"W1"

HIGH COURT
REPUBLIC OF SOUTH AFRICA
NORTH WEST HIGH COURT, MAFIKENG

Chambers of the High Court Judge: Cnr Hector Peterson and University Drive, Private Bag X2010, MMABATHO, 2735
Tel: (018) 392 8200 Fax: (018) 392 1908

CASE NUMBER: 495/2015

In the matter between:-

ITIRELENG BAKGATLA MINERAL RESOURCES (PTY) LTD	1ST APPLICANT
PILANESBERG PLATINUM MINES (PTY) LTD	2ND APPLICANT

And

GRACE MASELE (MPANE) MALEDU	1ST RESPONDENT
SHIMANKI RASEPAE	2ND RESPONDENT
OBAKENG MATSHEGO	3RD RESPONDENT
NKASHE MATSHEGO	4TH RESPONDENT
DONNY MATSHEGO	5TH RESPONDENT
MMAPULA PILANE	6TH RESPONDENT
PHOPHO KOTSEDI	7TH RESPONDENT
THERO MMALE	8TH RESPONDENT
JACOB MOALOSI RASEPAE	9TH RESPONDENT
NTUTU RASEPAE	10TH RESPONDENT
GOPANE RASEPAE	11TH RESPONDENT
MANTIRISI RASEPAE	12TH RESPONDENT
MPHO RAMFATE	13TH RESPONDENT
MOTLHAGODI PILANE	14TH RESPONDENT

JOSEPH SITSI TLHASI	15TH RESPONDENT
ISAAC RAMAFATSHE PALAI	16TH RESPONDENT
VICTOR KOTSEDI	17TH RESPONDENT
KUTLWANO MATSHEGO	18TH RESPONDENT
DANIEL MAUGOLE MALEBYE	19TH RESPONDENT
MOSES TSHWEU MALEBYE	20TH RESPONDENT
ALBAUES RAPULA MMALE	21ST RESPONDENT
EVA MALEBYE	22ND RESPONDENT
GERTRUDE PILANE	23RD RESPONDENT
SETWE MANNETJIE PILANE	24TH RESPONDENT
INOLOFATSENG RAMFATE	25TH RESPONDENT
ELIAS BAFYE RASEPAE	26TH RESPONDENT
MAKUBESELE DORIS SENOELO	27TH RESPONDENT
MAUDRIES GERTSOU RASEPAE	28TH RESPONDENT
MOGOTSI LEVY RASEPAE	29TH RESPONDENT
MESU RASEPAE	30TH RESPONDENT
TSHOSE DANIEL RASEPAE	31ST RESPONDENT
MMAKGOMO MARIA MATABEGE	32ND RESPONDENT
MMAMMU DORIEEAH TLHASI	33RD RESPONDENT
MMAMMUSI ELIZABETH PALAI	34TH RESPONDENT
MOGAPI KAISER MATSHEGO	35TH RESPONDENT
MOTLHEGODI JOSEPH MATSHEGO	36TH RESPONDENT
OLAOTSE TLHASI	37TH RESPONDENT
LESETLHENG VILLAGE COMMUNITY	38TH RESPONDENT
MOSES KOTANE MUNICIPALITY	39TH RESPONDENT
THE HEAD OF THE DEPARTMENT OF RURAL	

DEVELOPMENT AND LAND REFORM, NORTH WEST	40TH RESPONDENT
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	41ST RESPONDENT
MINISTER OF MINERAL RESOURCES	42ND RESPONDENT
BAKGATLA-BA-KGAFELA COMMUNITY	43RD RESPONDENT
BAKGATLA-BA-KGAFELA TRADITIONAL AUTHORITY	44TH RESPONDENT

JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] The applicant launched an application for eviction in terms of which the applicant sought an order in the following terms:

1.1 That the 1st to 37th respondents and all persons occupying through or under them be evicted from the property known as the farm Wilgespruit 2 J.Q, North West Province ("the property");

1.2 That the 1st to 37th respondents be ordered to vacate the property, move all their cattle and other animals and remove all their possessions from the property within 30 days from the date of service of this order upon them;

1.3 That the 1st to 37th respondents and the members of the 38th respondent be interdicted and restrained from accessing the property, from bringing cattle onto the property and from erecting or re-erecting any structures whatsoever on the property;

1.4 In the event that any of the said respondents fails to vacate the property as directed in paragraph 2 above or unlawfully accesses the property as set out in paragraph 3 above,

that the Sheriff for the district be authorised and directed forthwith to give effect to the eviction order;

1.5 That the costs of this application be paid by such respondents as oppose the application, jointly and severally, the one paying the other to be absolved.

B. BACKGROUND

[2] The first applicant (IBMR) is a company which was formed by the 43rd respondent (Bakgatla Community), a traditional community as contemplated in the Traditional Leadership and Governance Framework Act 41 of 2003, to exploit the platinum resource on *inter alia* the whole of the farm Wilgespruit 2 JQ, North West Province (the farm Wilgespruit).

[3] In 2004, IBMR was awarded a prospecting right on the farm Wilgespruit. IBMR initially partnered with Barrick Platinum SA (Pty) Ltd (Barrick) and transferred 10% of IBMR shares to Barrick as they had the necessary capital and expertise for prospecting.

[4] During 2008, IBMR was granted a mining right on the farm Wilgespruit and other farms. IBMR later bought back the 10% shareholding it had sold to Barrick. Pursuant thereto, IBMR purchased a 26% share interest in Sedibelo Platinum Mines (Sedibelo) in exchange for the shares in IBMR. The second applicant (PPM), is a wholly owned subsidiary of Sedibelo.

[5] PPM was already mining on the adjacent farms, Tuschenkomst and Witkleinfontein and have extended into the North West corner of Wilgespruit (known as Sedibelo West). The Bakgatla Community have an indirect interest in the extension of the mining into the remainder of the farm Wilgespruit

(hereinafter referred to as Wilgespruit) where the 'East Pit open mining is to be developed'.

[6] The 1st to the 38th respondents' (the respondents) farm on Wilgespruit. Their herders and cattle occupy Wilgespruit and the applicants are unable to conduct their mining operations.

C. APPLICANT'S CASE

[7] The applicants are the holders of the right to mine for platinum group metals and associated minerals ("PGMs") on the farm Wilgespruit in terms of section 23 of the Mineral and Petroleum Resources Development Act[1], ("MPRDA") as set more fully hereinbelow:

7.1 PPM holds a mining right in respect of Sedibelo West. PPM commenced full scale mining activities on this part of the farm during the last quarter of 2013.

7.2 IBMR holds a mining right in respect of Wilgespruit which was granted on 19 May 2008 and which took effect on 20 June 2008.

7.3 IBMR's environmental management programme ("EMP") was approved in terms of section 39 of the MPRDA on 20 June 2008.

7.4 On 28 June 2008, the Bakgatla Community decided at a *Kgotha Kgothe* to enter into a lease agreement with IBMR for purpose of conducting mining operations on the farm Wilgespruit. A *Kgotha Kgothe* (a community meeting

1 Act No. 28 of 2002

for attendance by all adult members of the Bakgatla-ba-Kgafela Traditional Community where important community decisions are taken) was convened and chaired by Kgosi Pilane.

7.5 The 41st respondent (Minister of Rural Development & Land Reform) ratified the resolution taken by the Bakgatla Community to lease the farm Wilgespruit to IBMR and approved that the lease agreement between the Bakgatla Community, IBMR and the said Minister could be entered into. IBMR subsequently entered into the (surface) lease agreement in respect of the farm Wilgespruit with the Minister of Rural Development & Land Reform and the Bakgatla Community. The Deed of Lease was notarially executed on 17 April 2012 and registered in the Deeds Office on 3 October 2012. In respect of the Sedibelo West area, IBMR later entered into a sub-lease agreement with PPM.

7.6 In April 2012, the IBMR mining right was amended in terms of section 102 to excise Sedibelo West. The PPM mining right was simultaneously amended to include Sedibelo West. IBMR, retained the mining right in respect of Wilgespruit. This application concerns this part of the farm, which the respondents are occupying.

7.7 PPM is in the process of taking transfer of this mining right from IBMR and in February 2014 obtained ministerial consent for the transfer, in terms of section 11 of the MPRDA. The cession has not yet been registered and has not yet taken effect. Pending registration of the transfer, PPM has been appointed as IBMR's contractor in terms of section 101 of the MPRDA and is acting in its own name for and on behalf of IBMR to exercise this mining right.

7.8 Applicants contend that, by virtue of holding the above mentioned mining right and approved EMP in respect of Wilgespruit and having notified and consulted with the landowner and lawful occupiers, they are entitled to mine and exercise the rights set out in section 5(3) of the MPRDA on Wilgespruit.

[8] The first to 37th respondents do not reside on the Wilgespruit as contemplated in the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). They reside in Bakgatla villages. It is common cause that ESTA is therefore not applicable to them. The applicants allege that the respondents use Wilgespruit to conduct farming on parcels of land, either personally or through herders in their employ. Huts and Kraals have been erected for use when tending to the cattle. A number of the respondents' herders reside on Wilgepruit as contemplated in ESTA. The applicants terminated these herder's rights to reside there as contemplated in section 8 of ESTA and brought a separate application in the Land Claims Court for the eviction. This application thus only concerns the farmers, their cattle and effects.

[9] The applicants wish to commence full-scale mining activities on Wilgespruit but allege that are unable to do so because of the respondents' refusal to vacate the farm. Aggressive and violent conduct and intimidation is used to keep the employees and contractors of the applicant away from the mining area or Wilgespruit.

[10] Applicant submits that it complied with the requirements for an interdict in that:

10.1 The applicants are entitled to mine on Wilgespruit in terms of the provisions of the MPRDA. The respondents' informal land rights in respect of Wilgespruit have been terminated in accordance with Bakgatla custom or usage. The respondents are accordingly no longer entitled to use the farm for agricultural purposes in terms of customary law or practice. Further, in view of the irreconcilable conflict between the rights of the applicants as holders of the mining rights and those of the respondents, the right to mine takes precedence even if the respondents were the owners of the land because the rights of an owner of land to use and enjoy the surface of the land are superseded by the rights of the mining right holder in such a case.

10.2 Any further delay in the commencement of mining on the remainder of the farm will have a profoundly negative effect on the profitability and longevity of the applicants' operations at Wilgespruit and the applicants will reach a point on or about April/May 2018 when the shortfall of tonnages will become critical and they will be unable to make up production losses. The applicants could lose their investment as it may become uneconomical to continue mining on Wilgespruit at all. In addition, the Bakgatla community stands to lose substantial direct and indirect economic benefits should the mine not be able to continue its mining activities as it holds 26% share in Sedibelo Platinum Mines, the holding company of the first and second applicants.

10.3 There is alternative farming land available to the respondents and their cattle are already predominantly grazing on neighbouring land. The applicants have undertaken to assist the respondents to relocate on equal terms to those offered to the farmers who have already relocated.

The respondents who suffer additional loss or damage, are entitled to claim it in terms of section 54 of the MPRDA.

10.4 The applicants have, despite their best efforts, not been able to resolve the matter with the respondents and have no alternative remedy.

D. RESPONDENT'S CASE

[11] The following facts are alleged by the respondents:

11.1 The 1st to 37th respondents are members of a community of people who regard Lesetlheng Village as their traditional home. Most of the respondents currently reside in Lesetlheng Village. This community is a constituent part of the Bakgatla-ba-Kgafela tribe.

11.2 Around 1916, the community at Lesetlheng village decided to buy a farm on which to conduct crop and stock farming. They decided on the farm Wilgespruit and concluded an agreement of sale with its then owner. The community then proceeded to raise the sales price from its members who could contribute.

11.3 Contributions were recorded with the name of the contributor in an old exercise book, now referred to as the 'Old Preserved Book' ('Book'). Eventually 13 clans (*dikgoro – singular kgoro*) from the Bakgatla Community at Lesetlheng contributed to the sales price. The sales price was raised in full by 1919

11.4 The respondents did not have the legal capacity to receive transfer and the property could not be registered in their name due to the fact that

black South Africans and a black community like the community at Lesetlheng Village were precluded from obtaining and holding rights in land. This impediment has now been removed and the respondents are now entitled to have the land registered in their name.

11.6 The land was registered in title to the state, who held it in trust for the Bakgatla-ba-kgafela tribe. The intention at the time was that neither the state nor the broader Bakgatla-ba-kgafela tribe, but only those *dikgoro* of the Bakgatla community at Lesetlheng who contributed to the sales price would become owners of the farm Wilgespruit. This understanding was at the time formally confirmed by the then acting *kgosana* (headman) of the Lesetlheng Village, Riyana Pilane and recorded in the Book.

11.7 Since transfer of the farm Wilgespruit took place in 1919, the 13 *dikgoro* have conducted crop and stock farming, for all intents and purposes as owners of the farm. The farm was divided into 13 portions and each *portion* was further divided into portions for different families in each kgoro and the 13 *dikgoro* and their constituent families assumed exclusive control of their various portions as a 'community' of the farm Wilgespruit. The descendants of the original 13 *dikgoro* are the Lesetlheng Village Community ("the Community") (the 38th Respondent)

11.8 Although at times grazing and other rights were temporarily allocated to persons who were not members of the 13 *dikgoro*, this was done by the 13 *dikgoro*. The Community was recognised as the *de facto* owner of the farm Wilgespruit and it formed a discrete community for purposes of its ownership and control. It controlled access of the farm Wilgespuit to the exclusion of everyone else. Although the Community was integrated into the broader Bakgatla tribe, this integration was only limited to social and

governance purposes and ownership of the farm Wilgespruit vested in the Community. Until mining interest in the farm Wilgespruit commenced in 2004 when a prospecting right was awarded to IBMR, no one else but the members of the 13 *dikgoro* decided about access to, use of and allocation of rights to the farm.

11.9 The mining activity conducted on the farm Wilgespruit in terms of these various mining-related rights have over time eroded the respondents' *de facto* ownership. Mining on the Sedibelo-West portion of Wilgespruit commenced toward the end of 2013 and the respondents lost all use and occupation of that portion of the farm. Activity in preparation for mining on Wilgespruit commenced in 2014. This severely disrupted the respondents' farming activity and their *de facto* ownership. The respondents obtained a spoliation order against the applicants in 2015, restoring possession of Wilgespruit.

11.10 In 2012, the Community instituted a claim in terms of the Land Titles Adjustment Act (LTAA)[2] for the title deed of the farm Wilgespruit to be amended to reflect them as owners. The application is still pending.

[12] The 1st to 38th respondent contend that:

12.1 the mining right granted to IBMR on the 20 June 2008 is invalid as the 1st to 38th respondents are the *de facto* and true owners of the farm and further they were not extensively consulted with prior to the granting of the mining right, in their capacity as owners or lawful occupiers.

---

2 Act NO 111 of 1993

12.2 The Bakgatla tribe also did not have authority to apply for and obtain a mining right without first consulting with the Community as the true owners and interested parties. IBMR failed to fulfil its statutory obligation to consult with the community before submitting the application and after the mining right was granted. Hence the mining right was invalid from the outset as a procedurally fair procedure was not observed.

12.3 The Community was also not consulted when the lease agreement was concluded. The Bakgatla tribe and/or IBMR had no authority to negotiate and execute the lease agreement. The lease agreement thus flows from the granting of an invalid mining right. As a result the lease agreement is invalid.

12.4 At the *Kgotha Kgothe* of 28 June 2008, a conclusion was reached without any involvement of the respondents, namely that the surface rights of the respondents would be wholly extinguished through the conclusion of the surface rights lease. The meeting was also not aimed at reaching a good faith accommodation with respect to the impact that exercise of the mining right would have on the holders of the surface rights.

12.5 The relocation process that commenced in March 2013 was the implementation of a unilateral decision of the applicants that the mining right would in effect extinguish the respondents' surface rights, so that they would have to vacate Wilgespruit and be relocated on terms determined by the applicants.

12.6 All the consultative processes were concluded on the erroneous basis that the respondents were merely holders of informal occupation rights

and not the owners. Negotiations were conducted with the Bakgatla-ba-Kgafela and not directly with the respondents.

12.7 The respondents alleged in the alternative that IBMR's mining right lapsed before it ceded the right to PPM because it was 'at no point executed' and because the cession had not yet been registered. Hence neither IBMR nor PPM are holders of a mining right in respect of Wilgespruit.

12.8 The respondents acknowledge that they should have taken the decision to grant the mining right on internal appeal in terms of section 96 of the MPRDA and the reason why they did not pursue that route is because the Community only become aware that the Bakgatla tribe held a mining right over Wilgespruit on the 9 November 2011 when the intended process of carrying out mining activities on the farm was advertised in the newspapers and by then the "horse had already bolted as the mining right had been granted some three years before". The Community would have appealed the award of the mining right had they been consulted or made aware in 2008.

12.9 The applicants are not entitled to proceed with mining operations on Wilgespruit unless and until agreement has been reached with the respondents on compensation for the injury to their surface rights, or the processes provided for in section 54 of the MPRDA have been concluded. The applicants have failed at all to comply with their duty in terms of Section 5(4)(c) of the MPRDA.

E. EVALUATION

Validity of the applicants mining rights

[13] The respondents' contend that they are the *de facto* or true owners of Wilgespruit and that "all the administrative decisions and purported legal actions" and "all the conduct of the applicants" mentioned *supra* are invalid because they were taken on the erroneous assumption that the State, is the owner of the land.

[14] It is common cause that in terms of the Deed of Transfer 1230/1919, the registered owner of the farm is, and to date remains, the Minister of Rural Development and Land Reform in trust for the Bakgatla-Ba-Kgafela Traditional Community. Although the respondents allege that an application has been made for the adjustment of this title under the LTAA, they did not annex the application or allege what the outcome of the application was and they do not state that any right to claim transfer has been found to exist under the Land Titles Adjustment Act and that a transfer has in consequence taken place. In the circumstances, Wilgespruit is still registered in terms of Deed of Transfer 1230/1919 as aforesaid.

[15] Furthermore when granting a mining right MPRDA does not take into account, the identity of the owner of the land and does not draw a distinction between owners and lawful occupiers. IBMR did not require the owner or lawful occupiers' consent for purposes of obtaining or exercising a mining right on Wilgespruit. The owner or lawful occupiers of land must however be notified of an application to mine and be consulted and they have a right to object, to appeal and to claim compensation for loss or damage. This issue will be dealt with more fully hereinbelow.

[16] Ownership of land also does not play any role when considering a section 11 application for the cession of the mining right by IBMR to PPM.

[17] The decision to grant the applicants the mining rights is an administrative decision and remains valid and enforceable until it is set aside on review by a court of law[3]. In *casu*, the respondents have not launched an application to review either the prospecting right or mining right.

[18] The owner of Wilgespruit appears from the Title Deed. Hence there is no merit in the respondents contention that the mining right is invalid because it was taken on the erroneous assumption that the state are the owners. Accordingly the mining right is valid and enforceable and has legal consequences. The dispute relating to the consultative process is dealt with *infra*.

Validity of the Lease Agreement

[19] For the same reasons stated *supra*, the respondents' contention that the lease agreement is invalid as they are the owners is factually flawed. No right to claim transfer has been found to exist under the LTAA and Wilgespruit has not been transferred to the respondents. Accordingly the owner of the farm remains the Member of Rural Development and Land Reform held in Trust for the Bakgatla-Ba-Kgafela Traditional Community.

[20] As stated *supra*, the Bakgatla Community passed a resolution at a *Kgotha Kgothe* held on 28 June 2008 to enter into a surface lease agreement with IBMR in terms of which IBMR would conduct mining operations on Wilgespruit. The Minister

---

3 See *Onderkraal Estates (Pty) Ltd v City of Cape Town and others* 2004(6) 222 SCA 241 H – 242 C paragraph 26

approved the lease agreement between IBMR and the Bakgatla Community, and also ratified the resolution taken by the Bakgatla. IBMR entered into this lease with both the Minister of Rural Development & Land Reform and the Bakgatla Community. The lease was notarially executed and registered in the Deeds office. The respondents have not launched any legal process to set aside the registration of the lease and until such time that these rights have been set aside they stand and are legally enforceable.

[21] The respondents acknowledge that they are part of the broader Bakgatla-ba-Kgafela tribe. They describe their Community as a group integrated into the larger Bakgatla tribe for governance and social purposes and that they share a single traditional authority and common law structure. However, they allege that, when it comes to the ownership of Wilgespruit, they are the sole owners of Wilgespruit for their own benefit. They aver that only the members of 13 clans or *dikgoro* raised money for the purchase price and the intention was that only those who contributed money would become the owners. The original 13 clans or *dikgoro* through successive generations have operated as the owners of the farm. This is contrary to what Kgosi Pilane states in his affidavit, that Wilgespruit was purchased with contributions made by members of the Bakgatla Community and that it was allocated by the Chief at the time to approximately 13 families of the nearby villages. The deed of sale also reflects that the land was purchased by Paramount Chief Linchwe K Pilane for himself and the Bakgatla Tribe. The respondents are members of the Bakgatla Community and they were represented by Kgosi Pilane when he concluded the lease agreement and they are accordingly bound by the resolution taken at the *Kgotha Kgothe*.

[22] Furthermore I agree with the applicants that it is in any event, unnecessary in law to enter into a lease agreement in respect of the surface of the land on which mining operations are to be conducted as the holder of a mining right enjoys rights to the surface as are necessary to mine, by virtue of section 5(3) of the MPRDA. This issue is canvassed more fully hereinbelow.

[23] Accordingly, validity or invalidity of the lease agreement would have no legal effect on IBMR's entitlement to mine on Wilgespruit.

Did the Mining Right Lapse before the Cession

[24] The respondents contend that IBMR's mining right lapsed before it ceded the right to PPM because at no point was it 'executed' and because the cession has not yet been registered. Although the cession has not been registered, IBMR remains the holder of the mining right as set out *supra*.

[25] It is clear from the applicants' replying affidavit that IBMR commenced with mining operations under its mining right as contemplated in section 25(2)(b) of the MPRDA through its contractor, Barrick Africa, as set out in the letter to the Department of Mineral Resources dated 19 August 2009. Furthermore as the applicant correctly contended, non-compliance with section 25(2)(b) of the MPRDA does not cause the mining right to lapse. The cases in which mining rights lapse are set out in section 56 of the MPRDA and do not include non-compliance with section 25(2)(b). Tuchten J in the matter of *Sephaku Tin (Pty) Ltd v Kranskoppie Boerdery*[4] considered this issue in the context of prospecting operations (Section 19(2)(b) and found in paragraph 65 "that a failure to commence prospecting activities within the prescribed period does not of itself and absent a decision validly

4 Sephaku Tin (Pty) Ltd v Kranskoppie Boerdery NGP 47561/2010, 7 May 2012,

taken under Section 47 of the MPRDA result in the lapsing of the right". The same principle applies to the mining right.

Can a Mining right be executed through an agent

[26] Applicant alleged that PPM has been appointed as IBMR's contractor in terms of section 101 of the MPRDA and is acting in its own name for and on behalf of IBMR in exercising the mining rights. Respondents contend that a holder of a mining right cannot execute the right through an agent.

[27] Section 101 of the MPRDA provides that "If the holder of a right ... appoints any person or employs a contractor to perform any work within the boundaries of the ... mining ... area ... such holder remains responsible for compliance with this Act". IBMR as the holder of the mining right has the right to exercise its right and to employ any person or contractor to perform any work. Initially IBMR appointed Barrick Africa as its contractor and later appointed PPM as its contractor to exercise the mining right on its behalf pending transfer of the mining right to PPM.

[28] Accordingly the appointment of PPM is permissible in terms of section 101 of the MPRDA.

Mining rights *visa vis* surface rights and the procedure in terms of Section 54

[29] The juristic nature of the applicants' right to mine is described in section 5(1) of the MPRDA as follows:

"A...mining right ... granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967), is a limited real right in respect of the mineral ... and the land to which such right relates". (own emphasis)

[30] IBMR thus holds a limited real right (*ius in re aliena*) in Wilgespruit. As the holder of a limited right IBMR can exercise its rights as provided in section 5(2) and 5(3) of the MPRDA which reads as follows:

"5(2) The holder of a prospecting right, a mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.

5(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may –

a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;

b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;

c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;

d) subject to the National Water Act, 1998 (Act No. 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land, and

e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act."

[31] Thus the applicants have the right to mine on Wilgespruit, that is, to enter, search for minerals and, if it finds any, to sever them and carry them away. The right to the minerals by definition includes all such rights to the surface as are reasonably necessary or incidental to mine the minerals on such land. Thus the surface rights of the holder of the mining right are limited real rights which burden the use of the property by the owner and the informal land rights holder. The holder of the mining right enjoys preference over the surface rights of the owner and the informal land rights holder. The grant of the mining right by the Minister accordingly diminishes the surface rights of the owner and informal land rights holder. That deprivation is an expropriation of the surface rights which takes place when the mining right is granted. Compensation for that expropriation and for loss suffered is to be paid by the mining right holder in terms of section 54 of the MPRDA.

[32] There are several cases dealing with the conflict that arise between the respective interests of the landowner and the holder of the mining right. The applicants in their heads of argument provide a succinct summary of the main and general principles borne from various judgments dating back to 1910 and they say *inter alia* that "the holder of the mineral rights (now called mining rights) enjoys a preference over the owner of the freehold, not only in regard to his underground mining operations but also in regard to the use of the surface for all purposes necessary to enable him to carry out his prospecting and mining operations effectively, provided that such rights are exercised in a reasonable manner which is least injurious to the property of the freehold owner"[5].

5 Hudson v Mann and Another 1950 (4) SA 485 T at 488 E-G, Anglo Operations Ltd v Sandhunt Estates (Pty) Ltd 2007 (2) SA 363 SCA

[33] As a mining right supersedes the owners or occupiers right then by implication, the mining right holder can exercise such rights in respect of the surface as are necessary in order to mine the minerals effectively. The only impediment to exercise the entillements is that the rights must be exercised *civiliter modo*: in a manner least injurious to the interests of the holders of surface rights to the farm.

[34] The respondents acknowledge that a mining right supersedes a surface right but say the following:

> "although in law a mining right supersedes the exercise on land with respect to which it is granted even of ownership rights and the entitlements that flow from that, we are again advised that the simple fact of holding a mining right does not in and of itself extinguish other rights including ownership on the land in question. Such rights can only be extinguished once the procedure attached to section 54 of the MPRDA has been properly followed".

[35] I agree with the applicants when they say that:

> "The respondents are correct in contending that the granting of a mining right does not in and of itself extinguish other surface rights including ownership on the land in question. What the respondents, however, do not realise is that there vests in the holder of the mining right only a *limited real right*, which means that the owner of the land remains owner of the surface but burdened with the limited real right. The same pertains to the informal land right".

[36] With regards to section 54, the applicants contend that as the mining rights automatically give way to surface rights, they may commence mining operations on Wilgespruit in spite of the fact that they have reached no agreement with the respondents about compensation for the consequent loss of their surface rights and even though neither they nor the respondents have

exhausted the processes provided in Section 54 of the MPRDA. For this proposition they rely on *Joubert and Others v Maranda Mining Co Pty Ltd* [6] (*Maranda*). The applicants submitted that in *Maranda* case *supra*[7], the SCA held that the fact that the Regional Commissioner referred to in Section 54(5) of the MPRDA has not initiated the process for expropriation of surface rights provided for there to break the impasse between a holder of a mining right and an owner of land who refuses that holder access does not oust the jurisdiction of the High Court to grant an interdict for access to the holder of the mineral right – in effect that the holder of the mineral right may obtain an interdict to enter onto the land and proceed mining even though the dispute about compensation has not yet been resolved through the expropriation process provided for in Section 54(5).

[37] The respondents submitted that the applicants' reliance on *Maranda supra* is distinguishable from this matter in the following respects:

> "1 The holder of the mining right in *Maranda* attempted in a good faith manner to comply with all of its consultative duties in terms of the MPRDA (in particular those then provided for in Section 5(4)(c), while the owner of the land in a blanket and unreasonable fashion refused to engage with the holder at all.
>
> 2 *Maranda* was decided at a time when section 5(4)(c) was still in force, providing at an early stage of the process the opportunity to the owner of the land to protect its interests against the impact of a mining right through consultation with the holder of that right.
>
> 3 These two facts taken together persuaded the Court in *Maranda* that it would be untenable to allow an owner who had every opportunity earlier in the process to protect its interests against exercise of the mining right, but unreasonably refused

6 2010 (1) SA 198 (SCA)
7 2010 (1) SA 198 (SCA) par 16

to make use of those opportunities, at the end of the process to hold the mining right holder to ransom through invoking section 54(5)".

[38] The respondents submit further that neither of the aforestated factors pertains in this matter in that:

"1 The applicants have not complied with their consultative duty in terms of Section 5(4)(c) and in fact have throughout the process failed to consult with the respondents in a good faith manner as envisaged in *Meepo*[8], *Maranda*[9] and *Bengwenyama*[10]. Although the applicants allege that they requested the Regional Manager in terms of Section 54(2) to intervene to resolve the dispute, this process has gone no further.

2 Section 5(4)(c) is since 7 June 2013 no longer a statutory requirement. The effect of absence of agreement on compensation and of failure to exhaust Section 54 processes on the entitlement of the holder of the mineral right to commence mining must therefore be interpreted in light of the fact that there is no longer any prior opportunity for the respondents to protect their interests in a process of good faith consultation with the applicants.

3 Second, even if *Maranda* was not distinguishable as submitted above, the interpretation of Section 54 proposed by the applicants, in the absence of a prior Section 5(4)(c) consultative requirement, would render the process of extinction of surface rights flowing from the granting of a mining right arbitrary.

4 The respondents if evicted would lose their property without having had the opportunity to mitigate the impact of the mining right on their property and other, related rights and that this loss is countenanced by the MPRDA. This is wholly inconsistent with the

8 Meepo v Kotze and Others 2008 (1) SA 104 (NC)
9 2010 (1) SA 198 (SCA)
10 Bengevenyama – ya Maswazi Community and Others v Minister of Mineral Resources and Others 2015 (1) SA 197 SCA at par 65

general approach to the interpretation of the consultative processes provided for in the MPRDA established in *Meepo, Maranda* and *Bengwenyama* set out above and the gist of which is that these processes are intended to achieve a rational balance between the rights of the holder of the mining right and the interests of the owner or lawful occupier of the land.

5 In the absence of section 5(4)(c) or an alternative consultative requirement to it, section 54 should instead be interpreted as an internal remedy at the disposal of parties to resolve an impasse around access and the commencement of mining that must be utilised and exhausted before mining may proceed. This does not amount to the ousting of the jurisdiction of the courts or impact on the right of either of the parties of access to court (which was the primary concern motivating the holding in *Maranda*). Once the remedies provided for in section 54 have been exhausted, it would be open to either of the parties dissatisfied with the results to then approach a court".

[39] In terms of section 54 of the MPRDA the owner or occupier has a claim for loss or damage. This process can be initiated by the holder of the right in terms of section 54(1) or by the owner or lawful occupier in terms of section 54(7).

[40] I am in agreement with the applicants that the surface rights concerned need not first be extinguished by expropriation in terms of section 54 before mining can commence for the following reasons:

40.1 Firstly, as stated *supra*, IBMR's rights to the surface was already expropriated from the owner or lawful occupier of the land when the mining right was granted.

40.2 In Maranda *supra*, Mlambo JA said[11]:

11 2010 (1) SA 198 (SCA) par 16

"[16] However, counsel for the appellants also submitted in the alternative that the impasse created by the appellants' blanket refusal to allow the respondent access to the land meant that the regional manager had to initiate the process aimed at the expropriation of the land and envisaged in section 54(5). The implication of this submission is that the jurisdiction of the High Court and this court to resolve that impasse is not countenanced by the Act. That there is no merit to this submission is borne out by the fact that it was made without much conviction, and rightly so. No provision in the Act could be pointed out in support of this line of reasoning. Furthermore, it would be absurd for the Act to permit an unreasonable refusal for access based on a clear objective to frustrate the legitimate endeavours of a permit holder". (own emphasis)

40.3 Thus IBMR can continue to exercise their mining rights before the process envisaged in section 54 is finalised. Further I am of the view that the applicants have attempted in good faith to comply with its consultative duties in terms of the MPRDA, the facts of which are set out more fully *infra*.

40.4 Up until 27 June 2013, commencement of mining operations were subject to compliance with section 5(4) of the MPRDA. Section 5(4)(c) provided that mining operations could not commence unless and until the holder of the mining right had notified and consulted with the owner or lawful occupier of the land in question. Although section 5(4)(c) is no longer a statutory requirement, the respondents retain their rights to claim compensation in terms of section 54.

[41] In the circumstances there is no merit in respondents' contention that the applicants cannot proceed with their mining operations until they have complied with the procedure prescribed in section 54 of MPRDA.

Respondents Informal Rights

[42] The respondents rely in the alternative on their informal right as contemplated in IPILRA. "Informal rights to land" are defined in section 1(a) of IPILRA as:

"the use of, occupation of, or access to land in terms of (i) any tribal, customary or indigenous law or practice of a tribe."

Section 2(2) of IPILRA provides that:

"where land is held on a communal basis, a person may, subject to section (4), be deprived of such land or right in land in accordance with the custom or usage of that community".

[43] As stated *supra*, at the *Kgotha Kgothe* held in June 2008, the Bakgatla community passed a resolution ratifying, confirming and approving the surface lease agreement between IBMR, the Bakgatla community and the Minister of Land Affairs. The respondents who are members of the Bakgatla community are bound by the said resolution. Accordingly, the residual informal rights held by the respondents were terminated in accordance with the customs or usage of the Bakgatla community when the *Kgotha Kgothe* resolved to enter into the surface lease agreement as contemplated in section 2(2) of IPILRA.

[44] Kgosi Pilane's in his affidavit alleged that sufficient notice was given of the meeting and that people of Lesetlheng were present or duly represented through community structures. The respondents admit that the resolution reflects that the *Kgotha Kgothe* adopted the resolution but allege that the applicants failed to provide proof of the fact that the Wilgespruit farmers were either present or were represented through community structures. These facts

are within the respondents' knowledge and it is noted that the respondents do not deny that they were in attendance.

[45] The respondents also do not deny that sufficient notice was given of the meeting. Having received sufficient notice, the respondents could have attended and could have participated in the meeting. If they did not attend, despite having received notice, it was by choice. The requirements of section 2(4) of IPILRA were accordingly complied with and the respondents' informal land right were duly terminated by a community decision which binds all members of the community.

[46] As stated *supra*, it was specifically resolved at the meeting that the Bakgatla community would conclude a surface lease agreement with IBMR on the terms and conditions as per the draft. Clause 11 *inter alia* provides that "if the Lessee wishes to establish any infrastructure, the Lessee shall compensate any farmer adversely affected thereby and shall pay reasonable compensation to those persons to enable them to be relocated elsewhere in suitable accommodation within residential or agricultural areas".

[47] From the aforegoing, it is clear that the resolution had the effect that the surface of the farm was to be used for mining purposes and that any use (informal) rights contrary thereto were terminated in terms of customary law and that affected persons were entitled to reasonable compensation to enable them to be relocated.

Were the respondents consulted?

[48] The 1st to 38th respondents allege *inter alia*, that:

48.1 Consultation has been flawed because the 1st to 38th respondents were not consulted in the capacity as owners but as lawful occupiers;

48.2 The respondents were not consulted before and after the mining right was granted;

48.3 In many instances the consultation process did not involve the 1st to 38th respondents but only representatives of IBMR and PPM, representatives of the broader Bakgatla community, state representatives and employers of the consulting firms engaged by the IBMR and PPM.

48.4 No members of the Lesetlheng Village were present at the *Kgotha Kgothe* when the decision was taken to conclude the surface lease agreement.

48.5 Consultation occurred only as part of the environmental management process.

48.6 Consultation commenced only after the decision had already been taken that Wilgespruit should be vacated;

48.7 The relocation process detailed in paragraph 7 of the applicants' founding affidavit was not a consultation process or negotiation but a process of information gathering and dissemination and taking a unilateral decision and then informing those affected of the decision and the consequences. The detailed relocation plan was compiled before interactions with the community.

[49] The applicants avers that there was extensive consultations with the Bakgatla community as interested and affected parties at all relevant stages of the

mining project, that is both before the mining right was granted to IBMR and after the grant of the mining right as set out more fully hereinbelow:

49.1 Prior to the grant of the mining right, a meeting was held on the 12 April 2003, to allow the Traditional Council to register a company owned by Bakgatla (IBMR) to apply for a prospecting right and to negotiate for a suitable partner in respect of a few farms including Wilgespruit.

49.2 During 2004, a resolution was adopted by the Bakgatla Community at a *Kgotha Kgothe* where it was agreed that the Bakgatla Community would apply for a prospecting permit to be held by IBMR.

49.3 Before the mining right was granted, a meeting was held at Lesetlheng village on 21 April 2007 regarding the proposed mining. The consultation was one envisaged by section 22(4)(b) of the MPRDA. The respondents admit that the meeting took place and the minutes are correct but 'note' that there was no indication on the minutes who from the community attended the meeting. The respondents do not deny that they attended the meeting and they were free to attend the community meetings. The meeting was advertised in the local newspaper, and the local radio station.

49.4 After the grant of mining right to IBMR on 19 May 2008, the Bakgatla Traditional Community resolved at a *Kgotha Kgothe* on the 28 June 2008 that the Bakgatla Community conclude a surface lease agreement with IBMR. The respondents admit both the meeting and resolution.

49.5 The consultation process that followed was aimed at reaching agreement about relocation and commenced about the time the IBMR

mining right was granted on set out fully in paragraph 7 of the applicants founding affidavit.

49.6 As mining was scheduled to commence on the remainder of Wilgespruit in July 2014, applicants re-commenced a consultation process with the affected land users of Wilgespruit in March 2013. The 'affected land users' included occupiers, informal land rights users and community members of alternative farming areas to which the farmers of Wilgespruit could be relocated. Consultations with affected parties were held individually and collectively.

49.7 During 2013 applicants employed the services of a specialist relocation company, Managing Transformation Solutions (Pty)Ltd ("MTS"), as project managers to consult, negotiate, capture data, plan and implement the relocation of persons. In order to ensure that all interested parties were represented during the consultation and relocation process, a relocation task team was established. The task team was intended to be a communications portal between the applicants, the Bakgatla Community, the BBKTA, farmers, occupiers and alternative land users during the different phases of consultation.

49.8 During the consultations, members of the households were informed, in their own language, of the fact that the applicants were the holders of mining rights and that they intended to continue with its mining activities on Wilgespruit. They were afforded the opportunity to raise their concerns and suggestions. Telephonic consultations were also held with farmers who could not be personally interviewed.

[50] It is apparent from the documentation attached to the applicants' affidavit that there were consultations before and after the mining right was granted. This is supported by Kgosi Pilane who represented the Bakgatla Community. In Kgosi Pilane's affidavit, he also said that meetings and discussions were held with the Bakgatla community in 2008 and 2011 by synergy a consultant firm previously appointed in order to complete a Resettlement Action Plan (RAP). The respondents make bald allegations that they were not consulted but do not dispute that members of the Bakgatla Community was consulted.

[51] The applicants in their founding affidavit provide a detailed chronological and summarized overview of the consultations conducted by the applicants and their consultants with the community in order to relocate their huts and farming operations from Wilgespruit to Wachteenbeetjeskagte or Cyferkuil and the actual relocation of those who agreed to move.

[52] From the aforegoing, I am of the view that the farmers and occupiers of Wilgespruit were informed that the applicants were holders of mining rights and that they intended to continue with mining activities. Extensive further consultations were conducted with the farmers and occupiers of Wilgespruit who were willing to consult with the applicants regarding the implementation of the relocation. During the negotiations, I am accordingly satisfied from the evidence *supra* that the applicants complied with the consultative process as provided in the MPRDA.

Moses Kotane Planning Scheme

[53] The respondents raised a new point in two supplementary affidavits filed shortly before the matter was due for hearing, that Wilgespruit is zoned 'agricultural' in

terms of the Moses Kotane Town Planning Scheme 2005 (Scheme) which took effect on the 22 December 2006. The uses permitted under the agricultural zoning is 'agricultural buildings' and 'residential buildings'. 'Mining Industry' as a use is permitted only with the special consent of the Municipal Council. The applicants did not secure special consent from the municipality, nor was there re-zoning to include mining. The respondents challenged the applicants' clear right to seek an interdict and submitted that the applicants rights to mine in terms of its mining right on Wilgespruit cannot lawfully be exercised unless the special consent of the municipality has been obtained.

[54] The respondents relied on the Constitutional Court's decision of *Maccsand v City of Cape Town*[12] ('*Maccsand*') where the court, in deciding the question whether a holder of a mining right, despite having been granted that right remains subject to and bound by the land use regulation imposed by a provincial land use ordinance held as follows;

"if it is accepted, as it should be, that LUPO [the applicable ordinance – the Land Use Planning Ordinance 15 of 1985 (Western Cape)] regulates municipal land planning and that, as a matter of fact, it applies to the land which is the subject matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws".

[55] The respondents thus submitted that if in terms of the applicable land use legislation and regulation, mining activity is not a permitted use of land to which a mining right has been granted, the holder of that mining right does not have

---

12 2012 (4) SA 181 (CC)

the right to commence mining operations unless and until the land concerned has been appropriately rezoned or there is another form of applicable use or consent has been acquired. The respondents submitted that *Maccsand* has subsequently been applied in other divisions of the High Court and referred to an unreported matter of *Jacobs and Another v Transand (Pty) Ltd*[13] (*Transand*) where the court interdicted the holder of a mining right from continuing with existing mining activity and expanding its existing mining activity on land, on the basis that the land was zoned for agricultural use only and the necessary use consent to permit mining had not been obtained.

[56] Hence the respondents contend that even if the applicants are indeed in possession of a valid mining right to Wilgespruit and even if they have complied with all of the requirements in terms of the MPRDA to allow them to proceed with mining on Wilgespruit, (which they deny), the applicant do not have the right to enter onto Wilgespruit in order to proceed with mining activity while the zoning of Wilgespruit is 'Agricultural' and while the only permitted uses are 'agriculture building' and 'residential' and for this reason alone the application should be dismissed.

[57] Respondents submit that although the applicants can approach the municipal council in order to obtain the requisite rezoning or special consent, that, it would be inappropriate for this court in anticipation of this happening to grant the interdict the applicants seek, and to suspend its operation pending resolution of any rezoning or special consent process, for the following reasons:

---

13 (11554/2014) [2014] ZAWCHC 172 (14 November 2014)

"19.1 First, in terms of section 40(2) of the Ordinance, any person who failed to comply with a provision of a Zoning Scheme shall be guilty of an offence. Use of land in contravention of its zoning and permitted uses in other words constitutes an offence in terms of the Ordinance.

19.2 In Transand (above), where an application for an interdict to prohibit the respondent mining company to proceed with mining activity was an issue, that court refused to suspend the operation of that interdict pending resolution of an application for alteration of use of the land concerned on grounds that to do so would be 'to countenance and illegality' – this despite the prejudice that would result from the operation of the interdict for the respondent mining company.

19.3 It is submitted that to grant the interdict the applicants seek but suspend its operation until rezoning or use permission processes have been completed would similarly 'countenance illegality'. After all, the applicants have by their own admission conducted full-scale mining on the Sedibelo West portion of Wilgespruit in contravention of the Zoning Scheme since 2013 and have also engaged in various activities in preparation for mining on the 'remainder' of Wilgespruit since 2014, again in contravention of the Zoning Scheme.

19.4 Second, to grant but suspend the operation of the interdict would in effect render the outcome of rezoning application or special consent application a foregone conclusion and so place this court in the position that it prescribes to the council the outcome of its pending administrative decision – the process of deciding that application would be rendered a mere formality.

19.5 This would create precisely the situation that the Constitutional Court was so careful to avoid in *Maccsand* – that a decision taken by one sphere of government in one context (the Minister of Minerals and Energy in terms of the MPRDA) would intrude upon and

render superfluous the decision-making power of another sphere of government in another context (the Council in terms of the Ordinance).

19.6 Third and finally, for this court to so grant but suspend the operation of the interdict would reward what has been a train of unlawful and now illegal conduct of the applicants in this matter with precisely the outcome they have sought to achieve with that unlawful conduct: to remove the 1st to 38th respondents from their property without complying with applicable requirements of consultation and negotiation through which they could properly safeguard their interests".

[58] The applicants in their supplementary replying affidavit allege that they are entitled to continue their existing use as at 22 December 2006 lawfully in terms of the Scheme which was promulgated in terms of section 43 of the Town-Planning and Townships Ordinance 15 of 1989 (NW)(Ordinance) for at least 15 years after the scheme took effect on 22 December 2006 for the following reasons:

58.1 Wilgespruit is zoned 'agricultural' and falls under use zone 9. Use zone 17 is zoned 'mining industry' and is a use which is permitted in Wilgespruit only with the special consent of the municipal council.

58.2 The definition of "mining industry" in the Town Planning Scheme is:

"The mining of minerals from the ground including gravel, sand and stone and it includes buildings connected with such operations and a crusher plant."

58.3 The town-planning scheme differentiates between surface mining and underground mining, in that Clause 5(1) of the Scheme: exempts

underground mining from any prohibition or restriction contained in the town-planning scheme and refers to-

"(1) the exploitation of minerals by underground working as regards any land not included in an established township".

58.4 The concept of "mining" is a broad one which includes a host of activities and it amounts to the exploitation of minerals. All activities designed to extract minerals from the earth for that purpose are included. The activity of prospecting falls within the said meaning of "exploitation" of minerals and is by its very nature an activity designed to make use of and turn minerals to account.

58.5 If "mining" is interpreted so as to exclude prospecting it would mean that although mining in the strict sense is allowed with special consent, prospecting will be absolutely prohibited by virtue of clause 2 of the town-planning scheme which provides that the land may not be used for a purpose other than that permitted in the Scheme. The use of the word "mining industry" includes the integrated process of prospecting and mining and if a special consent for "mining industry" is obtained in respect of Wilgespruit, prospecting and mining operations may be conducted in terms thereof.

58.6 Both the town-planning scheme and the Ordinance provide that a non-conforming use, i.e. one which is not in conformity with the scheme, may be continued for a period of 15 years from the date of commencement of the Scheme and that the 15 year period may on application be extended for a maximum of 15 years.

58.7 On 22 December 2006 the applicants were conducting activities on Wilgespruit which, after that date would be prohibited by clause 2(1) of the town-planning scheme in the absence of a special consent of the Municipality. These activities were lawfully conducted in terms of a prospecting right granted to the first respondent. Mining was later continued in terms of a mining right granted to the first applicant on 19 May 2008. A mining right was granted to the second applicant and extended to include the western portion of the Farm Wilgespruit.

58.8 The mining industry activities which were taking place already one month before 22 December 2006 on Wilgespruit, were thus lawful and were continued in a lawful manner until the present. The mining industry activities on Wilgespruit continued after 22 December 2006 until the present without any interruption for a continuous period of 15 months or at all. The respondents cannot rely on the prohibition in clause 2 to prohibit the conduct of mining industry activities by the applicants on Wilgespruit.

58.9 The Moses Kotane Local Municipality is also of the opinion and acts on the basis that the activities of the applicants on Wilgespruit are lawful.

[59] A town-planning scheme is a document which regulates the land uses of properties in the area. "Property" is defined in the Scheme as "any piece of land indicated on a diagram or general plan approved by the Surveyor-General intended for registration as a separate unit in terms of the Deeds Registries Act". It therefore deals with the whole of the farm Wilgespruit as a registered unit of land.

[60] Under the heading 'Control of use of Land' Clause 2 provides:

"The use of all land included in the area of jurisdiction of the council shall be controlled by this Scheme. No land or building may be used for any purpose other than that permitted in this Scheme".

[61] Clause 4(7) provides that: "a lawfully existing use which is not in conformity with the scheme may be continued for a period of 15 years from the date of commencement of the Scheme, subject to the provisions of section 43 of the Ordinance".

[62] Section 43 of the Ordinance reads:

(1) "Where on the date of the coming into operation of an approved scheme any land or building is being used or, within one month immediately prior to that date, was used for a purpose which is not a purpose for which the land concerned has been reserved or zoned in terms of the provisions of the Scheme, but which is otherwise lawful and not subject to any prohibition in terms of the Ordinance, the use for that purpose may subject to the provisions of subsection (2) be continued after that date

(2) The right to continue using any land or building by virtue of the provisions of subsection (1) shall subject to the provisions of subsections (4), (5), (6) and (7)(a)__

(a) where the right is not exercised for a continuous period of 15 months,
(b) lapse at the expiry of 15 years calculated from the date contemplated in subsection 1. In which case no compensation shall be payable.

[63] The aforestated provisions relieve the Municipality from paying compensation where the Scheme prohibits an otherwise lawful use.

[64] An important consideration in deciding whether clause 4(7) of the Scheme read with section 43 of the Ordinance *supra*, finds application is whether the definition of 'mining industry' in the Scheme should be interpreted to include mining and prospecting.

[65] The MPRDA draws a distinction between the two terms, as follows:

'to mine' means, when –

(a) used as a noun –

(i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;

(ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource; and

(b) used as a verb –

in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area.

'Prospecting' is defined as 'intentionally searching for any mineral by means of any method'

(a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or

(b) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or

(c) In the sea or other on land.

[66] The MPRDA further provides two distinct regimes for obtaining and exercising a prospecting right under sections 16 to 21 and a mining right under sections 22 to 30.

[67] Under the heading 'Permission to remove and dispose of minerals', Section 20 of the MPRDA contemplates that prospecting entails the extraction of minerals from the ground.

Section 20 reads:

"(1) Subject to subsection (2), the holder of a prospecting right may only remove and dispose for his or her own account any mineral found by such holder in the course of prospecting operations conducted pursuant to such prospecting right in such quantities as may be required to conduct tests on it or to identify or analyse it.

(2) The holder of a prospecting right must obtain the Minister's written permission to remove and dispose for such holder's own account of diamonds and bulk samples of any other minerals found by such holder in the course of prospecting operations"

[68] Hence, in terms of the MPRDA, mining is the extraction of minerals from the ground for ones own account while prospecting is the removal of minerals from the ground only for purposes of testing or analysing it for which the Minister's consent is required. This fact appears to be common cause.

[69] It is also common cause that in terms of the MPRDA, many of the activities conducted in mining and prospecting overlap but that mining is more permanently invasive of the surface of land than prospecting. A large part of

prospecting activities is invasive of the surface of the land as is explained in the applicants' supplementary replying affidavit. The background facts with respect to the nature of prospecting and mining operations, form part of the facts which on principles of interpretation I have taken into account in interpreting the town-planning scheme.

[70] .Neither the Scheme nor the Ordinance define prospecting or mining. The Scheme only defines '*Mining Industry*' referred to *supra*. The Scheme also does not refer to the term prospecting.

[71] When interpreting the meaning attached to the term 'Mining Industry' one cannot consider the meaning of the word 'mine' or mining in isolation but the words 'Mining Industry' should be read as a whole and its context.

[72] The Marriam Webster dictionary defines 'Mining' as "the process or business of digging in mines to obtain minerals, metals etc."

Wikipedia defines 'Mining' as "Mining is extraction of valuable metals and minerals or other geological materials from the earth ...which is carried out through prospecting or exploration to find and then define the extent, location and value (of the ore body)". (own emphasis)

[73] The Marriam Webster dictionary defines 'Industry' as"

"a distinct group of productive or profit making enterprises"
"manufacturing activity as a whole"

The Oxford Living Dictionary defines, 'Industry' as:

mass noun – "Economic activity concerned with the processing of raw materials and manufacture of goods in factories"

count noun – "A particular form or branch of economic or commercial activity"

[74] From the aforegoing, when considering the words 'mining industry' as a whole and in the context used in the Scheme, then I am of the view that it is an economic activity, describing mining activity as a whole which would include both prospecting and mining.

[75] Further I agree with the applicants' submission that to exclude prospecting from 'Mining Industry' would lead to absurd results as it would exclude the development of new mines in an area which is rich in platinum group metals and would be directly contrary to the purpose of the town-planning scheme, which is to coordinate harmonious development in such a way as will most effectively promote the efficiency and economy of development. The object of a town-planning scheme is to regulate the surface use and it would be an anomaly if on the very same land the town-planning scheme regulates mining but not prospecting which continues even after mining has started[14].

[76] Furthermore, section 21(1)(b) of the Ordinance makes a distinction between mining operations and prospecting. It provides that a local authority shall not prepare a town planning scheme with respect of land 'on which prospecting, digging or mining operations are being carried out'. 'Prospecting' digging and mining

14 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

operations in my view falls under the definition of 'mining industry' in the Scheme for which the special consent of Council is required.

[77] Applicants in their supplementary replying affidavit set out details of the prospecting and mining operations conducted on Wilgespruit for the period 2004 to 2016. These facts are not in dispute. Hence it is clear that the applicants have engaged fully in mining industry activities from 22 November 2006 up to the present.

[78] The applicants prior to the Scheme had obtained a right to prospect on Wilgespruit in terms of the MPRDA and on the date of the coming into operation of the Scheme or within one month prior to that date, Wilgespruit was used for 'mining industry' which is not a purpose for which it had been zoned in terms of the Scheme but which was lawfully obtained in terms of the MPRDA and was not subject to any prohibition in terms of the ordinance, thus the use for 'mining industry' may be continued after that date.

[79] Clause 4(7) of the town-planning scheme and section 43 of the Ordinance, are therefore of direct application and the 'mining industry' activities thus conducted, may be continued for at least 15 years from the 22 November 2006. Hence the prohibition in clause 2(1) of the Moses Kotane Town-Planning Scheme is not applicable to the applicants' prospecting and mining activities on the Farm Wilgespruit.

[80] In the light of the aforegoing, I am of the view that the applicants have discharged the *onus* to prove that they have a clear right and that they have not contravened the Moses Kotane Town-Planning Scheme.

Interdict

[81] As stated supra, the applicants have a clear right to apply for interdictory relief. Furthermore it is common cause that the respondents' continued use of the farm within the proposed open pit or within close proximity of active open-cast mining operations is impossible from a health and safety point of view and thus irreconcilable with the ordinary and reasonable exercise by the applicants of their mining rights and will render any continued occupation of Wilgespruit as well as continued farming operations by the respondents on the farm impossible. A further delay in mining will negatively effect applicants' profitability and longevity of their operations at Wilgespruit as it may become uneconomical to continue mining and this will also negatively effect the Bakgatla Community. The applicants in my view have no alternative remedy but to seek relief from this Court. In the circumstances, the applicants are entitled to the interdictory relief sought.

F. COSTS

[82] The counsel for the defendant, submitted that the court should follow the principle laid down in the Constitutional court case of *Biowatch Trust v Registrar Genetic Resources and others*[15] and submitted that the court should not saddle the respondents with a cost order in the event that the court grants the order in the applicants' favour.

---

15 2009(6) SA 232 CC

[83] The Biowatch decision provides guidance when dealing with constitutional matters as it involved constitutional litigation "where the state is sued for the state's failure to fulfil its responsibilities for compelling claims between private parties[16]."

[84] The constitutional court in Biowatch divided constitutional cases into 3 categories, with different rules for costs in each case, namely disputes between a private party and the state, disputes where the state plays a regulatory role and private disputes, that is private parties engaged in constitutional disputes. The constitutional court did not provide a clear guidance to private dispute. However in *Bothma v Els and Others*[17] the court concluded: "The general principle as far as private litigation is concerned is that costs will ordinarily follow the result however there would be exceptional cases which would justify a departure from this Rule".

[85] This matter involves a private dispute between private companies and individual land occupiers and the state is cited as an interested party. No exceptional circumstance have been presented to warrant a departure from the principle that costs should follow the result.

[86] Further with regards the costs that were reserved on the 22 February 2016 and 25 August 2016, I am of the view after hearing submissions from counsel, that the costs should be borne by the respondents.

G. ORDER

[87] In the result, the application is granted as follows:

---

16 Biowatch *supra* at para. 26
17 2010 (2) SA 622 (CC)

1. That the 1st to 37th respondents and all persons occupying through or under them be evicted from the property known as the farm Wilgespruit 2 J.Q., North West Province ("the property");

2. That the 1st to 37th respondents are ordered to vacate the property, move all their cattle and other animals and remove all their possessions from the property within 30 days from the date of service of this order upon them;

3. That the 1st to 37th respondents and the members of the 38th respondent be interdicted and restrained from accessing the property, from bringing cattle onto the property and from erecting or re-erecting any structures whatsoever on the property;

4. In the event that any of the said respondents fails to vacate the property as directed in paragraph 2 above or unlawfully accesses the property as set out in paragraph 3 above, that the Sheriff for the district be and is hereby authorised and directed forthwith to give effect to the eviction order;

5. The costs of this application be paid by the 1st to 38th respondents, jointly and severally, the one paying the other to be absolved, which costs are to include the costs of three counsels, as well as the costs that were reserved on the 22 February 2016 and 25 August 2016.

N. GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 19 OCTOBER 2016
DATE OF JUDGMENT	: 16 FEBRUARY 2017
COUNSELS FOR APPLICANT	: ADV G L GROBLER (SC) ADV GELDENHUYS ADV OSCHMAN
COUNSELS FOR RESPONDENT	: ADV DE VOS (SC) ADV D BRAND ADV M MUSANDIWA
ATTORNEYS FOR APPLICANT	: SMIT STANTON INC. (Instructed by Edward Nathan Sonnenberg Inc.)
ATTORNEYS FOR RESPONDENT	: NIENABER & WISSING ATTORNEYS (Instructed by Lawyers for Human Rights)

" W2 "

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAFIKENG)

CASE NO: M495/2015

Held at MMABATHO on this the 19th day of OCTOBER 2016
BEFORE the Honourable Madam Justice GUTTA

In the matter between:

ITIRELENG BAKGATLA MINERALS RESOURCES (PTY) LTD	1st Applicant
PILANESBERG PLATINUM MINES (PTY) LTD	2nd Applicant

And

GRACE MASELE (MPANE) MALEDU	1st Respondent
SHIMANKI RASEPAE	2nd Respondent
OBAKENG MATSHEGO	3rd Respondent
NKASHE MATSHEGO	4th Respondent
DONNY MATSHEGO	5th Respondent
MMAPULA PILANE	6th Respondent
PHOPHO KOTSEDI	7th Respondent
THERO MMALE	8th Respondent
JACOB MOALOSI RASEPAE	9th Respondent
NTUTU RASEPAE	10th Respondent
GOPANE RASEPAE	11th Respondent
MANTIRISI RASEPAE	12th Respondent

MPHO RAMFATE	13th Respondent
MOTLHAGODI PILANE	14th Respondent
JOSEPH SITSI TLHASI	15th Respondent
ISAAC RAMAFATSHE PALAI	16th Respondent
VICTOR KOTSEDI	17th Respondent
KUTLWANO MATSHEGO	18th Respondent
DANIEL MAUGOLE MALEBYE	19th Respondent
MOSES TSHWEU MALEBYE	20th Respondent
ALBAUES MMALE	21st Respondent
EVA MALEBYE	22nd respondent
GER'TRUDE PILANE	23rd Respondent
SETWE MANNETJIE PILANE	24th Respondent
INOLOFATSENG RAMFATE	25th Respondent
ELIAS BAFYE RASEPAE	26th Respondent
MAKUBESELE DORIS SENOELO	27th Respondent
MAUDRIES GERTSOU RASEPAE	28th Respondent
MOGOTSI LEVY RASEPAE	29th Respondent
MESU RASEPAE	30th Respondent
TSHOSE DANIEL RASEPAE	31st Respondent
MMAKGOMO MARIA MATABEGE	32nd respondent
MMAMMU DORIEEAH TLHASI	33rd Respondent
MMAMMUSI ELIZABETH PALAI	34th Respondent
MOGAPI KAISER MATSHEGO	35th Respondent
MOTLHEGODI JOSEPH MATSHEGO	36th Respondent
OLAOTSE THLASI	37th Respondent
LESETLHENG VILLAGE COMMUNITY	38th Respondent
MOSES KOTANE MUNICIPALITY	39th Respondent

THE HEAD OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, NORTH WEST	40th Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	41st Respondent
MINISTER OF MINERAL RESOURCES	42nd Respondent
BAKGATLA-BA-KGAFELA COMMUNITY	43rd Respondent
BAKGATLA-BA-KGAFELA TRADITIONAL AUTHORITY	44th Respondent

HAVING HEARD ADV G L GROBLER SC with him ADV GELDENHUYS and ADV OSCHMAN on behalf of the Applicants and ADV DE VOS SC with him ADV D BRAND and ADV MUSANDIWA on behalf of the Respondents and having read the Notice of Motion and other documents filed of record;

IT IS ORDERED

THAT: Judgment be reserved.

THEREAFTER on the 16th day of FEBRUARY 2017

IT IS ORDERED

1. THAT: The 1st to 37th Respondents and all persons occupying through or under them be evicted from the property known as the farm Wilgespruit 2 J.Q., North West Province ("the property");

2. THAT: The 1st to 37th Respondents to vacate the property move all their cattle and other animals and remove all their possessions from the property within 30 days from the date of service of this order upon them;

3. THAT: The 1st to 37th Respondents and the members of the 38th Respondent be interdicted and restrained from accessing the property, from bringing cattle onto the property and from erecting or re-erecting any structures whatsoever on the property;

4. THAT: In the event that any of the said respondents fails to vacate the property as directed in paragraph 2 above or unlawfully accesses the property as set out in paragraph 3 above, that the Sheriff for the district be and is hereby authorised and directed forthwith to give effect to the eviction order;

5. THAT: The costs of this application be paid by the 1st to 38th Respondents, jointly and severally, the one paying the other to be absolved, which costs are to include the costs of three counsels, as Well as the costs that were reserved on the 22nd day of FEBRUARY 2016 and the 25th day of AUGUST 2016.

REGISTRAR
NORTH WEST HIGH COURT, MAFIKENG
PRIVATE BAG X2010
2017 -02- 21
MMABATHO 2735
REPUBLIC OF SOUTH AFRICA

BY THE COURT

REGISTRAR OF HIGH COURT
NORTH WEST HIGH COURT
MAFIKENG
REGISTRAR

S S