

SOUTH AFRICA / JUDGMENT

Harmony Golf Mining (Pty) Ltd and Others v Lejweleputswa Community Engagement Structure and Others (502/2023) [2023] ZAFSHC 193 (18 May 2023)

[2023] ZAFSHC 193

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

502/2023

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE STATE

DIVISION, BLOEMFONTEIN

Case No:502/2023

In the matter between:

HARMONY
GOLD MINING COMPANY LIMITED
1st
Applicant
AVGOLD
LIMITED
2nd
Applicant
FREEGOLD
(HARMOY) PTY LTD
3rd
Applicant
and
LEJWELEPUTSWA

COMMUNITY ENGAGEMENT

1st

Respondent

STRUCTURE

THAPELO

HOLLAND

2nd

Respondent

MKHONTO

MOKOENA

3rd

Respondent

ZENZILE

MNYAMANE

4th

Respondent

THABANG

TSHAKA 5th

Respondent

KHOTHULE

6th

Respondent

THABO

RAMOKOATSI

7th

Respondent

TAIBOS

KLEINBOOI NONYANE

8th

Respondent

MOIPONE

HLALELE

9th

Respondent

OUPA

MALELE

10th

Respondent

JAR

NDADE

11th

Respondent

AZANIA

MOKOMA

12th

Respondent

BEN

MCOQI

13th

Respondent

THABO

NTHOKA
14th
Respondent
ZENZILE
ZULWAYO
15th
Respondent
ITUMELENG
RAMABENYANE
16th
Respondent
ISHMAEL
NGOMANA
17th
Respondent
JOSHUA
MOKHERE
18th
Respondent
CHRISTINAH
HOLLAND
19th
Respondent
HEARD

ON: 11 MAY 2023

JUDGMENT

BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 11h00 on 18 May 2023.

[1] On 11 May 2023, I reserved judgment, postponed and extended the rule nisi to 18 May 2023, the day on which the judgment would be delivered. A rule nisi was granted on 06 February 2023 when the following relief was granted:

"IT IS ORDERED THAT:

1. The forms, service and time periods prescribed by the Uniform Rules of Court is dispensed with and this application is heard as one of urgency on an ex parte basis in terms of Rule 6(12) of the Uniform Rules of Court.
2. Condonation is granted to the Applicants for non-compliance with the directives pertaining to set down, and time periods for hearing urgent applications to the extent of any deviation.

3. The Respondents are called to show cause on the 2nd day of MARCH 2023 at 10h00 or as soon thereafter as the matter may be heard, why a final order should not be made in the following terms: -

3.1. The Respondents are interdicted and restrained from: -

3.1.1. Causing or allowing any damage, loss, injury or other physical or psychological harm (“harm”) to any person employed by the applicants and/or their service providers and/or agents whether on duty or not, and any property

owned or in control of the applicants and/or their service providers and/or agents;

3.1.2. Inciting or encouraging any affiliate, associate, member or other third party to cause or allow harm to: any person employed by the applicants and/or their service providers and/or agents whether on duty or not, and any property owned or in control of the applicants and/or their service providers and/or agents;

3.1.3. Threatening to cause or allow harm to: any person employed by the applicants and/or their service providers and/or agents whether on duty or not, and any property owned or in control of the applicants and/or their service providers and/or agents;

3.1.4. Preventing or otherwise discouraging any and/or all of the applicants’ employees, service providers and/or agents from discharging any duty and/or rendering any service for or on behalf of the applicants or for the applicants’ benefit;

3.1.5. Blockading entrances and access to properties or mining operations owned and/or occupied and/or operated by the applicants;

3.1.6. Interfering with any of the applicants’ mining operations and business;

3.1.7. Accessing the mining premises and making any commercial demands from the applicants, the employees, service providers and/or agents; and

3.1.8. Using any of the applicants or their service providers’ property without the applicants’ and/or service providers’ permission.

(“the interdicted activities”)

3.2. the Respondents are directed to: -

3.2.1. To take all reasonable steps to ensure that their affiliates, associates, members and/or other third parties refrain from engaging in all or any of the interdicted activities, including by informing such affiliates, associates, members and/or other third parties of the provisions of this order and calling on them categorically and unequivocally not to engage in all or any of the interdicted activities; and

3.2.2. jointly and severally pay the costs of this application, on the attorney and client scale, including the costs of two counsel; and

3.2.3. to adhere to any such further and/or alternative relief as may be warranted on the papers.

4. Pending the final determination of this application, paragraphs 3.1 and 3.2 above (including all subparagraphs, except paragraphs 3.2.2 and 3.2.3) hereby operate as an Interim Order with immediate effect.

5. This application and Court Order be served: -

5.1. By email upon the first respondent at:

lejwel[...]

5.2. Via WhatsApp to: the Fourth Respondent (078 [...]); the Seventh Respondent (078 [...]); the Eleventh Respondent (065 [...]); the Sixteenth Respondent (073 [...]); the Seventeenth Respondent (073 [...]) and the Nineteenth Respondent (076 [...]);

5.3. By the Sherriff who will amongst others call the individual respondents to meet with the Sherriff for purposes of being served;

5.4. On the South African Police Service ("SAPS") Provincial Commissioner(s) for the Free State Province; and

5.5. on the Station Commander(s) of the SAPS Welkom Police Station

6. The SAPS Welkom Police Station is hereby authorized and directed to: -

6.1. give effect to this Order by preventing the Respondents from breaching the terms hereof; and

6.2. dispersing and/or arresting persons or any groups of persons who act in any unlawful manner and/or who are acting in a manner as to contravene or reduce the effect thereof.

7. The Respondents have the right to anticipate the return date with 24-hour notice to the Applicants.

[2] Some of the respondents filed a notice of opposition on 28 February

2023. The order of 02 March 2023 which postponed the application to 11 May 2023 indicated that all the respondents were opposing the application.

[3] A further notice of intention to oppose the application in respect of the remaining respondents was filed and served on 13 March 2023 and the opposing affidavits were filed two days out of time in terms of the court order of 2 March 2023. The applicants did not oppose the respondents' application for the condonation of the late filing thereof.

[4] The applicants seek final interdictory relief (which excludes subparagraph 3.2.3 of the interim order).

Background

[5] The applicants have four mining operations in the Free State province named Tshepong/Phakisa, Masimong, Joel and Target. All of them are situated in the Free State Goldfields in and around Welkom. The applicants collectively employ 22 000 people in the said mining operations[1] which produce 1200kg per month of precious metals or 43kg per day. Their operations produce R44.7 million in revenue per day.

[6] The first respondent, the Lejweleputswa Community Development Structure, is a community organisation consisting of community leaders, activists and various community structures representing several community members affected by the applicants'

mining activities in the Free State.[2] The second to the eighteenth respondents are members of the first respondent and represent the first respondent's various

sub-communities.[3] The nineteenth respondent is the second respondent's wife and is not associated with the first respondent.[4]

[7] The respondents delivered a memorandum of demands to the applicants during a peaceful march to the applicants'

offices on 29 November 2022. The respondents notified the local authorities and the South African Police Services to ensure safety

during the march.[5] The applicants responded to the demands in writing on 15 December 2022.

[6] A meeting between the representatives of the first applicant and the first respondent was convened on 1 February 2023 to discuss the contents of the letter of 15 December 2022.

[8] The respondents were of the view that the applicants did not meet any of the promises made at previous meetings and informed the applicants that the community members intended to take protest action.[7] The meeting degenerated and serious threats of a shutdown were made by the members and representatives of the first respondent.[8]

[9] On the same day, the applicant received a WhatsApp voice note in Sesotho from an unknown speaker which was circulated on the first respondent's WhatsApp group, indicating that the first respondent intended to embark on a shutdown of the applicants' mining operations.[9] The translated and transcribed voice note reads as follows:

"Mr X: Morning, Morning leadership. Yah, General Mokoma you are right but let's all work at this thing and we'll see how we work around those media, yah. Let's not mandate other people about such things, General. Let us be the ones to handle it. If I speak with the, if you speak with the everyone will organise however they organise. So that we know that those people will struggle to talk to them, those people even with data for the internet General, yes others have phone numbers and they call each other, these people are given all the details. What will happen Leadership, make no mistake when we say we are not going to picket the way things happen, we are going to close down production. No one is going to work. Already it is all over social media, even the voice notes will go viral...[inaudible] If a person stands before the interests of the community.... [inaudible] of work, then he must make sure that he

pays for mortuary

so that his family won't struggle because there are going to close production there, the production is in this community but the community does not benefit, there's nothing we benefit as stakeholders. On top of that, we going to close until our demands are met, no matter how long were are there for, 3 days or 5 days, we don't care because we have concluded that for this thing we will sacrifice. If they come to the table, I want this thing to go viral just like when... [inaudible] they chased me away from there, they must know that CEF says their stinking tables they always call us on to come to managing us, them getting jobs to manage us ... [inaudible] they are playing, we will mobilize our community members, so that when they see them they must hate them to the extent that whatever must happen to them because its them, they are the enemies of these processes that are ruling over the lives of this community. So we are going to the shutdown, whether it's cold or hot we are going to the shutdown. We are going to close production at Harmony, we are going to close production at Harmony, all the networks. The coal stations releasing production around Free State, its Tshepong and Phakisa, yes, the coal station is Tshepong, on top of that Leadership the issue that they are going to test us, we are done being tested, we are done with the issue of being

recognised, we want our demand to be met and we are not backing down, we are familiar with hunger. How those people will survive, they will see moving forward. In a way we will be sitting making our own way forward. This clip must go viral, they must all know that there is nothing that will stop us. If needs be there will be a Marikana part 2 here in Matshabeng Free State, we don't care, we only care about those people who care about us. So if there is going to be a Marikana part 2 here, we going to recruit our children who are underage to be part of the toyi-toyi, while they are busy delaying those processes we are going to collapse Matshabeng, all of it. It will go to the shops, to the malls and all the networks in Matshabeng because now it's going to start at the mine. If they think we are playing they will see what will happen, we don't play, we don't just talk here on social media."

[10] On 2 February 2023, the first respondent sent an email stating that the first respondent and its members would embark on a shutdown on 7 February 2023.[10] The email reads as follows:

"Good morning everyone

We hope this email finds you well in this oppressing time.

As CES we are dedicated to a right course for the Communities of Lejweleputswa, driven by ambition to serve and protect the rights of weak and vulnerable. WHEN IT COMES TO THE COMMUNITY WE DON'T COMPROMISE

This email serves as reminder to Harmony Gold Mine that CES will embarking on a Shutdown on the 7th of February 2023, after having multiple engagements with Harmony Gold Mine with no POSITIVE response and to see tangible development from Harmony.

The boiling issue that CES has pronounced forward to the attention of Harmony officials with an aim for urgent remedy to this quagmire of some sort is the issue of Terms of Reference that Harmony is playing delay tactics.

Harmony Gold has failed dismally to provide transparency to the communities of Lejweleputswa, by prioritizing structures that was Charged by Corruption,. Through Harmony policy rather of being misled by some individuals who want perpetuate Corruption and Maladministration, in the Harmony by continuing to work with the structure that is oppressing our people to pay bribes for getting employed.

CES doesn't want to engage or have meetings with Mr Sabelo Mgotywa anymore because he has failed to suffocate the hysteria that we are faced with as the representative of the community at large. In a nutshell please take note that there will be a total Shutdown. Our mass action will perpetuate until such time where our demands are met to its fullest implementation.

When we revolt it's not for a particular not culture, we revolt simply because, for many reasons, we can no longer breathe.

kindly see the attached documents in order.

We hope you find above in order.

Best regards"

[11] The applicants approached the court for an urgent interim interdict which was granted on 6 February 2023 and served on the respondents by email and via WhatsApp as per the court order.

The respondents' opposition

[12] In the answering affidavit, the application was opposed on several grounds under the following headings: Urgency and ex parte,[11] duty of disclosure,[12] No prima facie right,[13] well-grounded apprehension of irreparable harm,[14] balance of convenience,[15] no other satisfactory remedy in law,[16] incompetence of relief sought,[17] relief sought against third parties not cited,[18] authority to arrest and disperse protestors,[19] and confusion regarding what is actually expected of the respondents.[20] In the written heads of argument, the grounds were significantly reduced.

[13] The first ground of urgency raised in the answering affidavit has become moot as Van Rhyn J had already determined in the urgent court that the matter was urgent on 6 February 2023. [21] The law relating to final interdicts was succinctly set out in *Setlogelo v Setlogelo*,[22] where it was stated that the requisites for the right to claim an interdict are : a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.

Clear right

[14] The respondents stated in their answering affidavit that the applicants based their application solely on commercial interest or constitutional right to trade, which they feared the respondents would interfere with.[23] The applicants did not believe that the shutdown would include any form of violence and accepted that the interference with their business and operations was the only risk they faced.[24] In their oral and written submissions, the respondents maintained that while the applicants could certainly lay claim to a right to conduct their business in the exercise of the right to freedom of trade and occupation, free from unlawful interference, they could not lay claim to that right as a freedom from any lawful interference.[25] By implication, the respondents contend that their conduct was lawful in the circumstances as they exercised their right to protest and the applicants had no reason to complain.[26]

[15] In Hotz[27] it was stated that protest action is not itself unlawful and the right to protest against injustice is one that is protected under the Constitution. The right of demonstration is to be exercised peacefully and all rights are to be exercised in a manner that

respects and protects the foundational value of human dignity of other people and the rights other people enjoy under the

Constitution. In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups, and people must recognise this when exercising their own constitutional rights.

[16] It is evident from the respondents' answering affidavit that the respondents do not contest the applicants' right to freedom of trade or right to trade and to conduct their mining operations. Consequently, I find that the applicants have established a clear right and have met the first requirement for an interdict.

An injury actually committed or reasonably apprehended

[17] The respondents took the position that the applicants failed to provide any evidence of any unlawful conduct planned or perpetuated

in previous protests. The applicants, it was contended, also failed to create a nexus between all four of their mining sites and the intended shutdown.[28] It was, furthermore, opportunistic of the applicants to rely on the WhatsApp voice note of an unknown author and which was without context. However, the respondents did not deny that the voice note was circulated on the WhatsApp group of the first respondent where some of the respondents were present.[29]

[18] It was argued on behalf of the respondents that the shutdown to which the respondents could be factually linked, was not per se unlawful. Had the shutdown occurred, it would only have been unlawful if the respondents had attempted and managed to enforce it in an absolutely coercive manner or had in fact been violent.[30] I disagree.

[19] In *V & A WATERFRONT PROPERTIES (PTY) LTD AND ANOTHER v HELICOPTER & MARINE SERVICES (PTY) LTD AND OTHERS*,^[31] it was held that: “The argument was that ‘injury’ in that phrase had necessarily to entail physical harm or pecuniary loss. The appellants had consequently to show, so the contention proceeded, that the helicopter was unairworthy and that its operation involved risk to life and property. The argument is founded on neither authority nor principle. The leading commonlaw writer on the subject of interdict relief used

the words ‘eene gepleegde feitelijkheid’ to designate what is now in the present context, loosely referred to as ‘injury’. The Dutch expression has been construed as something actually done which is prejudicial to or interferes with, the applicant’s right. Subsequent judicial pronouncements have variously used ‘infringement’ of right and ‘invasion of right’. Indeed, the leading case, *Setlogelo*, was itself one involving the invasion of the right of possession. Of course it is hard to imagine that a rights invasion will not be effected most often by way of physical conduct but to prove the necessary injury or harm it is enough to show that a right has been invaded. The fact that physical means were employed or physical consequences sustained is incidental.”

[20] I was referred by counsel to a passage in *Nestor and Others v Minister of Police and Others*^[32] where it was held that: “A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts

(*Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA 505 (W) at 515). The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result (*Free State Gold Areas* case *supra* at 518). However, the test for apprehension is an objective one (*Ex parte Lipshitz* 1913 CPD 737; *Seligman Bros v Gordon* 1931 OPD 164; *Pickles v Pickles* 1947 (3) SA 175 (W)). This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.”

[21] The applicants contended that they approached the court for interim relief because there was evidence that the respondents intended to violently shut down the applicants’ mining operations. This evidence was contained in the email of 2 February 2023, the WhatsApp voice note circulated on the first respondent’s WhatsApp Group, and a poster indicating that a shutdown would take place on 7 February 2023. The poster, marked Annexure “FA5”,^[33] bore, *inter alia*, the following lettering “Lejweleputswa Community Engagement Structure/ CES vs Harmony Gold Mine” and “Shutdown at Harmony Gold Mine operations on the 07th of February 2023.” People and litter or debris were shown in some of the photos on the poster.

[22] The violent and aggressive language used in the email and WhatsApp note does not give the impression that the shutdown would be peaceful as suggested by the respondents. It was a total shutdown and the mass action would “perpetuate” until such time the demands were

met to “its fullest implementation.” The build-up towards the shutdown was kinetic and in full swing and, had the interim relief not have been sought and granted, as it was, the intended shutdown would have taken place as scheduled. On a consideration of these facts, the applicants were, objectively

speaking, entitled to entertain a reasonable apprehension of injury. This is borne out by the suspension of the shutdown by the

respondents only hours after the interim order was served on them on 6 February 2023.[34]

Absence of similar protection by any other ordinary remedy

[23] The respondents contended that the applicants did not require a court order to protect them against unlawful conduct as such power to act lay with the South African Police Service and private security.[35] The applicants correctly pointed out that this contention was flawed as criminal proceedings are not an alternative remedy for the purposes of an interdict.[36] A criminal prosecution punishes past conduct while the protection afforded by an interdict is the cessation of the unlawful activity.

It would seem to me that, on raising some of the defences, the respondents had in mind an attack on the requirements of an interlocutory interdict. The remaining defences raised by the respondents are beside the point and do not in any way neutralise the applicants’ case that they have met the requirements for a final interdict.

Conclusion

[24] I am satisfied that the requirements of an interdict have been met. In Hotz,[37] Wallis JA stated that once the applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief. He stated further: “That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict, that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected

right of access to courts for the resolution of disputes, and potentially infringe the rights of security of the person enjoyed by students, staff and other persons on the campus.”[38]

[25] The following order is made:

ORDER:

Paragraphs 3.1 and 3.2 of the Rule Nisi (including all subparagraphs except subparagraph 3.2.3) are confirmed with costs of two counsel.

MHLAMBI, J

On behalf of the applicants: Adv. Andrew South SC & Vincent Mabuza Instructed by: Lovius Block Incorporated 31 First Avenue Westdene Bloemfontein On behalf of the respondent: Adv. JFD Brand Instructed by: UFS LAW CLINIC Sports Avenue & Nelson Mandela Drive UFS Main Campus BLOEMFONTEIN

- [1] Para 9.15 of the FA.
- [2] Para 13 of the AA.
- [3] Para 14 of the AA.
- [4] Para 15 of the AA.
- [5] Para 17 of the AA.
- [6] Para 18 of the AA.
- [7] Paras 21 and 22 of the AA.
- [8] Paras 49 of the FA and 84 of the AA.
- [9] Paras 35 of the FA and *! Of the AA.
- [10] Paras 54 of the FA and 32 and 87 of the AA.
- [11] Para 31 of the AA.
- [12] Para 34 of the AA.
- [13] Para 39 of the AA.
- [14] Para 41 of the AA.
- [15] Para 51 of the AA.
- [16] Para 57 of the AA.
- [17] Para 60 of the AA.
- [18] Para 62 of the AA.
- [19] Para 64 of the AA.
- [20] Para 66 of the AA.
- [21] Masilonyana Local Municipality v Kokoane and Others (4140/2020)
- [2022] ZAFSHC 49 (8 March 2022).
- [22] 1914 AD 221 at page 227; Hotz and Others v University of Cape Town 2017

- (2) SA 485 (SCA).
 - [23] Para 39 of the AA.
 - [24] Para 40 of the AA.
 - [25] Para 39 of the respondents' heads of argument.
 - [26] Para 41 of the respondents' heads of argument.
 - [27] Supra para 62.
 - [28] Paras 44 and 45 of the AA.
 - [29] Para 47 of the AA.
 - [30] Para 42 and 43 of the heads of argument.
 - [31] 2006 (1) SA 252 (SCA) at paras 20 & 21.
 - [32] 1984 (4) SA 230 (SWA) at para
 - [33] Para 55 of the AA and annexure "FA5" on page 38 of the indexed papers.
 - [34] Email dated 6 February 2023 on page 104 of the indexed papers.
 - [35] Para 59 of the AA.
 - [36] Berg River Municipality v Zelpy 2065 (Pty) Ltd 2013 (4) SA (WCC) para 47.
 - [37] Supra.
 - [38] Para 29.
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