

SOUTH AFRICA / JUDGMENT

Ntadile Miniral Resources (Pty) Ltd v Samancor Chrome Limited and Others (2874/2024) [2024] ZANWHC 141 (19 June 2024) [2024] ZANWHC 141

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

2874/2024

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: 2874/2024

Reportable: YES/NO

Circulate to Judges:

YES/NO

Circulate to Magistrates:

YES/NO

Circulate to Regional

Magistrates: YES/NO

In the matter between:-

NTADILE

MINIRAL RESOURCES (PTY) LTD

Applicant

and

SAMANCOR

CHROME LIMITED

1st

Respondent

MOLEFI

KITSO LINCWE

2nd
Respondent
BENHAUS
MINING SERVICES (PTY) LTD
3rd
Respondent
REGIONAL
MANAGER DEPARTMENT RESOURCES, NORTH WEST PROVINCE
4th
Respondent
This judgment is
handed down electronically by distribution to the legal
representatives of the parties. The date of hand
down is deemed
to be 19 JUNE 2024

JUDGMENT

FMM REID J

Introduction

- [1] On 10 June 2024 an ex parte order was granted on an urgent basis in terms of which the 1st respondent (Samancor) was interdicted and restrained from conducting any mining activities and mining-related activities including, but not limited to the removal and selling of all chrome from Portion 2 of the farm Varkensvlei 403, Registration Division KQ, North West Province, held under title deed T[...] (the property) that has occurred between December 2023 to May 2024, pending the finalisation of the proceedings instituted by the applicant (Ntadile Mineral Resources) under Section 54(7) read with Section 54(4) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) together with ancillary relief.
- [2] Further, in the ex parte order, Samancor and the 3rd respondent (Benhaus Mining) were directed to restore to the applicant (Ntadile Minerals) undisturbed access to the property and plant situated on the property.
- [3] Samancor has anticipated the return date, and this judgment deals with the confirmation or discharge of the interim interdict granted.

Material

background

[4] Ntadile Minerals and the 2nd respondent (Linchwe) are the registered owners of an undivided half share of the property. Samancor is the holder of a mining right in respect of the chrome deposits on the property. In order to obtain the mining rights, a lease and compensation agreement was entered into between Samancor and the owners of the property. The owners of the property have rights to the property that are colloquially known as “surface” rights.

[5] A lease and compensation agreement was entered into between the owners and Samancor during 2021. In terms of the lease agreement Samancor had to pay to the owners of the property an amount for rental of the property. In terms of the compensation agreement an amount for compensation has to be paid by Samancor to the owners,

which amount of compensation is determined by the amount of ore that is mined from the property.

[6] To provide context to this application, it is necessary to set out the meaning of ore and the mining of chrome deposits. In the Oxford Dictionary “ore” is described as “A naturally occurring mineral from which a metal and certain other elements (e.g. phosphorus) can be extracted, usually on a commercial

basis.” Wikipedia describes ore as “a natural rock or sediment that contains one or more valuable minerals concentrated above background levels, typically containing metals, that can be mined, treated and sold at a profit. The grade of ore refers to the concentration of the desired material it contains.”

[7] The definition of ore is self-explanatory in that the ore in itself contains sediment of one or more valuable minerals. Ore is also normally mined by means of an opencast mine. The Anglo American

website describes an opencast mine as follows:

“Open-pit mining, also known as opencast mining, is a surface mining technique that extracts minerals from an open pit in the ground. Open-pit mining is the most common method used throughout the world for mineral mining and does not require extractive methods or tunnels.”

[8] The deponent to the affidavit on behalf of Ntadile Minerals states that the compensation paid by Samancor is not a true reflection of the amount of ore that is mined and dispatched, after the ore has

been weighed at the weigh bridge. Ntadile Minerals contends that Samancor conceals a portion of the ore that is mined.

[9] In the founding affidavit the following is stated by the deponent on behalf of Ntadile Minerals:

“33. (Ntadile Minerals), as demonstrated by the title deed; compensation agreement, attached as Annexures “B” and “E” herein, that it is the owner of the property and due the necessary compensation for the mining activities at an agreed rate depending on the amount of chrome actually removed from the property.

34. This right can only be enforced if (Samancor) allows (Ntadile Minerals) the right to participate in the certification of the removals, which (Samancor) has demonstrated it cannot be solely responsible for same as it has failed to report removals to (Ntadile Minerals) for the first four months of production and when it in fact filed its report of removals on 24 April 2024, it only reported 696 tons removed and contradicts itself (sic-letter) when its own attorneys produce documents from Benhaus Mining which indicates that over 100,000 tons were actually removed but (Samancor) only accepts that 696 tons were removed.
- ...
40. (Samancor) has sole control of the mining site and has called the police to remove me and other representatives of (Ntadile Minerals) in order to prevent us from controlling the removal of chrome from the property in order to assert (Ntadile Minerals) right to know the volume that are being removed from the property.
43. The (Samancor), with the assistance of (Benhaus Mining) is continuing in removals in order to frustrate any eventual right that (Ntadile) would seek to enforce in arbitration in terms of section 54 of the Act, as (Ntadile) will not be in a position to quantify how much chrome has been removed from the property.
44. The application is brought ex parte and on extremely urgent basis because as of the signing and drafting of this application (Samancor) has locked out (Ntadile Minerals) from its property and has been removing the product to its adjacent farm and there will not be possible to objectively determine how much has been removed from the property because (Samancor) is in control of the determination thereof and notice will defeat the purpose as (Samancor), a public company with huge financial resources can mobilise to remove all stock piles on the property overnight.
45. (Ntadile) will not be able to remedy such losses in the future by claiming same from (Samancor), who has thus far demonstrated that it is intent on under reporting he amount of removals it is making from the property, which is contrary to its contractual and statutory obligations.
46. (Ntadile Minerals) intends to cause proceedings in terms of Section 54(4) of the Act which will determine the reasonable compensation that it would have been due had (Samancor) shared the reasonable costs of the intended production and such an application would be prejudiced if (Samancor) is left to continue locking out (Ntadile Minerals) and solely being responsible for the reporting of the removals without the intervention of (Ntadile).

47. On a simple comparison of the ROM projection by (Ntadile Minerals) as set out in Annexure “F” against the current selling price as published by Ferro Alloy, the court will note that the projected price of \$170.00 has doubled and the handling costs was also unreasonably inflated. Copies of Ferro Alloy and reasonable handling costs are attached as Annexure “P” and “Q”.
- [10] In answer to the allegations that Samancor has unilaterally deprived Ntadile Minerals from access to the mining site (as per paragraph 40 of the founding affidavit), the deponent to the affidavit on behalf of Samancor states that Ntadile Minerals “... and its supporters were removed as they were blocking the entrance to the Nooitgedacht mine. Their actions in doing so were unlawful.”
- [11] In the answering affidavit, Samancor states that the mine has been operating since December
2023. The mine currently has 220 employees and produces approximately 1,500.00 hundred tons of ore per day. The mine operates 24 hours a day. The cessation of mining activities means a loss of R4,5 million rand per day in income for Samancor.
- [12] In its heads of argument, counsel acting on behalf of Samancor argues as follows:
- “16. (Ntadile Minerals) relies on a dispatch summary, that is a summary of ore dispatched via the weigh bridge from the mine – reflecting a total of 696 tons dispatched and compares same to Production Certificates issued by (Samancor) of ore mined. (Samancor) concludes that the Production Certificate reflects that some 40,000 tons were mined, whereas the dispatch summary shows that 696 tons of ore were dispatched.*
17. (Samancor) explains that the Production Certificate refers to ore mined, whereas the dispatch certificate refers to ore weighed by the weighbridge and dispatched from the mine.
18. In other words, the reconciliation is artificial.
19. The next issue raised is that the ore being mined is being stored at the mine of (Samancor) on the adjacent property. (Ntadile Minerals) maintains that this is being done to conceal the amount of ore being mined. (Ntadile Minerals) alleges a fraud in this respect is being perpetrated against (Ntadile Minerals) by (Samancor).
20. (Samancor) explains the ore being moved to the mine next door, by stating that Varkensvlei, the mine, is a new mine, that they have not erected secure facilities for storage, and as a result they are using their storage facilities at the mine on the adjacent property. (Samancor) further explains that a full audit trail is available, from Production Certificates signed by surveyors as well as dispatch summaries are available and has provided them to (Ntadile Minerals).”

[13] The deponent to the affidavit of Samancor states that the unfettered access of Ntadile Minerals to the plant and mine is not practical as the Mine Health and Safety obligations specify that unsupervised persons cannot be allowed to enter the mine. This is due to the safety personnel who has the requisite training and Personal Protection Equipment and that it would be dangerous and conflicts with the provisions of the Mine Health and Safety Act 29 of

1996. Unsupervised persons are prevented from entering the mining site.

[14] It is further stated by Samancor that Varkensvlei is a new mine and does not have secure storage facilities. Should stockpiles be left unsecured, it will be pillaged due to the constant problem of illegal mining in the area. The ore mined from Varkensvlei is stored at Nooitgedacht and is stockpiled separately from the ore mined at Nooitgedacht. The stockpiled ore is weighed at the nearest weighbridge at Nooitgedacht once it has been crushed, and after crushing it is removed from the mine. Once it is weighed at the weighbridge Samancor sends a dispatch report to Ntadile Minerals and Ntadile Minerals, pursuant to the information contained in the dispatch report invoices Samancor, which invoice is then paid

by Samancor.

[15] Samancor disputes that Ntadile Minerals has made out a case for the relief granted in the rule nisi. In order to establish whether the rule nisi should be confirmed (in the event that Samancor has made out a case) or whether the rule nisi should be discharged (if Samancor has failed to make out a case).

Legal Position

[16] Ntadile Minerals seeks an interim interdict that Samancor is to cease all mining operations, mining activities and mining-related activities, pending the finalisation of the proceedings instituted by Ntadile Minerals under section 54(7) read with section 54(4) of the Mineral and Petroleum Resources Development Act 28 of 2002.

[17] A rule nisi is nothing other than an interim interdict with a return date for the respondent to prove its rights. See *Zulu and Others v Ethekwini Municipality and Others* 2014

(4) SA 590 (CC). On the return date, the rule nisi is either confirmed, and thus becomes a final interdict, or discharged, in terms of which the interim interdict is dismissed.

[18] The legal position that a rule nisi operates as an interim interdict has also been confirmed in the Constitutional Court in *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003

(4) SA 1 (CC).

[19] The applicant requests confirmation of an interim interdict pending the finalisation of the compensation dispute. The requirements of an interim interdict have been established in our law to be:

19.1.

A prima facie right;

19.2.

Apprehension of irreparable harm;

19.3.

Balance of convenience; and

19.4.

No other satisfactory remedy.

[20] I will briefly discuss each requirement separately.

Prima facie right

[21] Ntadile Minerals referred a dispute to the Department of Mineral Affairs and Energy pursuant to section 54(7) as read with section 54(4) of the Mineral Petroleum Resources Development Act 2002, which is a dispute as to the payment of compensation due to it in terms of the written compensation agreement.

[22] The rights of the parties are regulated by the lease and compensation agreement entered into between the parties. This means that the right of Samancor to mine, and the right of Ntadile to compensation, arise from the Compensation Agreement.

[23] Ntadile Minerals claim that their rights are infringed on, inter alia, the following 3 grounds:

23.1. That the Production Certificates do not reflect the correct amounts of ore mined;

23.2. The Dispatch Summary does not accord with what ore have been mined; and

23.3. Ore is being concealed from Ntadile Minerals.

[24] Samancor answers to the effect that the Production Certificates and Dispatch Summaries should not be conflated, and some of the Certificates attached to the founding affidavit was not the final certificates in the absence of a signature. Samancor attaches the final certificate with the signature, reflecting the same amount as the certificate attached by Ntadile Minerals.

[25] Samancor explains that the Production Certificate refers to the ore mined, whereas the dispatch certificate refers to the ore weighed by the weighbridge and dispatched from the mine.

- [26] In relation to the storage of the ore on the nearby farm, Samancor provides a reasonable explanation that the ore is not safe to be stored at the Varkenvlei mine, it being a new mining operation.
- [27] Samancor contends that Section 54 of the Act only applies in instances where the parties have not reached an agreement as to the compensation payable by the mineral rights holder to the landowner.
- [28] Ntadile Minerals referred a dispute in terms of Section 54 of the Act, which section reads as follows:

“54 Compensation payable under certain circumstances

- (1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question-
 - (a) refuses to allow such holder to enter the land;
 - (b) places unreasonable demands in return for access to the land; or
 - (c) cannot be found in order to apply for access.
- (2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)-
 - (a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;
 - (b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;
 - (c) set out the provisions of this Act which such owner or occupier is contravening; and
 - (d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.
- (3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.
- (4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act 42 of 1965), or by a competent court.

- (5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2 (c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.
- (6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.
- (7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context.”

[29] In the matter Coal of Africa Limited and Another v Akkerland Boerdery (Pty) Ltd (38528/2012) [2014] ZAGPPHC 195 (5 March 2014) the following was found by Kgomo J:

“[114] Section 54 of the MPRDA is generally aimed at regulating and/or resolving disputes between landowners and mining or prospecting operator concerning compensation. Such compensation is limited to reasonable compensation to the landowner or lawful occupier of the land for such loss or damage as they might suffer as a result of the holders prospecting operations.

[115] Normally the holder of a right would lodge a complaint that he is being prejudiced in his prospecting operations by the landowners lack of co-operation. The Regional Manager would then apprise the landowner or occupier of the relevant provisions of the MPRDA being breached in terms of section 54(2) of the MPRDA.

[116] The above processes do not advance access. It is so that the landowner may advance grounds why he believes further access to the land is prejudicial to him. Section 54(3) only envisages that further procedures in terms of section 54(3) to 54(6) may be triggered where a conclusion is arrived that the owner/occupier is likely to suffer loss or damage. The above requires a subjective view by the landowner or occupier.

[117] Murphy J dealt with section 54 in Joubert NO v Miranda Mining Company (Pty) Ltd [2009] 4 All SA 127 (SCA) where among others the following was stated:

“The section deals with the compensation payable under certain circumstances From those provisions it is clear that the only topic for consultation is the question of compensation for loss or damage suffered or to be suffered as a consequence of the mining operations. Section 54 does not include a general provision that if the parties are unable to reach agreement on compensation that the

consequences of that is that the mining operations should be suspended. That will only occur where the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the mining permit holder ..."

- [118] The respondent has valiantly tried to resuscitate issues relative to compensation in these papers. However, they appear to have been after-thoughts that are geared at further keeping the applicants out of the farm and/or their prospecting operations.
- [119] It is so that the longer this dispute lasts, the more time set for operations elapse..."
- [30] It is not for this Court to determine, on an urgent basis, whether there was a breach in the compensation agreement or not. This Court has to establish whether Ntadile Minerals has made out a prima facie case to have all mining operations of Samancor on the property, seized pending the outcome of the section 54 dispute in terms of the Act.
- [31] Samancor contends that the fact that the parties entered into a lease and compensation agreement in 2021 with the issue of compensation payable as a result of Samancor's mining operations, has been resolved in that the payment of compensation is agreed to in terms of the compensation agreement.
- [32] It is also argued on behalf of Samancor that the remedies available to the parties are set out in the compensation agreement, which would include specific performance or an action claiming damages.
- [33] The question before this Court is whether Ntadile Minerals has made out a prima facie case for the relief sought. The relief sought by Ntadile Minerals is to have Samancor mining activities seized pending finalisation of the section 54 dispute of the Act.
- [34] Having regard to the answers given by Samancor to each of the allegations that Samancor is not disclosing the true amounts of ore, and that Samancor is concealing the ore that is mined, I hold the view that Ntadile Minerals has not made out a prima facie case for the relief sought.
- [35] As such, Ntadile has failed to prove a prima facie right to the relief sought.

Balance of convenience

- [36] For the sake of being detailed, I will briefly discuss the other requirements of an interim interdict.
- [37] Ntadile Minerals must prove that the balance of convenience favours the granting of an interdict pending the outcome of the dispute referred to in terms of section 54 of the Act.

[38] The relief must commensurate with the harm anticipated. Samancor has tendered that the fears of Ntadile Minerals will be furnished with an audit trail and that Ntadile Minerals may appoint a surveyor to monitor the ore mined, stockpiled, weighed and dispatched. This tender was not accepted by Ntadile Minerals on the basis that Ntadile Minerals persist that Samancor is manipulating the documents. This is stated as follows by the deponent to the affidavit of Ntadile Minerals:

“40. However, (Samancor) is still in control of the “audit trail” and as demonstrated by these proceedings it is not above doctoring of documents which would provide his audit trail, furthermore, (Ntadile Minerals) did make a call to (Samancor) as early as 13 May 2024 for joint removal inspections which were rejected.”

[39] In exercising the test of the balance of convenience, the following 2 factors are to be weighed and considered against each other:

39.1. Should the rule nisi be confirmed, what harm will Samancor suffer; and

39.2. Should the rule nisi not be confirmed, what harm will Ntadile Minerals suffer.

[40] In the event that the rule nisi is confirmed, Samancor will not be able to operate its mining business, which is contractually awarded by the owners of the property. In being prohibited to continue its mining business, 220 people will be left unemployed and a total amount of R4,5 million per day will be lost.

[41] In the event that the rule nisi is not confirmed, Ntadile Minerals will suffer potential harm in that it may not be compensated what it is due in terms of the lease and compensation agreement. This compensation due, is to be determined by the dispute resolutions established in the Act.

[42] The above exposition indicate that the balance of convenience favours Samancor and dictates against confirmation of the rule nisi.

[43] On this ground too, the rule nisi is to be discharged.

Alternative remedy

[44] The alternative remedy is found in the tender by Samancor to have a surveyor appointed to participate in the removal process.

[45] In addition, the compensation agreement confirms that the parties contemplated reconciliations, specifically mentions that despatch reports is to be reconciled with production certificates.

[46] The dispute instituted by Ntadile Minerals in terms of section 54 of the Act also provides an alternative solution than shutting mining operations down.

[47] The above illustrates that there are other adequate remedies available to Ntadile Minerals.

Irreparable harm

- [48] For the reasons set out above, irreparable harm is unlikely. The mine is an open cast mine and, at the very least, can the amount of ore that is removed, be estimated.
- [49] The audit trail of Samancor has to reveal the amount of ore that was removed. The compensation agreement acknowledges as much in clause 5.1 where it is stated that reconciliations be performed comparing the production certificates to the dispatched summaries.
- [50] Should the audit and comparison of the summaries reveal irregularities, Ntadile Minerals will have the right to claim compensation on a contractual basis for the amount of damages suffered.
- [51] On this basis, Ntadile Minerals has also failed to prove that it will suffer irreparable harm should the rule nisi not be confirmed.

Conclusion

- [52] Even in the event that the applicant has complied with all the requirements to be granted the interim relief as sought, the Court remains to have a discretion to exercise in granting the interim interdict. Such discretion is a judicial one which must be exercised according to law and upon established facts. See *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 562 (GP); *Knox D'Arcy Ltd v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (A); and *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* [1996] ZASCA 107; 1997 (1) SA 391 (A).
- [53] Having cognisance of the fact that Ntadile Minerals has not established the principles to be entitled to an interim interdict, this Court exercises its judicial power and determines that it would not be in the interest of justice that the rule nisi be confirmed.
- [54] It would not be just to shut the mining operations of Samancor down, pending the finalisation of the section 54 dispute of the Act.
- [55] The rule nisi should be discharged with immediate effect.

Cost

- [56] The normal rule is that the party that was successful, is entitled to be compensated by the party that was not successful.
- [57] I find no reason to deviate from the normal principle and the applicant Ntadile Mineral Resources should thus be ordered to pay the costs of the first respondent Samancor.

Order

In the premise, I make the following order:

- i) The rule nisi as granted on 10 June 2024 is discharged with immediate effect.

ii) The applicant is to pay the costs of the respondents who opposed the application.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF ARGUMENT: 10 JUNE 2024

DATE OF JUDGMENT: 19 JUNE 2024

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