IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 34563/2017

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

23 November 2017

(Signature)

AMAYA MINING (PTY) LTD	**Applicant**
and	
MADIMETJA PHELADI PROJECTS AND MINING CC	**1st Respondent**
LESIBA EDWARD LEDWABA	**2nd Respondent**
MEDIMETJA CHARLIE LEDWABA	**3rd Respondent**
CECILIA NAPYADI MAZWI	**4th Respondent**
MIHLEKETO OSCAR MIYAMBU	**5th Respondent**
MATOME HUMPHREY MOKGOBI	**6th Respondent**

Heard on: 15 November 2017

Delivered on: 28 November 2017

JUDGMENT

DE VILLIERS AJ:

[1] This matter has been allocated to me for adjudication from the Pretoria High Court. I have a discretion to hear the matter (**Thembani Wholesalers (Pty) Ltd v September and Another** 2014 (5) SA 51 (ECG) at para 13). Both counsel are from Johannesburg, and the Pretoria High Court and the Johannesburg High Court have concurrent jurisdiction (**Government Notice** 30 published in Government Gazette 39601 of 15 January 2016). I exercised my discretion and heard the matter.

[2] The applicant sought relief pursuant to a mining and exploration agreement concluded between it and the first respondent on 7 December 2012. At the commencement of the hearing, the applicant sought a referral to trial. The respondent opposed a referral to trial and sought a dismissal of the application.

[3] The applicant's case is that it was unaware of any disputes between the parties before launching the proceedings as the respondents ignored all communications between the parties. The issues that have arisen since, relate to (1) the interpretation, effect of, and possible waiver of two clauses in the agreement under the heading '*conditions precedent*', (2) what had transpired with regard to the disposal of membership interests between the second and sixth respondents, and (3) what the status of ministerial approval of a prospecting right is.

[4] I took into account that the first issue would require evidence not yet pleaded. The latter two issues are not in the nature of a conflict between two versions, but more in the nature that they require discovery for the

issues to be determined. In those two instances, the case so presented at trial may differ from the case made out in the founding and replying affidavits.

[5] I also took into account that almost no costs would be saved if a summons has to be served afresh. In addition, the agreement is not very clear. The applicant probably should have foreseen that the current law almost invariably requires contextual evidence on interpretation. I say this knowing that the wisdom of hindsight is not available to practitioners when they make the election between motion and trial proceedings, and hence without intending to criticise the decision to approach the court by way of motion proceedings.

[6] My discretion in this instance is set out in **Uniform Rule** 6(5)(g):

> '*Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.*'

[7] The respondent sought a dismissal of the application on three grounds.

[8] First, the respondent argued that the agreement in issue was between the applicant and the first respondent and that the applicant acquired no rights against the first respondent's shareholders, the second to sixth respondents. I may add by way of explanation that the first respondent has been converted from a close corporation to a company, hence the reference to shareholders and not to members. The relevant clause in the agreement reads:

'b) In the event that the right holder[1] wishes to change its shareholding structure, the contractor[2] will have the first option of refusal on purchasing any shares that the right holder wishes to issue or the right holder's shareholders wish to dispose of.'

[9] Second, the first respondent denies that it has issued shares. The applicant never had evidence to the contrary. This, read with the previous paragraph, would on its own point to a dismissal of the application. The general rule is that I should dismiss an application where an applicant has failed to make out a case for the relief claimed (**Transnet Ltd t/a Metrorail and Others v Rail Commuters Action Group and Others** 2003 (6) SA 349 (SCA) at para 22 and 24).

[10] Third, the respondent argued that the agreement is void in that suspensive conditions have not been fulfilled. The relevant clause in the agreement reads:

'2. CONDITIONS PRECEDENT

a) The contractor and Kwanza Gold Exploration conclude an agreement for the contractor to acquire the cession, rights, loan accounts, geological information and exploration results of Kwanza Gold Exploration (Pty) Ltd over the right holder and the prospecting right, under a separate agreement with Kwanza Gold Exploration (Pty) Ltd.

b) The right holder is granted an extension to the prospecting right for a period of five years. If an extension is granted for a period of less than five years, the contractor reserves the right to, at his sole and only discretion, waive the five year requirement and accept whatever shorter period is granted by the authorities.'

[11] Due to the decision that I have taken in this matter, I believe that I should not comment much on the most likely interpretation of the two clauses. In my view, the applicant ought to have dealt with these in its founding papers, and did not do so.

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[1] The first respondent;
[2] The applicant;

[12] I asked if the respondents, in the alternative would prefer a referral to trial or to evidence. The answer was that an attempt to formulate a referral to evidence would show that this is a matter that should come to an end. There is merit in this view.

[13] It is common cause that the application cannot properly be decided on affidavit. In this case, I believe that I should not exercise my discretion to refer the matter to trial.

Accordingly I grant the following order:

1 The application is dismissed with costs.

DP de Villiers AJ

On behalf of the Applicant:	Adv J Daniels
Instructed by:	Fullard Mayer Morrison Inc
On behalf of the Respondents:	Adv J M Heher
Instructed by:	Maubane Mphahlele Attorneys