IN THE HIGH COURT OF SOUTH AFRICA
NORTH-WEST DIVISON, MAHIKENG

CASE NO: 1126/24

In the matter between:

THARISA MINERALS PROPRIETARY LIMITED Applicant
Registration number: 2006/009544/07

and

ODIRILE RICHARD KGATEA First Respondent
Identity Number: 971208 5752 082

RONNIE KAGISO KOTSEDI Second Respondent
Identity Number: 881226 5845 081

FIRST AND SECOND RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

INTRODUCTION

1. The question facing this court is whether the final interdict should be granted following on the *rule nisi* that was granted on 20 March 2024.

2. In making its order, the Honourable Court is directed to consider whether:

2.1 The First and Second Respondents have proven that it is the Applicant's negative mining impacts which made the community to previously lodge various complaints with the DMRE Rustenburg offices and to visit the Applicant's mine operations. Put differently, whether there is nothing else which made the community to lodge complaints, other than health and safety hazards caused by the Applicant's operations in close proximity to a residential area;[1] and

2.2 Whether the First and Second Respondents have established grounds for this to be declared a SLAPP suit against community members who voice their concerns and lodge complaints against health and safety hazards and negative mining impacts caused by the Applicant.

2.3 It is submitted that the facts of this case calls upon this Honourable Court to develop SLAPP suit defence which is an area of our law that is still at its infancy and require further development, as shall be further stated below.

3. It is respectfully submitted that granting of a final interdict would not be a competent relief in light of the facts presented by the respondents – and the application should be dismissed with costs.

THE STRUCTURE

[1] Supplementary AA para 22.1.

4. These heads of argument are structured as follows:

4.1 Firstly, I first address the Honourable Court on the *point in limine* raised;

4.2 Secondly, I address the Honourable Court on the summary of the respondent's argument;

4.3 Thirdly, I address the Honourable Court on the summary of the Applicant's argument;

4.4 Fourthly, I address the Honourable Court on the summary of the material factual background;

4.5 Fifthly, I address the Honourable Court on the SLAPP suit;

4.6 Sixthly, I address the Honourable Court on why the Applicant does not meet the requirements of for final interdict;

4.7 Seventhly, I make final submissions; and

4.8 Lastly, I address the Honourable Court on the conclusion and the relief sought by the respondents.

5. I have used the terms as they are defined by the Parties in various affidavits.

POINT IN LIMINE

6. This is on the grounds of a necessary joinder and/or joinder as a matter of convenience.[2]

7. The reason for this is that it a settled principle of our law that interested and affected parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest.[3]

8. The root cause of the community of Mmaditlhokwa village previously lodging complaints with the DMRE and the Applicant's management at the mine is because of the negative impacts caused by the Applicant's mining operations in close proximity to a residential area.[4]

9. The DMRE and the DEDECT are the authorities which regulates the mining operations and the high waste rock dumps which continue to expand towards the residential area.[5]

10. Seen in that context, both the DMRE and DEDECT stand as interested and affect parties with a direct and substantial interest in the subject of this litigation and the two regulators have not been cited as parties.[6]

11. Put differently, without the mining rights and environmental authorisations granted and regulated by the DMRE and the DEDECT, there Applicant would

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[2] Herbstein and Van Winsen *The Civil Practice of the High Court* p 208. [2001] (4) SA 1230 (SCA) at para 9.
[3] Ibid.
[4] Ibid para 12.1 – 12.9.
[5] Ibid.
[6] Ibid para 13.

not be mining and causing negative impacts the community of Mmaditlhokwa village is subjected to.

12. The DMRE and the DEDECT stand as the enablers of the challenges (continued mining and waste rock dumps expansion) faced by the respondents and the community.

13. Hence the The community has lodged various complaints with the DMRE Rustenburg offices on (a) blasting that is taking place within 500 meters from residential houses leading to the DMRE issuing the Applicant with a stoppage instruction in terms of section 54 of the MHSA (the section 54 stoppage instruction was unlawfully uplifted during July 2023 and the issues remain unresolved - with the Applicant mine operations continuing undisturbed) (b) on health and safety incidents which result in damages to the houses and diseases leading to the DMRE initiating an inquiry to investigate the issues in terms of section 60 of the MHSA (the inquiry is still pending and the issues remain unresolved - with the Applicant mine operations continuing undisturbed).[7]

14. It is not a requirement that the Applicant should seek relief against every party cited – what is required is that, interested and affect parties with a direct and substantial interest in the subject of litigation should be cited and the matter brought to their attention.[8]

[7] AA para 47 – 48. Supplementary AA para 20.1 – 20.12.
[8] [2005] (5) SA 357 (W) para 71 -73.

15. The Applicant has failed and/or neglected to cite the DMRE and the DEDECT and bring this litigation to their attention.[9]

16. The failure to cite the DMRE and the DEDECT and bring these proceedings to their attention stand as non-joinder of necessary parties and/or non -joinder for convenience.

17. Accordingly, the *point in limine* raised should succeed and this application stand to be dismissed solely on the grounds of non-joinder of interested and affected parties.[10]

SUMMARY OF THE RESPONDENT'S ARGUMENT

18. The respondents submit that:

    18.1 The Applicant operates a mine on communal land;[11]

    18.2 The mine operations have continued to expand and currently on the community doorsteps;[12]

    18.3 The mine operations cause negative impacts such as fly rocks, cracking houses and windows as well as chronic diseases such as lung and eye diseases;

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[9] Supplementary AA para 12.
[10] [2005] (5) SA 357 (W) para 71 -73. Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa*.
[11] Supplementary AA para 22.4.
[12] Ibid paras 22.14 and 23.

18.4 The community has lodged various complaints with the DMRE Rustenburg offices on (a) blasting that is taking place within 500 meters from residential houses leading to the DMRE issuing the Applicant with a stoppage instruction in terms of section 54 of the MHSA (the section 54 stoppage instruction was unlawfully uplifted during July 2023 and the issues remain unresolved - with the Applicant mine operations continuing undisturbed) (b) on health and safety incidents which result in damages to the houses and diseases leading to the DMRE initiating an inquiry to investigate the issues in terms of section 60 of the MHSA (the inquiry is still pending and the issues remain unresolved - with the Applicant mine operations continuing undisturbed) (c) the community has also lodged complaints with the Applicant's management at the mine resulting in the security chasing the community away (the issues remain unresolved - with the Applicant mine operations continuing undisturbed).[13]

18.5 As can be seen, all these various complaints related to health and safety hazards caused by the Applicant's mine operations;

18.6 The Applicant in all its affidavits filed in this matter has not denied its operations causing health and safety hazards to the community of Mmaditlhokwa village. This should be taken as an admission;

18.7 Instead, the Applicant tries by all means to make the respondents and the community to appear as hooligans, lawlessness people refusing to

[13] AA paras 47 – 48. Supplementary AA paras 23 and 22.26.

abide by the law with the interdict as the only remedy[14], all which is denied;

18.8 Unfortunately for the community of Mmaditlhokwa village, lodging complaints with the DMRE and the Applicant's management at the mine has proved not to be the solution to the health and safety hazards experienced by the community;[15]

18.9 It is these various complaints lodged with the DMRE and the Applicant's management at the mine which resulted in the Applicant instituting legal proceedings on urgent basis – without first seeking an undertaking form the respondents and/or the community;[16]

18.10 The applicant also failed to take a suitable remedy of engage with the respondents and/or the community through its Social Labour Plan (SLP) and Community Liaison Officers (CLO) departments with the intention of amicably resolving the issues - prior to instituting legal proceedings on urgent basis;[17]

18.11 Instead, the Applicant seek an order interdicting the respondents and community members and directing the community to first make an appointment prior to lodging complaints – when the Applicant does not

[14] Applicant's HOA paras 9.2 – 9.4. Supplementary AA para 25.
[15] FA paras 70 – 91. AA paras 47 – 48. Supplementary AA para 22.22.
[16] See NoM and FA. AA para 58. Supplementary AA para 59.
[17] See NoM and FA.

make an appointment before causing health and safety hazards at its operations;[18]

18.12 The above demonstrates that this is a SLAPP suit against community members who voice their concerns and lodge complaints against negative mining impacts caused by the Applicant;[19]

18.13 The Applicant's conduct amounts to abuse of court process;[20]

15814 The Applicant has not established a case calling for a final interdict;

18.15 The Applicant has the following suitable alternative remedies available to it (since various complaints lodged by the community with the DMRE and the Applicant's management at the mine are not rescuing the community from their plight);[21]

18.15.1 The Applicant as a resourceful and established mining company should cause its SLP and CLO departments to engage with the local community and amicably resolve the health and safety hazards which continue to bother the community;

18.15.2 The Applicant will not suffer any harm by engaging with the community through its SLP and CLO departments at the

[18] Ibid.
[19] AA paras 68.1 – 68.6. Supplementary AA para 28.
[20] Ibid.
[21] Supplementary AA paras 39.2, 41 -42.

mine. The interdict sought demonstrates the Applicant's abuse of court process; and

18.15.3 Alternatively, the Applicant to relocate the current Mmaditlhokwa village to a safer place as advised by its environmental consultant SLR. The same reasons which caused the Applicant in its wisdom to relocate 850 persons in 2012 applies as the Applicant deliberately expanded its operations (mine and waste rock dumps) towards the houses while fully aware of the health and safety hazards which would materialise.[22]

SUMMARY OF THE APPLICANT'S ARGUMENT

19. The Applicants submits that:

19.1 Firstly, the community should feel free to lodge complaints with the DMRE and DEDECT on issues concerning the negative impacts caused by the Applicant's mining operations[23] – answer to this argument is that the community has already lodged various complaints with the DMRE during March and June 2023 and no positive outcome has come out of the section 54 stoppage instruction which was subsequently unlawfully withdrawn by the DMRE in cohort with the Applicant officials. The section 60 inquiry is pending with dates of resuming the investigation not

[22] Ibid paras 20.9 – 20.10, and 27.
[23] Applicant's HOA para 18, 19 and 97.

communicated by the DMRE while the Applicant and its contractors continuing with their operations;[24]

19.2 Secondly, the community should make prior arrangements to book appointment with the Applicant's management when coming to lodge complaints on Applicant's daily blasting, blasting flying rocks which continuously break house windows, house vibrations after blasting, dust and noise[25] – answer to this argument is that the Applicant does not make prior appointment with the community when daily blasting destroy community houses, causing noise day and night and causing dust leading to chronic diseases;[26]

19.3 Thirdly, the community should stay away from the Applicant's contractors even when such contractors site establish in close proximity to community houses and cause noise day and night[27] – answer to this argument is that there is no need for the Applicant to obtain an interdict for the reasons relied upon, instead the Applicant's SLP and CLO departments should engage with the community before the contractors site establish closer to houses. In fact the Applicant under para 106 of the FA admits that….. *"the Applicant has established for a and channels to address complaints from the community and ancillary matters. The*

[24] AA paras 47 – 48. Supplementary AA paras 22 .26, 22 .27, 22.28 and 22.31.
[25] See NoM and prayers sought.
[26] Supplementary AA paras 21.1. Applicant's HOA para 98.
[27] See NoM and prayers sought . FA paras Applicant's HOA para 21.

respondents are well aware of these fora and channels and have used same in the past" [28];

19.4 The Applicant in its heads of argument further reference Pebetsi of SLP and Bongani of CLO and states that *"….if there is anything that needs to be addressed, they must follow the right channel of communication between them as the community and SLP/CLO, by so doing they will get attention from the company and their demands will be taken to consideration"*;

16.5 Clearly there is no need for a drastic interdict such as the one sought by the Applicant when there are personnel and systems in place to address health and safety concerns raised by the respondent's and the community;

19.6 The upside of an interdict should it be granted, is that, the respondents and the community will in future fear approaching the SLP and CLO departments for fear of being in contempt of the final order;

19.7 Fourthly, the community should not reference the Applicant when complaining on social media about the Applicant's daily blasting, blasting flying rocks which continuously break house windows, house vibrations after blasting, dust and noise[29] – answer to this argument is that it is not practical to monitor and identify members of the public making

[28] FA para 26.
[29] See NoM and prayer sought.

comments on social media as the comments can be made by anybody from anywhere with fake social media profiles prevalent.

SUMMARY OF THE MATERIAL FACTUAL BACKGROUND[30]

20. The Applicant's open cast mine operations have grown from 1 (one) during the year 2008 to 6 (six) in 2024. The Applicant's mine high waste rock dumps has also increased during the same period.

21. Both the Applicant's mine open cast operations and high waste rock dumps have been expanded towards the houses and currently on the doorstep of the community houses including, the First and Second Respondents houses – and this is the cause of the respondent's and community's continued complaints regarding negative mining impacts caused by daily blasting, fly rocks, noise, dust, and contaminated drinking water.

22. The frontline houses in Mmaditlhokwa village are within 30 meters of the mine boundary fence as well as the mine high waste rock dumps and within 500 meters of the open cast operations. The old complaint of blasting taking place within 500 meters has not been resolved.

23. The First and Second Respondents are Environmental Justice activists and have voiced out their concerns about negative impacts caused by the Applicant's mining related activities in and around Mmaditlhokwa village where

[30] Supplementary AA paras 16 – 28.

they reside and how such negative mining impacts affects nearby surrounding communities.

24. In addition to voicing their concerns, the community of Mmaditlhokwa village have lodged complaints with the Department of Mineral Resources and Energy ("the DMRE") during June 2023 as well as the Applicant's management at the mine. All complaints related to the Applicants breach of the various provisions of the Mine Health Safety Act ("the MHSA").

25. On the complaints lodged with the DMRE: this has resulted in the Regional Inspectors issuing a stoppage instruction in terms section 54 of the MHSA directing the Applicant to stop its operations at the affected open cast operation until the health and safety concerns complaints were satisfactory resolved.

26. The section 54 stoppage instruction was unlawfully uplifted during July 2023 without resolution of the complaints lodged l satisfactory resolved.

27. The complaints lodged with the DMRE during March 2023 also led to the pending inquiry in terms of section 60 of the MHSA.

28. It is unknown when does the DMRE regional inspectors intend resuming the inquiry hearings so that the health and safety complaints raised can be investigated and a determination made.

29. On the complaints lodged with the Applicant's management at the mine: this has resulted the Applicant's management turning the community away without attending to the complaints.

30. It is submitted that it is the complaints lodged with the DMRE and the Applicant's management at the mine which resulted in this urgent application.

31. As can be seen from what is stated above, the community of Mmaditlhokwa has already lodged complaints with the DMRE as well with the Applicant's management at the mine and none of these complaints has yielded positive results.

32. At this point, the least the court can do is to dismiss the application with costs.

33. The granting of a final order will be tantamount to silencing the respondents and the community of Mmaditlhokwa from voicing the concerns as well as suppressing the community's human rights (freedom to express themselves and lodge complaints when their right to live in a healthy and safe environment is violated by the Applicant).

34. With the above background, it is submitted that, the circumstances of this case demonstrate that the Applicant's conduct amounts to a SLAPP suit.

SLAPP SUIT

35. SLAPP suit finds itself as an area of our law that is still at its infancy and require further development.[31]

[31] Supplementary Affidavit para 32.

36. It is submitted that this Honourable Court is seized with the authority to further develop this area of the law in light of the facts presented - and not denied by the Applicant.[32]

37. In *Beinash v Wixley*[33] it was held that courts have the authority to protect against the abuse of its processes, take steps to guard against this by dismissing and/or setting aside such applications or actions.

38. For example, the Applicant has not denied (a) the old and the current Mmaditlhokwa village is a communal private owned land (not a tribal land), (b) the Applicant has been expanding its mine open pit operations since 2008 towards the houses relocated in 2012 and currently operates 6 (six) pits, (c) the Applicant has been expanding its waste rock dumps towards the houses relocated in 2008, (d) 2 (two) drilling sites by RMH, (e) the local primary school is in close proximity to the mine operations and new tailing dam is under construction, and lastly (f) the current Mmaditlhokwa village community resides in close proximity to the Applicant's mine operations and the community is negatively impacted by the Applicant's daily blasting, blasting flying rocks which continuously break house windows, house vibrations after blasting, dust and noise.[34]

39. The Honourable Court is called upon to dismiss the application with costs and not shy away from developing this area of the law – in that the facts presented

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[32] Ibid.
[33] [1997] ZASCA 32.
[34] AA para 72. Supplementary Affidavit para 23.

qualify and calls for the development of the SLAPP suit defence recognised in our law.[35]

40. Furthermore, it is submitted that this Honourable Court should condemn the use of SLAPP suits, in that, these suits are tools of intimidation and harassment and highlight the "chilling effect" these suits have on the members of the public.[36]

How does a SLAPP suit come about:

41. A SLAPP suit come about when a party that stands with an upper hand and/or is resourceful (such as the Applicant as an established mining company) abuse court process or litigate vexatiously in order to achieve its nefarious intentions.[37]

42. Put differently, SLAPP suits are often used to intimidate or silence individuals who speak out on matters of public interest.[38]

43. The main objective is to burden the defendant with the costs, time, and stress of litigation, thereby discouraging them from pursuing critical or investigative activities.

44. In this case, the aim is to silence the respondents and the community of Mmaditlhokwa village and to disable them from complaining about the continuous negative mining impacts caused by daily blasting, fly rocks, noise, dust, and contaminated drinking water.[39]

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[35] Ibid at para 47.
[36] [2022] ZACC at paras 42 - 43.
[37] Ibid at para 42.
[38] Ibid.
[39] Supplementary AA para 44.

45. The Constitutional Court in the landmark *Mineral Sands Resources (Pty) Ltd and Other v Reddell and Others*[40] (the *Reddell* case) did two (2) important things.

46. Firstly, the court found that a defence that litigation amounts to a SLAPP suit is accommodated by our law because of the common law doctrine of abuse of court process. Put differently, abuse of court process doctrine accommodates SLAPP suits under its broad umbrella.[41]

47. The court further described other examples of abuse of court process, the first being the abuse of court rules to, for example delaying a case unnecessarily or asserting that a case is urgent when is not, relying on the rules developed by the court on urgency. [42]

48. The second being vexatious litigation which it describes as litigation brought repeatedly by a litigant and that lacks merit.[43]

49. The third form of abuse of court process are cases which are by nature illegal because their motivated by irrelevant underlying reasons.[44]

50. The court refers to unlawful arrest as an example of this form of abuse and explains that although the arrest itself does not amount to a court process but because of its illegal nature, it is a form of abuse.[45]

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[40] [2022] ZACC at paras 42 - 43.
[41] Ibid.
[42] Ibid at para 46.
[43] Ibid at para 47
[44] Ibid at para 76.
[45] Ibid at para 79.

51. Malicious prosecutions are another form of abuse, the fourth type which the court explains that the conduct of the malicious prosecutor and prosecution in general plays a central role in determining the existence of this from of abuse.[46]

52. Firstly, the court holds that SLAPP suits require an assessment of both the motive of the case and the merits, which unlike the other forms of abuse described above, may only be about the motive or merit but not both.[47]

53. If the litigation is brought by a party for ulterior motive or to achieve nefarious ends, this type of litigation could be found as constituting abusive litigation.[48]

54. Furthermore, and as confirmed by the court, the lack of merits of the case will also inform the ulterior purpose.[49]

55. The court deemed these lawsuits an abuse of the legal process, highlighting that SLAPP suits undermine fundamental principles of justice.[50]

56. The *Reddell* decision demonstrates that courts have the authority to protect defendants from this type of abusive litigation, even in the absence of explicit anti-SLAPP laws.[51]

57. In this case, the Applicant seek to interdict the respondents attending and gathering at the mine without an appointment; threatening or intimidating the

[46] Ibid at para 80.
[47] Ibid at para 92.
[48] Ibid.
[49] Ibid at para 96
[50] Ibid.
[51] Ibid.

Applicant and its employees; harming its personal safety and conducting any unlawful conduct in its premises.

58. It is submitted that the Honourable Court should find that litigation in this case was brought for an ulterior purpose or to achieve nefarious ends or constitute abusive litigation because:

58.1 The respondents have not threatened; intimidated or compromised and harmed the Applicants and/or its employees. The respondents have also not engaged in any unlawful conduct as described by the Applicant.[52]

58.2 Even if, this court may find that our efforts to engage the Applicant amount to unlawful conduct, the Applicant have not exhausted alternative suitable remedies available to it before approaching this court, this includes, approaching the SAPS and opening cases against the respondents; [53]

58.3 The Applicants have not provided this court with any evidence demonstrating and the linking the respondents to any unlawful conduct. The Applicant speaks of “old security reports” however the Applicant fails to disclose to this court why it has been seating with those reports all along;[54]

[52] AA para 85. Supplementary AA at para 39.2.
[53] Ibid.
[54] Applicant’s HOA para 66.

58.4 The respondents maintain that their engagement with the Applicant and have been assertive but peaceful. All have been directed at obtaining redress for and on behalf of all residents of the Mmaditlhokwa village;

58.5 The Applicant in its affidavits filed in this matter has failed to refute the respondent's version as being wrong or false;

58.6 The Applicant has also failed to demonstrate that this is not a SLAPP suit;

58.7 Instead, the Applicant opted to deny that it is the negative mining impacts such as daily blasting, fly rocks, noise, dust, and contaminated drinking water which made the community to lodge complaints.

Why this is a SLAPP suit:

59. It is submitted that a well resourceful mining company such as the Applicant should engage with the respondents through its SLP or CLO departments in order to meaningfully and amicably resolve the issues which seemed to be bothering the Applicant (visiting the mine offices without an appointment, defaming the Applicant and its employees through social media, harming and/or threatening to harm the personal safety of the Applicant's employees and

contractors, and engaging in any form of unlawful conduct aimed at disturbing the Applicant's employees and contractors operations) all which are denied.[55]

60. Engaging local communities in a peaceful and amicable manner is what established mining companies are known to be doing when dealing with host community members.

61. Instead, the Applicant in this instance resorted to flexing its muscles and using its resources by approaching this Honourable Court on urgent basis to seek an interdict against the vulnerable respondents without a warning and/or seeking an undertaking first.

62. The Applicant has failed to demonstrate what prevented it as a resourceful mining company from calling community meeting to engage with the respondents and the community of Mmaditlhokwa to resolve conduct sought to be interdicted.

63. Accordingly, the Applicant's conduct amount to a SLAPP suit and final order should not be granted.

64. The Constitutional Court in the *Reddell* case recognised that SLAPP suits described as lawsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest… not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of

[55] [2022] ZACC at paras 42 – 43, 96.

others… and deter that party, or other potential interested parties, from participating in public affairs.[56]

Is the SLAPP suit defence available to the respondents:

65. In the case of *Maughan v Zuma and Others*[57] (the *Maughan* case), the court further elaborated on this defence in South African law and confirmed that SLAPP suit can be raised as a defence whenever appropriate and not only limited to defamation cases.

66. It is submitted that the *Reddell* decision is binding on this court and SLAPP suit defence is available to the respondents in this case and should upheld as a shield against the mining company which seeks to silence and disable the respondents from voicing the concerns about negative impacts cause by mining.

67. The court in the *Maughan* case held that private prosecution of Maughan exhibited all the characteristics of a SLAPP suit because (a) it related to her journalistic obligations to report on matters of public interest (b) it infringed upon her right to freedom of expression and the public's right to access such information (c) it aimed to intimidate, harass, and silence Maughan as its underlying motive (d) it had poor prospects of success.[58]

REQUIREMENTS FOR FINAL INTERDICT

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[56] [2022] ZACC at paras 2, 42 – 43, 96. 2023 (5) SA at para 173.
[57] 2023 (5) SA at para 177 - 178.

[58] [2022] ZACC at paras 98.

68. It is settled law that the Applicant must establish requirements for a final interdict as set out in *Setlogelo v Setlogelo*.[59]

69. The three requirements are (a) a clear right (b) injury actually committed or reasonably apprehended (c) and the absence of a suitable alternative remedy.[60]

70. In *Olympic Passenger service (Pty) Ltd v Ramlagan[61] the court held that in* exercising its discretion the court weights, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of some doubt, the greater the need for the other factors to favour him. The court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities, Viewed in that light, the reference to a right which, though prima facie established, is open to some doubt" is apt, flexible and practical, and needs no further elaboration*".*

A clear right:

71. As outlined above, the Applicant operations takes place on communal land owned by the Mmaditlhokwa and the Applicant has not denied this fact.

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[59] [1914] AD at para 227.
[60] Ibid.
[61] [1957] (2) SA 382 (D) at para 383 D-G.

72. As landowners, the community of Mmaditlhokwa has a right to use and security of tenure over the communal land and right to live in a safe and healthy environment.[62]

73. As stated by the Constitutional Court in *both Bengwenyama-ye-Maswati v Generoh Resources (Pty) Ltd* and *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[63]

"Accordingly, given the invasive nature of a mining right, there can be no denying that when exercising her rights, the mining right holder, would intrude into the rights of the owner of the land to which the mining right relates. And the more invasive the mining operations are the greater the extent of subtraction from a landowner's dominium will it entail. On their own version, the respondents accept that it is not possible for them to undertake their mining operations whilst the applicants remain in occupation of the farm. It must follow from this that the applicants will be deprived of their informal rights to the farm if the order evicting them from the farm were allowed to stand".

74. The Applicant being the holder of the mining rights over the communal land has a duty to balance its right to exploit the minerals with those of the landowners.[64]

[62] [2011] (3) BCLR 229 (CC) at para 63. [2018] ZACC 41 paras 57-58.
[63] Ibid.

[64] Ibid.

75. The Applicant in arguing for its right to mine has not even attempted to explain why its right to mine should trump the communal rights.[65]

76. The respondents have a clear right to live in a safe and healthy environment and being descendants of the old Mmaditlhokwa village community which previously experienced the brutal end of the apartheid regime – the respondents have this Honourable Court as a measure of last resort to protect them from the far-reaching interdict sought by the Applicant.

injury actually committed or reasonably apprehended:

77. The following incidents seem to be relied upon by the Applicant to establish an injury actually committed or reasonably apprehended.

78. It is submitted that the argument below should be understood in the context of (a) the community of Mmaditlhokwa being the landowners and lawful occupiers of the village they live in (b) the community and the respondents have no history of using violence and threats against the Applicant even under the extremely harsh conditions the Applicant has subjected the community to (c) the Applicant in its Founding Affidavit, Supplementary Founding Affidavit and two Replying Affidavits has not demonstrated the use of violence and threats by the community and the respondents (d) the Applicant has not opened a case with the against the community and the respondents (e) the Applicant has not engaged the community and the respondents through its SLP and CLO departments to amicably resolve the issues (f) the Applicant has not sought an

[65] See FA.

undertaking from the respondents prior to instituting these proceedings on urgent basis (g) the community of Mmaditlhokwa is sick and tired of the negative impacts caused by the Applicant's mining operations.[66]

78.1 On the alleged October 2023 incident which relates to the alleged parking of vehicles in the blasting zone to prevent the Applicant's blast:[67]

78.1.1 This allegation is denied as per paragraph 118 of the Answering Affidavit.

78.1.2 It is disingenuous for the Applicant to allege potential financial losses (not actual) without demonstrating actual and/or potential financial impacts or numbers and grave safety risk posed to those alleged to have parked their cars in the blasting zone - when the Applicant knows and has not denied that it is the company's daily blasting that is causing blasting flying rocks which continuously break house windows, solar panels placed top of house roofs, house vibrations after blasting, dust, noise, and chronic lung and eyes diseases as well as contaminated drinking water.

78.1.3 It is these known negative impacts caused by the Applicant's mining operations which make the Applicant to fail explaining and taking the court in its confidence as to

[66] Supplementary Affidavit para 22.1.
[67] Applicant's HOA paras 34 – 42.

what could have been the cause of the community parking their cars in the blasting zone (which is denied).

78.1.4 The alleged blasting was only delayed as it took place later the same day.

78.1.5 In the event that the Applicant persists with its argument – it is submitted that if there is any party that suffered actual harm on the October 2023 date - it is the community of Mmaditlhokwa which suffered actual health and safety harm on the day as each blasting breaks house windows, solar panels placed top of house roofs, house vibrations after blasting, dust, noise, and chronic lung and eyes diseases as well as contaminated drinking water.

78.1.7 Accordingly, the Applicant has not proved actual and/or potential harm required for the granting of a final interdict.

78.2. On the 15 February 2024 incident where a group of approximately eight individuals allegedly interfered with RMH work:[68]

78.2.1 The Applicant is put to the proof of the allegations as per paragraph 134 of the Answering Affidavit.

[68] Ibid at paras 43 – 48.

78.2.2 What is clear from the Founding Affidavit and heads of argument filed by the Applicant is that no actual and/or potential violence occurred on the day in question.

78.2.3 It is submitted the alleged group would have caused violence if they wanted to - and that nothing stopped the alleged group from causing violence as such no interdict is not required.

78.2.4 In the event that there was violence (which the Applicant has not demonstrated) - surely the Applicant had an opportunity to take own initiative and open a case with the SAPS since RMH personnel feared for their lives - however the Applicant opted not to presumably because there was nothing to proof the allegations.

78.2.5 Instead of opening a case with the SAPS which costs no money for the incident to be investigated and culprits arrested - the Applicant has resorted to flexing its financial muscle on the respondents by seeks an interdict which is a drastic measure against the respondents and the community which have no history of using violence.

78.2.6 In the event that the Applicant persists with its argument – it is submitted that there is no proof of RMH personnel being threated and/or violence used against them on 15 February 2024.

78.2.7 The Applicant also has not explained what stopped the company from opening a case with the saps on its own.

78.2.8 Accordingly, the explanation that RMH personnel did not open the case as their feared for their safety does not prove actual and/or potential harm required for the granting of a final interdict.

78.3 On the 15 January 2024 incident where the respondents allegedly gathered at the Applicant's main gate and denied access:[69]

78.3.1 It is admitted that the respondents went to the Applicant's gate however the use of violence and threats are denied as per paragraph 138 of the Answering Affidavit.

78.3.2 It is clear from the Applicant's Founding Affidavit para 81 that the people who went to the Applicant's mine and waited at the gate on 15 January 2024 were making a follow up on the email sent to management regarding drinking water contaminated by the Applicant's operations.

78.3.3 The email referenced under para 81 of the Applicant's Founding Affidavit confirms that the Applicant is aware of the reasons why the people went and waited at its gate - however the applicant is again being disingenuous on its

[69] Ibid paras 63 – 65.

reliance on this 15 January 2024 incident allegation by not disclosing the facts.

78.3.4 To set the record, (a) the Applicant is aware of the daily negative mining impacts it is subjecting the respondents and the community to but the Applicant is refusing and/or neglecting to be a responsible corporate citizen (b) the alleged people would not have bothered themselves with going and waiting at the Applicant's gate had the Applicant management replied to the email as the content thereof was clear and only about drinking water contaminated by the Applicants operations (c) the alleged people would have caused violence if they wanted to – however the same people restricted themselves and remained peaceful until they went home without causing violence as such no interdict is required (d) even if the people wanted to force their entry into the Applicant's premises (which they did not) the Applicant's heavily armed security at the gate would have prevented them (e) the applicant does not make an appoint with the respondents and the community when subjecting them to daily negative impacts cause by mining – however the Applicant demands an appointment prior to complaints lodged.

78.3.5 In the event that the Applicant persists with its argument – it is submitted that if there is any party that suffered actual

harm on 15 January 2024 - it is the community of Mmaditlhokwa which suffered actual harm as the community drinking water remains contaminated to date.

78.3.6 Accordingly, the Applicant's reliance on the alleged 15 January 2024 incident and the explanation provided does not prove actual and/or potential harm required for the granting of a final interdict.

79. As stated above, the community has previously lodged various health and safety complaints with the DMRE and the Applicant's management at the mine and the issues have not been resolved[70] – yet the Applicant is seeking a final interdict and with an order directing the community to make appointment prior to lodging complaints as if the Applicant has history of resolving the complaints. [71]

80. The above various incidents which the Applicant seem to be relying on demonstrates that the people who allegedly went and waited at its gate without violence are not job seekers or people loitering around – but complainants against negative impacts caused by mining operations in and around their village.

Alternative suitable remedy:

[70] AA para 47 – 48.
[71] See NoM and relief sought.

81. The Applicant has the following suitable alternative remedies available to it (since various complaints lodged by the community with the DMRE and the Applicant's management at the mine are not rescuing the community from their plight):

81.1 The Applicant as a resourceful and established mining company should cause its SLP and CLO departments to engage with the local community and amicably resolve the health and safety hazards which continue to bother the community.

81.2 The Applicant will not suffer any harm by engaging with the community through its SLP and CLO departments at the mine.

81.3 The interdict sought demonstrates the Applicant's abuse of court process and a mining company flexing its financial muscle on the vulnerable respondents and community of Mmaditlhokwa village.

81.4 Alternatively, the Applicant to relocate the current Mmaditlhokwa village to a safer place as advised by its environmental consultant SLR.[72]

81.5 The same reasons which caused the Applicant in its wisdom to relocate 850 persons in 2012 should apply as the Applicant deliberately continue to expand its operations (mine and waste

[72] Supplementary AA para 20.9.

rock dumps) towards the houses while fully aware of the health and safety hazards which would materialise.

82. In other words, there will be no need for the respondents and the community to make prior appointments to visit the Applicant's management if either or both of the above alternative suitable remedies is ordered.

83. This available remedy will ensure that the Applicant's officials meet and peacefully engage with the community at designated areas.

83. Furthermore, no violence or threats amongst the community, Applicant employees and contractors will arise if either or both of the above alternative suitable remedies is ordered.

84. Accordingly, the application stands to be dismissed with the Applicant directed to pursue any of the suitable alternative remedies.

FINAL SUBMISSIONS

85. Nowhere in the affidavits filed by the Applicant has the Applicant demonstrated past and future use of violence and/or threats by the respondents against the Applicant, its employees and contractors such as RMH.

86. Furthermore, nowhere in the affidavits filed by the Applicant has the Applicant identified the respondents using violence and/or threats against the Applicant, its employees and contractors such as RMH and why the respondents are the only ones from Mmaditlhokwa village to be interdicted.

87. It is a fallacy that the respondents and the community of Mmaditlhokwa village are or will threaten the Applicant and its contractors such as RMH operations.

88. Accordingly, there is no conduct of the part of the respondents which calls for the granting of a final order.

89. It is noted that the Honourable in exercising its discretion decided to add the words "*and other people acting on behalf of the respondents"* into the order that was made on 20 March 2024.

90. It is respectfully submitted that *"and other people acting on behalf of the respondents"* is not the Applicant's pleaded and proven case and the Honourable Court is discouraged from extending such ruling.

91. It is a settled principle of our law that the founding affidavit must set out a cause of action and the Applicant must stand or fall by its pleaded and proven case in the founding affidavit.[73]

92. It further a settled principle of our law that the necessary allegations must appear in the supporting affidavits.[74]

93. In light of the complaints already lodged with the DMRE and the Applicant's management at the mine which have not yielded positive results, the granting of a final interdict will be tantamount to silencing the respondents and the community of Mmaditlhokwa from voicing the concerns as well as suppressing the community's human rights (freedom to express themselves and lodge

[73] Herbstein and Van Winsen *The Practice of the High Courts of South Africa* p 439.
[74] Ibid p 410.

complaints when their right to live in a healthy and safe environment is violated by the Applicant).

CONCLUSION

94. It is common cause that the community has lodged various complaints with the DMRE Rustenburg offices on (a) blasting that is taking place within 500 meters from residential houses leading to the DMRE issuing the Applicant with a stoppage instruction in terms of section 54 of the MHSA (the section 54 stoppage instruction was unlawfully uplifted during July 2023 and the issues remain unresolved - with the Applicant mine operations continuing undisturbed) (b) on health and safety incidents which result in damages to the houses and diseases leading to the DMRE initiating an inquiry to investigate the issues in terms of section 60 of the MHSA (the inquiry is still pending and the issues remain unresolved - with the Applicant mine operations continuing undisturbed) (c) the community has also lodged complaints with the Applicant's management at the mine resulting in the security chasing the community away (the issues remain unresolved - with the Applicant mine operations continuing undisturbed).

95. The issues raised by both parties establish a *bona fide* dispute of fact.[75]

96. The Applicant in all its affidavits filed has not denied its operations causing health and safety hazards to the community of Mmaditlhokwa village. This should be taken as an admission by the Applicant.

[75] See FA, AA, Supplementary FA, Supplementary AA and two RA filed.

97. In line with principle enunciated in *Plascon-Evans* when factual disputes arise, therefore, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order.[76]

98. In this case the respondent's version raise a real genuine or *bona fide* dispute of fact, is not far-fetched or clearly untenable, and the Honourable Court is asked not to dismiss or reject the respondent's version.[77]

99. For the reasons set out above it is apparent that the application is a SLAPP suit, has been brought *mala fide* and for an ulterior purpose, and constitutes an abuse of process.

100. In the premises, I submit that the respondents have made out a case for the relief they seek, and that this application must therefore be dismissed with costs, including cost of counsel.

MODISE SHAKUNG

CHAMBERS, JOHANNESBURG

28 April 2024

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[76] [1984] (3) All SA 623 (A).

[77] Ibid.

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