of the court of Bermuda, it was aware of the ongoing dispute between the applicant and the first respondent. It knew that the first respondent had instituted application proceedings in this court wherein it argues, the Department of Mineral

Resources and Energy being cited, that the effect of the amalgamation was that there was a transfer or disposal of the mining right.

42. Surely, when receiving such representations, the Department of Mineral Resources and Energy and its Minister or Director General or the other officials of the Department can make up their own minds. The interdict disallows the first respondent to engage the custodian of the MPRDA on issues relating to mining rights, and effectively ousts the Minister's competency to deal with disputes regarding mineral rights.

43. The interdict interferes with South Africa's sovereignty in that it interferes with a dispute that has as its basis an interpretation of section 11 of the MPRDA. The interpretation of that Act falls squarely within the exclusive jurisdiction of our courts. Its implementation falls within the authority of the Department. The State, represented by the Minister, is the custodian of all mineral resources in South Africa. To prevent anyone from making representations to the Minister on an issue that pertains to a mining right undermines the sovereignty of the State.

44. In addition, the interdict attempts to prohibit the first respondent from having access to the public administration in that it cannot approach the Department with its views on the dispute.

45. Disconcerting is the effect that the injunction would have on the administration of justice. It is common cause that the representations, which the court of Bermuda, attempts to silence and interdict, have already been made in court papers in the pending MPRDA application. As respondents to that application,

the Department of Mineral Resources and Energy, the Minister and the Director General have been joined. These representatives have been made in public court proceedings. As such, there is simply no basis upon which such an interdict can be recognised and/or enforced since it would in effect prohibit the first respondent from arguing its case and/or persisting with its views in the pending MPRDA application.

46. The interdict furthermore offends section 16 of the Constitution of the Republic of South Africa, 1996 (the freedom of expression), which can only be limited in exceptional circumstances. All litigation and all administrative disputes depend on the exchange of different views. To exchange opposing views, parties, as an integral part of the process, make representations as to their adverse contentions. To prohibit parties to do so offends section 33 (just administrative action) and section 34 (access to courts) of the Constitution.

47. It is inconceivable that a foreign court should ever have the power to regulate the conduct of citizens in another country in respect of the internal functioning of the administration of a country and its courts.

48. As such I find that the recognition and enforcement of the interdict would indeed be contrary to South African public policy and on that basis further the relief cannot be granted, and the application falls to be dismissed.

Relief academic:

49. During the hearing of the case, I enquired with counsel for the applicant why the applicant sought to enforce the interdict. I asked that because there is not one iota of evidence in the founding papers which confirms that the applicant

makes any ongoing the representations to the Department of Mineral Resources and Energy. Especially not where litigation is pending on the issues in dispute. Interdicts are there to prevent future conduct.

50. There is also nothing about the trite South African requisites for interdicts such as the reasonable apprehension of harm, etcetera, said in the founding papers. The Supreme Court of Bermuda did not deal at all with the requirements for an interdict. It might be, although doubtful, that in Bermuda interdicts are granted on a different basis. The question remains why the applicant wants to recognise the interdict, and have it enforced and/or what its practical effect will be.

51. The applicant argued that it does not approach the court for an interdict, but for a recognition of an existing interdict and therefore it had no need to deal with the requirements for an interdict. I accept that proposition, but that does not negate the fact that a party cannot approach a court for a purely academic recognition of a foreign order, where such recognition will have no practical effect at all.

52. No explanation could be proffered as to why the recognition and enforcement was sought and the inference that I must draw is that it is a purely academic exercise, which ought not be entertained by our courts. There would be no point in enforcing the order where it will have no practical effect.

In the premises, I issue the following order:

1. The application is dismissed.

2. The applicant is ordered to pay the first respondent's costs, such cost to include the costs of two counsel.

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D VAN DEN BOGERT
Acting Judge
High Court of South Africa
Gauteng Division, Pretoria

\Counsel for the Applicant
CDA Loxton SC
with
CAA Louw
Instructed by:
Edward Nathan Sonnenbergs Inc
Ref: S Mbatha/D Comninos/0493167

Counsel for the first applicant:
A Subel SC
with
JJ Meiring
Instructed by:
Malan Scholes Inc
Ref: H Scholes/F Sieberhagen/MAT1871