REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 055281/23

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

TAU LEKOA GOLD MINING COMPANY Applicant

And

NICOLAR (PTY) LTD Respondent

JUDGMENT

MAKUME, J:

[1] This matter served before me in the Urgent Court on the 27 June 2023 in which the Applicant sought an order that the Respondent be directed to provide the Applicant with certain reports and information detailed in paragraphs 2 and 3 of the notice of motion. Secondly directing the Respondent to deliver within 5 days an account for debatement.

[2] The Respondent maintained that the Application was not Urgent secondly that there are serious dispute of fact not capable of being resolved on motion.

[3] On the 17th July 2023. I granted the order as prayed for by the Applicant. What follows hereunder are my reasons for the judgement and order.

THE PARTIES

[4] The Applicant Tau Lekoa Gold Mining Company Ltd is a private company with limited liability duly incorporated and registered in accordance with the Company Laws of the Republic of South Africa with its principal place of business situated in Johannesburg within the jurisdiction of this Court.

[5] The Applicant is the holder of Mining rights granted by the Department of Mineral Resources and Energy under references number NW20/5/1/2/2/17 MR and FS 30/5/1/2/2/03 MR. It operates and owns a goldmine situated at Portion 1[…] Goedgenoeg 4[…] IP in Orkney Northwest Province.

[6] The Respondent owns and operates an ore processing plant at Buffelsfontein in terms of its precious metals refining licence number AP17994.

THE AGREEMENT

[7] It is common cause that on or about the 14th March 2023 the parties concluded a Treatment Agreement being agreement number SPS0236. The terms and conditions of that Agreement are not in dispute.

[8] In terms of clause 5.1 of the Agreement the Applicant would deliver to the Respondent its gold bearing material consisting of run of mine ore also known as contractor extract for purposes of treatment in order to produce doré bars where after the Respondent would then deliver the dore bars to the Refinery so that gold and/or silver bullion could be produced.

[9] It was a further term of the Treatment Agreement that the Respondent should procure that the Applicant's metals account at the refinery be credited with gold and/or silver to the value of the gold and/or silver allocated from the contractor extract.

[10] Besides treating extract delivered to it by the Applicant the Respondent also was entitled to treat its own and other third parties extract or other unprocessed metal or mineral.

[11] Clause 11 of the Treatment Agreement has the heading "Record Keeping" and read as follows:

> 11.1 The Company (meaning Nicolar the Respondent) shall keep reasonable
>
> written and electronic records with regards to all matters arising out of this Agreement and without limitation of the foregoing, shall keep proper records with regard to all contractor extract delivered by the contractor to the Nicolar Plant.
>
> 11.3 The Company shall render to the contractor on a daily basis and each month a statement of the volumes measured in tonnages of the contractor extract delivered to the Nicolar Plant.
>
> 11.4 The Company shall render to the contractor on a daily basis (only if and when the information is available) and at the end of each month a statement of the volumes in tonnages of the contractor extract delivered to the Nicolar Plant, the average grade and the moisture content of the contractor extract and the tonnage treated.
>
> 11.5 The Company shall at all reasonable times make the records kept by it in terms of clause 11.1 available for inspection at the request of the duly authorised representative of the contractor. The contractor shall likewise keep reasonable records with regard to all matters arising out

of this Agreement and shall at all reasonable times make such records available for inspection by the duly authorised representative of the Company.

[12] It was a term of the agreement that the Applicant will make payment of treatment fees levied by the Respondent as consideration for the services rendered for the treatment of the contractor extract.

[13] It is not in dispute that the Respondent has the obligation in terms of the Treatment Agreement to provide documentation to the Applicant and to account fully for all material processed at the Respondent's ore processing plant. What the Respondent says is that all relevant information pertaining to the contractor extract brought and treated and the allocation of precious metals was furnished to the Applicant.

URGENCY

[14] Besides its response to the merits the Respondent has raised a number of points in *limine* amongst them that the application is not urgent and falls to be struck off the roll. I allowed the parties to address me on the merits as well besides the point in *limine*. My reasoning for that being that it is one of those matters where merits overlap into the points in *limine* raised. Having heard the parties, I reserved judgement and later granted an order upholding all the prayers of the Applicant.

[15] This matter is urgent for the reasons set out in the Applicant's Founding Affidavit as well as in the Applicant's Heads of Argument. This is a Commercial matter in which amongst others the livelihood of about 2000 unskilled labourers is dependent on. The Court in **Twentieth Century Fox Film Corp v Auto Black Films (Pty) Ltd 1982 (3) SA 582 (W)** held as follows:

> "In my opinion the urgency of Commercial interest may justify the invocation of Uniform Rule 6(12) no less than any other interests. Each case must

> depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter I assumed as I have to do, that the Applicants case was a good one and that the Respondent was unlawfully infringing the Applicant's copy right in the films in question. Having regard to the obvious substantial value of the rights in question, I formed the view that an unlawful infringer, if the Respondent is one should not be entitled to a Windfall only because the Court happened to be in recess for a period of two months."

[16] In paragraph 15.4 of its Founding Affidavit the Applicant says the following amongst others

> "The Applicant faces a real prospect of not being able to operate as a going concern in the near future if the Respondent continues to refuse to account fully to the Applicant in accordance with the terms of the Treatment Agreement (which is already stated above renders the Applicant unable to take any steps to protect its interest) while the Applicant broke-even in March 2023, it made an operating loss in April 2023 and this as a consequence of the Respondent's under-allocation of gold and silver."

IS THERE IN REALITY A GENUINE DISPUTE OF FACT

[17] It is common cause that the purpose of this application is to compel the Respondent to account to the Applicant for the gold and other precious metals and to provide the necessary documentation to Applicant in terms of the Treatment Agreement. The Respondent in its Answering Affidavit and the heads maintains that "there exists a massive factual dispute, which is evident from the papers before the Court."

[18] What the Respondent fails to do is to point out where and what the dispute is. The Respondent firstly does not dispute that under the Treatment Agreement it has or bears the obligation and responsibility to provide documentation and account fully to the Applicant's regarding all the materials processed at the Respondent ore processing plant.

[19] Rule 6(5) (g) provides that where an application cannot properly be decided on affidavit presumably because of a dispute of fact the Court may dismiss such application or make such order as it seems meet with a view to ensuring a just and expeditious decision.

[20] In **Ripoll-Dausa vs Middleton N.O. and Others 2005(3) SA 141 (C)** the question was whether there was a real genuine or *bona fide* dispute of fact on the affidavits Davis J held that the Court may in certain circumstances proceed on the basis of the correctness of alleged facts where the Respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5) (a). In particular, at paragraph 151 the Court said the following: "In certain instances the denial by Respondent of a fact alleged by the Applicant may not be such as to raise a real genuine or *bona fide* dispute of fact."

[21] Applying the approach to factual disputes as narrated in **Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA)**. I have come to the conclusion that no real and genuine dispute of facts exist. This matter is capable of being decided on the papers before me.

THE ALLEGED NON-COMPLIANCE WITH RULE 41A

[22] Uniform Rule 41A (2) (a) states as follows:

> "In every new action or application proceedings the Plaintiff on application shall together with the summons or combined summons or notice of motion serve on each Defendant or Respondent a notice indicating whether such Plaintiff or Applicant agrees to or opposes referral of the dispute to mediation."

[23] The Applicant subsequently did serve such a notice on the Respondent with its Replying Affidavit. The question is whether this nullifies the process *ab initio* or whether this Court can condone such failure. The Respondent in order to succeed with this point in *limine* must indicate how such failure has

prejudiced it in its defence. The Applicant has referred this court to two decisions in their heads of argument being matter of **Nomandela and Another v Nyandeni Local Municipality and Others 2021 (5) SA 619 (ECM)** as well as the unreported decision of **Growth Point Properties vs Africa Master Blackchain Company (Pty) Ltd**. The long and short of those decision is to the effect that failure to serve the Rules 41A notice with the Founding papers does not a bar to the application being heard. This point in *limine* is likewise dismissed.

ALLEGED LACK OF JURISDICTION

[24] This point in *limine* is a non-starter. The Respondent has avoided to deal with the contents of clause 26.2 of the Treatment Agreement in which the parties specifically agreed to subject themselves to the jurisdiction of this Court. I do not understand what the Respondent means when it says that "Although the parties consented to the jurisdiction the aforesaid consent is in direct contradiction with the geographical area in which the sole cause of the dispute as alleged by the Applicant arose including the Respondent's chosen *domicilium citandi et executandi*.

[25] The fact of the matter is that when the Respondent concluded the Treatment Agreement it knows where its *domicilium* was and waived that right willingly. The Respondent does not allege any misrepresentation. I accordingly also dismiss this point in *limine*.

NON-COMPLIANCE WITH THE ARBITRATION CLAUSE

[26] The Respondent relies on clause 22.1 of the Treatment Agreement which provides that in the event of any dispute arising between the parties such dispute should be referred to arbitration and that failure to refer such a dispute to arbitration makes the Applicant non-suited to proceed with this application. The Respondent fails to take cognisance of clause 22.5 which reads that "nothing herein contained shall be deemed to prevent or prohibit either party

from applying to the appropriate Court for urgent relief or for judgement in relation to a liquidated claim.

[27] The Applicant seeks urgent relief in this matter and has accordingly acted properly. In any event I have already made a finding that this application is urgent. In **Delfante v Delta Electrical Industries 1992 (2) SA 221 (C)** the Court held that an arbitration agreement is no automatic bar to legal proceedings in respect of disputes covered by the agreement. This point in *limine* also must fail and it is accordingly dismissed.

THE MERITS OF THE APPLICATION

[28] The Applicant's case on the merits is set out in paragraph 13 of the Founding Affidavit and in particular at paragraph 13.1.2 the Applicant sets out the quantity gold of submitted to the Respondent and what the shortfall was. In reply the Respondent makes a bare denial. It is clear that the Respondent has up to now failed to understand what the issue is it is not the under allocation of gold and silver by the Respondent to the Applicant but rather the issue relates to the failure by the Respondent to account and furnish documents to the Applicant in contravention of its contractual obligation.

[29] The Respondent has failed to give reason why it should not abide by the provisions of clause 2.3 of Annexure B to the Treatment Agreement or the detailed calculation of Reconciled Amount as envisaged in clause 2.4.1.2 of Annexure B.

[30] The Respondent has in paragraph 9.3 of its Answering Affidavit conceded that it has information pertaining to the accounting under the Treatment Agreement and fails to provide such information to the Applicant in contravention of the Agreement.

[31] It is rather surprising that at paragraph 9.8 of their answer the Respondent say that it is common cause between the parties that from the onset there will be certain teething problems due to implementation of new procedures by

Nicolar. The Respondent does not say what teething problems are those that it is referring to and how that should be an excuse not to comply with their contractual obligation.

[32] It is clear that to date hereof the Respondent has only provided weekly interim calculation and not the monthly reconciliation for all sources. The provisions of weekly interim reports are inadequate and do not amount to a full and proper accounting as envisaged in the Treatment Agreement.

[33] The Respondent makes the point further that the documentation furnished only refers to the Applicant ore. It is not a gold plant allocation sheet containing the breakdown of the complete allocation of gold and silver from all sources as envisaged in clause 2.3.2.1 of annexure B.

[34] I am satisfied that the Respondent has failed to satisfy this Court that it has complied with its obligation in terms of the Agreement. In the result I make the following order:

ORDER

1 The Respondent is directed to provide to the Applicant, in accordance with the Treatment Agreement concluded between them on 14 March 2023 (**Treatment Agreement**), within 5 (five) calendar days of the date of this order for the months of March, April and May 2023, and within 5 (five) calendar days of demand in respect of any period thereafter:

1.1 Daily total plant production files for all ore sources (Metallurgical Accounting files);

1.2 Daily total plant Assay File reports;

1.3 Weekly total plant gold and tonnage forecasts per source;

1.4 Monthly total plant Excel-based gold allocation for all sources, which includes information on the grade, recovery, preg-robbing, tons and final gold allocated;

1.5 Month-end total plant gold-in-process or Work-In-Progress;

1.6 Monthly total plant production files for all sources;

1.7 Monthly total plant silver allocations;

1.8 Dispatch notes issued for each month.

2 The Respondent is directed, within 5 (five) calendar days of this order, and for the months of March, April and May 2023 to:

2.1 render an account to the Applicant under the Treatment Agreement in respect of all sources of metals for the entire plant, fully supported by the necessary books, records and documents, including, without limitation:

2.1.1 daily production rates;

2.1.2 monthly production as well as the month-end gold in process;

2.1.3 daily and monthly statement of the volumes in tonnages of the Contractor Extract, the average grade and the moisture content of the Contractor Extract and tonnage treated;

2.1.4 weekly calculation of Weekly Produced Gold;

2.1.5 monthly calculation of the Actual Dispatched Gold per source and a reconciliation with the Produced Gold;

2.1.6 breakdown of the complete allocation of gold accounted for from all sources, including but not limited to volumes, grades, moisture content and tonnages treated per source;

2.1.7 a detailed calculation of the Reconciled Amount;

2.1.8 the volumes and specifications of the Contractor Product delivered to the refinery and satisfaction of the Applicant that HGSA's Account has been credited in accordance with the Treatment Agreement; and

2.2 make available for inspection and copying any books of accounts, records, documents and vouchers relating to its activities, as may be demanded by the Applicant for purposes of giving effect to prayer 3.1; (collectively, an **Account**).

3 The Respondent is directed, within 5 (five) calendar days of any demand by the Applicant in respect of periods after May 2023 to provide an Account.

4 The Respondent is directed to debate the Account with the Applicant, pursuant to the Respondent complying with prayer 3 and/or 4, within 10

(ten) business days of such compliance, at the Respondent's business premises situated at Portion […], Hartebeesfontein 4[…] IP, off the R502 section west of Vermaasdrift Road, Buffelsfontein and within such period to formulate a list of disputed items, if any.

5 The Respondent is directed to pay the costs of this application on an attorney-client-scale.

Dated at Johannesburg on this day of August 2023

_____

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	27 JUNE 2023
DATE OF JUDGMENT	:	14 AUGUST 2023
FOR APPLICANT	:	ADV HC BOTHMA
INSTRUCTED BY	:	MESSRS VAN COLLER BLOM INC
FOR 1ST TO 8TH RESPONDENTS:		ADV AM VIVIERS
INSTRUCTED BY	:	DLA PIPER SOUTH AFRICA (RF) INC