IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 400/23

In the matter between:

UASA-THE UNION	**Applicant**
and	
ANGLO AMERICAN PLATINUM LIMITED	**First Respondent**
RUSTENBURG PLATINUM MINES LIMITED	**Second Respondent**
THE MINISTER OF MINERAL RESOURCES AND ENERGY	**Third Respondent**
THE CHIEF INSPECTOR OF MINES	**Fourth Respondent**
THE PRINCIPAL INSPECTOR OF MINES: (NORTH-WEST, RUSTENBURG) REGION DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**Fifth Respondent**
THE MINISTER OF EMPLOYMENT AND LABOUR	**Sixth Respondent**
THE CHIEF INSPECTOR –OHS	**Seventh Respondent**
NATIONAL UNION OF MINEWORKERS	**Eight Respondent**
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**Ninth Respondent**

Heard: **5 December 2023**

Delivered: **10 MAY 2024**

Summary: Declaration-Mine Health and Safety Act is not applicable to Retained Operations of the First and or Second Respondent-Declaratory requirements are met- Labour Court as a creature of statute, lacks jurisdiction to Occupational Health and Safety Act-Application is dismissed with costs.

JUDGMENT

DIKOTLA, AJ

Introduction

[1] The issue before this Court is the following:

1.1 Declaring that the Mine Health and Safety Act, 29 of 1996 and its Regulations (hereinafter referred to as MHSA) are applicable to the operations known as Retained Operations of the First and or Second Respondent;

1.2 Declaring that the Occupational Health and Safety Act, 85 of 1993 and regulations (hereinafter referred to as OHSA) are not applicable to the aforesaid operations;

1.3 The Applicant further seeks a cost order against those of the Respondents opposing this application on the scale of attorney and client.

[2] The referred Retained Operations are operated by the Second Respondent (Rustenburg Platinum Mines Ltd) hereinafter referred to as (RPM) or by the First Respondent (Anglo American Platinum Limited) hereinafter referred to as "AAP" through the Second Respondent.

[3] The Retained Operations consist of:

3.1 Anglo American Platinum Rustenburg Platinum Mines Ltd, Waterval Smelter;

3.2 Anglo American Platinum Rustenburg Platinum Mines Ltd, Anglo Convertor Plant (ACP);

3.3 Anglo American Platinum Rustenburg Platinum Mines Ltd, Precious Metals Refinery (PMR);

3.4 Anglo American Platinum Rustenburg Platinum Mines Ltd, Rustenburg Base Metals Refinery (RBMR); and

3.5 Anglo American Platinum Rustenburg Platinum Mines Ltd, Mortimer Smelter.

[4] The application is opposed on the basis of numerous grounds.

Background facts

[5] The facts are clearly recorded and mostly common cause. Therefore, there is no need to burden this judgment with a repetition of the entire factual background, unless where deemed necessary.

[6] So far, it is sufficient to record that:

6.1 The First Respondent is a well-established diversified global mining company with a historic existence in South Africa, and the Second Respondent is a subsidiary to it.

6.2 The application is instituted by the Applicant which is a recognized and registered trade union in terms of the relevant provisions.

6.3 The other parties with deemed direct and substantial interest are cited herein and also served accordingly.

6.4 The Retained Operations are owned and operated by RPM which is a subsidiary of AAP, whereas both are hereinafter referred to as First and Second Respondents respectively.

6.5 The First Respondent has embarked on a process of restricting its business during the period of 2016 and 2018 respectively, and consequently sold the respective mining rights to third parties.

Legislative History

6.6 The OHSA is dedicated to workers in general whilst MHSA is a kind of specialised legislation dedicated to the mining industry as informed by the Mineral and Petroleum Resources Development Act 28 2002.[1]

6.7 Historically, the Mines and Works Act[2] hereinafter referred to as (MWA) legislatively answered for purposes of mineworkers' health and safety rights up until it was substituted as a result of its amenability to discrimination, seemingly on the basis of race and also that it was incidentally promulgated during the difficult days of apartheid.[3]

6.8 With the deficiencies attributable to MWA, as well as the birth of the Eight Respondent at about the early 80's in a way to *inter alia* advocate the social as well as economic wellbeing of workers within the mining industry, the legislative scope was expanded rapidly. So far, it is only fair to acknowledge its historic contribution to indefinite health and safety challenges in the mining belt.

6.9 During the same period, the post 80's, Machinery and Occupational Safety Act[4] hereinafter referred to as (MOSA) was promulgated in order to detain health and safety aspects in general. Later on, in the early 90's Mine Health and Safety Act which herein referred to as "MHSA" was revolutionary advocated by the Eight Respondent, and apparently on the basis of undistorted history, together with the predecessor to Third Respondent influenced the passing of MHSA into law.

6.10 Meanwhile in 1993 on the same breath, the Occupational Health and Safety Act which is legislatively administered by the Sixth and Seventh Respondents by virtue of vested executive powers came into being, with the primary purpose of regulating health and safety on a broad scope. OHSA was mandated and jurisdiction is a clear reflection of the need to address the health and safety rights of workers in general.

6.11 In the meantime, the Republic of South Africa evolved into a democratic sequence, and thereafter both the interim Constitution and final

[1] Masilo and Rautenbach "Commentary on Mine Health and Safety Act and Regulations" (2009) Vol.2 *Journal of South African Law.*
[2] Act 27 of 1956.
[3] Refer supra to Masilo and Rautenbach Commentary on Mine and Safety Act and Regulations.
[4] Act 6 of 1983.

Constitution[5] took over the discriminatory space, with the cumulative purpose of correcting the historical imbalances of the past. In any way, the apartheid bridge was on the verge of destruction.

6.12 Having said so, it is remarkable that some fundamental rights which are contemplated in the bill of rights, including section 24 of the Constitution, which entrenched the right to an environment that is not harmful to health or well-being, passed into final constitutional stage without hassle. On the other hand, section 22 of MHSA which provides for the health and safety of employees has been implicated in the process, and cannot be undermined. In the circumstances, if these rights are as important as they are, if not protected, then the non-derogable rights like the right to life would be risk zoned.

6.13 Therefore in the due process of interpreting the application of the relevant legislation as may be applicable in the Retained Operations, the imminent implications of section 39 (2) of the Constitution[6] which would in addition to the Interpretation of Statute Act and other relevant authorities, be invoked, where applicable.

<u>The crux of the matter</u>

6.14 Process history indicates that around the period from the year 2016 to 2018, the First Respondent sold the mines or incidentally mining rights that were coupled to its process operations. The referred sale included smelters and refineries to third parties, whilst at the same time retaining the process operations which is known and would more often referred to as the Retained Operations. It is further submitted that the said operations are narrated to be operating independently, separately, and also contended to be ring-fenced industrial operations.

6.15 Consequent to the aforesaid decoupling of the Retained Operations from the mining operations to process operations, the Second Respondent acted by way of application from MHSA to OHSA jurisdiction.

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[5] Act 108 of 1996.

[6] It provides that *"when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".*

6.16 The primary cause of this application is said to be motivated by the nature of mining to process operations and as such, the migration of the health and safety policy from the MHSA to the OHSA was necessary, if not merely imminent.

6.17 Having considered the above background, the ultimate question in this application is whether the Retained Operations fall within the jurisdiction of MHSA or not. On the other hand, in order to grasp the correct answer, the probing questions such as whether the undertaken activities constitute a mine, mining area or works as defined in MHSA are deemed relevant.

6.18 Consequently, if the answer is in the affirmative, then the application would succeed, whereas if not, then it would in all likelihood be dismissed.

6.19 Turning to the application itself, the Applicant with the concurrence of at least the Eight Respondent contends that MHSA applies to Retained Operations, whereas the First and Second Respondent submits that OHSA takes precedence in the given territory.

6.20 On the other hand, other Respondents such as the Third, Fifth and Sixth Respondents have entered notices to abide by the decision of the Court, whereas the Seventh Respondent despite being under the executive and accounting authority of the Third Respondent, amazingly, resolved to file an explanatory affidavit supporting the Applicant.

Applicant's submission

6.21 It is important to take note that the operations take place on properties owned or leased by the Second Respondent and that are conducted by the Second Respondent or in the alternative by the First Respondent through the Second Respondent.

6.22 In terms of the given facts, the Second Respondent retained the operations as well as the surface rights where the operations are taking place.

6.23 However, the Applicant contends that the migration process is not recognized by the law and that MHSA takes precedence over the entire jurisdiction, despite the said migration. It further contended that the referred operations are and remain incidental and or ancillary to mining as it was prior to the sale of mining rights and the aforesaid restructuring.

6.24 Primarily, the objections to the migration process seem, after considerable reading to be influenced by *inter alia*:

6.24.1 That employees have better protection under MHSA as against OHSA.

6.24.2 The inspectors under the auspices of MHSA have more experience and competency than OHSA and are more beneficial.

6.24.3 That the migration process cannot be said to be legally endorsed or recognized by MHSA.

6.24.4 That the First Respondent could have invoked section 79 of the MHSA by applying for exemption.

6.25 In fact the Applicant's view is that the First Respondent's motive in its conduct, generally considered is aimed to the effect of escaping multiple legislative obligations.

First and Second Respondents' submission

6.26 The Second Respondent is the owner and operator of various mining, smelting and refining operations in South Africa.

6.27 However, the Second Respondent's submits that it is important to distinguish its mining operations and mining areas where related or incidental operations are performed. In other words, to distinguish areas where the MHSA applies by virtue of mining operations against where process operations take place and in that given instance, then OHSA should find application.

6.28 In terms of the given facts, the First and Second Respondents do not dispute the application of the MHSA at their mining operations as well as in their mining areas where operations related or incidental to their mining activities are performed. The referred operations include concentrator plants and tailings dams that are related or incidental to their mining operations. They also deny the Applicant's allegation that the application of OHSA at their workplaces is a way to avoid the application of the MHSA at its mines or related activities taking place on its mining areas.

6.29 In an attempt to provide further explanation, it is submitted that separate from its mining operations, the process operations of the Second Respondent include Polokwane Smelter, Mortimer Smelter hereinafter referred to as (Mortimer) near Northam in Limpopo Province, as well as the smelting and refining operations in the North-West Province, namely Waterval (Smelter Waterval), Anglo Coverter Process (ACP), Precious Metals Refinery (PMR) and Rustenburg Base Metals Refinery (RBMR). The Second Respondent also confirmed to have corporate offices in both Johannesburg and Polokwane, respectively.

6.30 As a matter of fact, the application concerns only Mortimer, Waterval (including ACP), PMR and RBMR, which are for ease of reference referred to collectively as the Retained Operations.

6.31 Previously, the process operations at the Retained Operations used to fall into mining operations of the Second Respondent, whilst at that time the Second Respondent was obliged to manage its health and safety requirements as per the dictates of MHSA, in respect of those operations.

6.32 It is further submitted, that it was only after the sale of underlying mining rights and related mining operations to third parties that Retained Operations are managed within the scope of OHSA.

6.33 Interestingly, the Applicant does not challenge Polokwane Smelter which has been applying OHSA for over 20 years to its operations, despite it having same, if not similar *modus operandi* facts as in respect of Retained Operations.

6.34 Pursuant to Third Respondent's consent, the mining rights for the areas beneath and adjacent to the Retained Operations have been confirmed to be sold to third parties.

6.35 On the other hand, the DMRE (represented by the third to fifth Respondents in this particular matter) has confirmed that the EMPRs applicable to the Retained Operations are not related to mining operations.

6.36 The First and Second Respondent have maintained that OHSA is the generally applicable health and safety statute in South Africa, with its limited exclusions that it does not apply in respect of "*a mine, a mining area or any works*" as clarified by its definition.

6.37 They maintained that MHSA was only applicable prior to the sale of mining operations and its application is limited to mining operations, whereas OHSA is only relevant and finds application to retained process operations.

6.38 The submission went further in that the Retained Operations being non-mining operations do not require a permit or mining right in terms of the Mineral and Petroleum Resources Development Act[7] hereinafter referred to as (MPRDA), and so also not subjected to its requirements. It further contended that they are not connected, nor incidental and actually not even necessary for the pursuance of mining rights held by the Second Respondent in accordance with the terms of the MPRDA in respect of its mining operations.

6.39 That the Retained Operations receive metal concentrate from third parties' mines as well as those owned by the Second Respondent who would normally produce it from raw ore at concentrator plant at mine level, and thereafter the Retained Operations would smelt it and refine the metal concentrate in order to produce Platinum Group Metals herein referred to as GPM''s.

6.40 According to the First and Second Respondents' submission, UASA's case is based on a fundamental misconception that the Second Respondent purchases raw ore from the third party being Sibanye for processing or smelting purposes at its operations, whereas it only purchases the metal concentrate that has already undergone a multi-step concentrator process at the mine level.

<u>Requirements of a declaratory order</u>

[7] Prior to determining the essence of the application, it is important as a point of departure, to determine if this application satisfies the requirements for declaratory order. A declaratory order is best described as an order in which a Court is called upon to settle a dispute over the existence or otherwise of some legal right or even entitlement. In the case of *NAPTOSA & others v Minister of Education, Western Cape & others*[8] that a prayer of declaratory order is normally but need not necessarily be coupled with a prayer for substantive relief. As a matter of principle, the Court is not supposed to act as some form of legal advisor to the parties, therefore the Applicant like AUSA the Union in this

[7] Act 28 of 2002.
[8] (2001) 22 ILJ 889 (C); 2001 (2) SA 112 (C).

case must prove an existing, future or contingent right or obligation that needs to be determined, further that there is another interested party on which the order would be binding and the issue is not abstract or merely intellectual.

[8] In tackling a similar declaratory question, the apex Court in the *Competition Commission of South Africa v Hosken Consolidated Investments Ltd and another*[9], it confirmed the above two stage approach and further quoted with approval the judgment in *Minister of Finance v Oakbay Investments (Pty) Ltd and others; Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre*[10]*,* where the lack of controversy was also considered together with other factors like legal certainty*.* As the principle of *stare decisis* dictates*,* the constitutional Court approach cannot be ignored.

[9] As further confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[11], it is trite that the requirements as applicable in respect of a declaratory order are two-fold:

(a) The Court must be satisfied that the Applicant has an interest in an existing, future or contingent right or obligation;
(b) Once the Court is so satisfied, it must then be considered whether or not the order should be granted.

[10] In *Milani and another v South African Medical and Dental Council and another*[12], it was held with authority that the interest that the Applicant should have is at least akin to the interest that the party has to intervene in proceedings in the High Court. The example of such interest is like direct and substantial interest. On the other hand, Section 38 of the (Bill of Rights) Constitution provides for the right of among others, anyone acting in their own interest; on behalf of another person who cannot act in their own name; as a member of, or in the interest of a group or class of persons; in the public interest and also association acting in the interest of its members.

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[9] [2018] 3 ALL SA 567 (GP).
[10] [2017] 4 ALL SA 150 (GP); [2017] ZAGPPHC 576 (GP).
[11] 2005 (6) SA 205 (SCA); [2005] ZASCA 50 at 213E-G.
[12] 1990 (1) SA 899 (T); [1990] 3 All SA 633 (T) at 902G.

[11] In this application, the Applicant is acting for the interest of its members, who are employees of the First and Second Respondent, respectively.

[12] Whereas, in *Family Benefit Friendly Society v Commissioner for Inland Revenue and another*[13], the contingent right or obligation is that which falls within the narrow meaning of conditional, i.e. the opposite of vested.

[13] Therefore in brief, when considering the grant of the declaratory order, the Court shall not grant such an order where the issue under determination is like hypothetical, abstract and academic, or where the position is clearly defined by statute[14].

[14] In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and others*[15] held as follows:

'… An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see Ex parte Nell 1963 (1) SA 754 (A) at 759H – 760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding.'

[15] As indicated, *supra*, the Applicant has considerable membership with the First and Second Respondent's employees with a direct and substantial interest in the matter, therefore it has the necessary *locus standi* thereof. Furthermore, this Court's power to consider this declaratory order is well vested in section 158 (a)(iv) of the Labour Relations Act[16] (LRA).

<u>The brief interpretation of MHSA</u>

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[13] 1995 (4) SA 120 (T); [1995] 1 All SA 557 (T) at 125B.
[14] *Ex Parte Noriskin* 1962 (1) SA 856 (D); [1962] 1 All SA 400 (N).
[15] 1995 (4) SA 1 (A) at 14F-I.
[16] Act 66 of 1995, as amended.

[16] As a point of departure, the role of the judiciary remains the interpretation and application of the statute and in this case MHSA in particular. In so doing, Courts are sometimes required to establish the true intention of Parliament in passing an Act like MHSA, therefore it should interpret the Act in accordance with the specific intention of Parliament.

[17] For now, it is sufficing to observe that the outline of MHSA is in a way, deceptively simple. While it is written in plain language in an attempt to make its meaning clear to the layperson, the meaning of the various provisions of most statute lends itself to some considerable debate, particularly by legal practitioners trained in the difficult days of reading ambiguities into legal texts and twisting their meaning to suit their client's position. Nevertheless, despite the attention and carefulness invested in the drafting of a particular statute, it is mostly subjected to the weaknesses inherent in all written texts.

[18] In the landmark cases of *R v Venter*[17] as well as in the case of *Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Fade Transporter*[18] the historic principle of interpretation was confirmed in that where the language becomes clear , the courts shall give effect to the interpretation unless to do so would lead to absurdity that could never have been contemplated by Parliament during its legislative drafting process or alternatively, where the result would be the contrary of its clear intention. As further established in a case of *Jaga v Donges, NO and another, Bhana v Donges and another*[19], the words as used in a particular legislation shall be viewed in the broader context of legislation as a whole.

[19] As correctly digested, in terms of authority in *Hahlo and Kahn* , 177-201,ordinary words shall be given their ordinary grammatical meaning as at the time an Act was written; words and expressions used throughout an Act should have the same meaning; words and expressions which have been interpreted by the courts

[17] 1907 TS 910 at 915.
[18] 1987 (2) SA 583 (A); [1987] ZASCA 2.
[19] 1950 (4) SA 653 (A); [1950] 4 All SA 414 (A).

previously should bear the same meaning previously interpreted; an Act will not bind the State unless specifically so mentioned to be bound; any provisions that seek to restrict the jurisdiction of the superior courts will be very strictly construed; An Act of Parliament should not be given retrospective effect as this would amount to taking away the rights of legal subjects.

[20] The Courts will *inter alia* adopt the aforementioned approach in ascertaining the correct interpretation of statute like MHSA and further take judicial notice that it will be assumed that the law was not intended to be unreasonable, create injustice, or apply only certain legal subjects. As of cardinal importance, the purpose of the given statute must be considered, as no interpretation which will allow fraud or evasion of the object of the Act would be accepted.

[21] Thus, the stated principles would be applied equally.

<u>Extracting the essence of the application</u>

[22] Perhaps, the essence of this case may be zoomed through the preamble to the MHSA which impressed the protection of the health and safety of employees and other persons at mines.

[23] Section 1 outlined the objects of this Act among others:

(a) To protect the health and safety of persons at mines;
(b) To require employers and employees to identify hazards and eliminate, control and minimize the risks relating to health and safety at mines;
(c) To give effect to the public international law obligations of the Republic that concern health and safety at mines;
(d) To provide for employee participation in matters of health and safety through health and safety representatives and the health and safety committees at mines;
(e) To provide for effective monitoring of health and safety conditions at mines,
(f) To provide for enforcement of health and safety measures at mines;

(g) To provide for investigations and inquiries to improve health and safety at mines; and

(h) To promote-

(i) A culture of health and safety in the mining industry;

(ii) Training in health and safety in the mining industry;

(iii) Co-operation and consultation on health and safety between the State, employers, employees and their representatives.

[24] A passing observation of both the preamble and objects of the MHSA which has been in effect since January 1997, directs the health and safety in the mines as the constituent common denominator in every respect. Consequently, the reassuring conclusion is that the yardstick of MHSA is the health and safety in the mines. It burdened the employer (mine owner) with the primary responsibility for ensuring a healthy and safe working environment in mines. In so doing, the employer must do what is reasonably practicable to ensure the health and safety of persons employed in mines and others who may be likely affected.

[25] In defining the dividing line between the mining operations and Retained Operations certain provoking determinations shall be aligned to the application's question. Within the limits of jurisdiction, the legal question is focused on the determination of whether MHSA is the applicable legislation within the Retained Operations, then it follows that in order to identify the legislature's intention in this regard, the key words such as *"mining area"* followed by "mine" shall be unpacked accordingly.

[26] The Mineral and Petroleum Resources Development Act, 28 of 2002 herein referred to as (MPRDA) in its context, defines mining area as *"(b) in relation to any environmental, health, social and labour matter and any residual, latent or other impact thereto, including (i) any land or surface adjacent or non-adjacent to the area as contemplated in subsection (i) but upon which related or incidental operations are being undertaken"*.

[27] On the other hand, the same legislative instrument, MPRDA defines a mine as "*any operation or activity for the purposes of winning any mineral on, in or under*

the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto".

[28] Whereas section102 of the MHSA defines a mine as any other place where the mineral deposit is being exploited, including the mining area and all buildings, structures, machinery, mine dumps, access roads, or objects situated on or in that area that are intended to be used in connection with searching, winning, exploitation or processing of the mineral, all for health and safety purposes. It further defines mineral as that which occurs naturally in or on the earth or in tailings.

[29] Section 103 of the MHSA provides that OHSA is not applicable to any matter of any provision to which the MHSA is applicable, whereas section 1(3) of the OHSA provides that this Act shall not apply in respect of:

> '(i) A mine, a mining area or any works as defined in the Minerals Act 50 of 1991, except in so far as that Act provides otherwise.
>
> (ii) … or in respect of any person present on or in such mine, mining area, works, ship, boat or crane.'

[30] First and foremost, the Applicant contends that since the above-mentioned provisions of the MHSA and the OHSA have not been amended, accordingly, the First Respondent's business restructuring, sale of mines and mining rights should not be the basis for changing or migrating applicable legislation at the raw ore processing operations as it has retained it in its business, as the nature and purpose of the operations did not change.

[31] Further to the submission in *casu*, it has provided that the concept of mining area is defined in section 1 of the Mineral and Petroleum Resources Development Act[20] hereinafter referred to as MPRDA as follows:

> '(a)…
>
> (b) In relation to any environmental, health, social and labour matter and any residual, latent or other impact thereto, including-

[20] Act 28 of 2002.

(i) any land or surface adjacent or non-adjacent to the area as contemplated in subsection (i) but upon which related or incidental operations are being undertaken;

(ii) …

(iii) all buildings, structures, machinery, residue stockpiles, or objects situated on or in the area as contemplated in subsections (ii) (a) and (ii) (b).'

[32] In terms of section 1 of the MPRDA, the concept of "*mine*" is defined as follows:

'(a) (i) …

(ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connected with such searching, winning or extraction or processing of such mineral resource.'

[33] So briefly is the Applicant's argument as adduced from the above definition of MPRDA as reasoned that the concept "*mining area*" includes:

33.1 Any area not included in the mining right or mining permit but which is adjacent or non-adjacent to the mining operations and upon which related or incidental operations are being undertaken, including any area connected to such area by means of any road, railway line, power line, cable way or conveyor belt.

33.2 The Applicant further submits that it is reasonable to deduct that, if the First Respondent intends "migrating" from the provisions of MHSA, the ulterior motive is to design a plan to escape multiple legislative obligations imposed on mining companies by both the MHSA and the MPRDA as well as the respective regulations thereof.

[34] In the same breath, the Applicants also focused on the Occupational Diseases in Mines and Works Act as amended hereinafter referred to as ODIMWA[21], more specifically on its definitions including referral to a "*mine*" that includes "*any operation relating to the act of mining and matters directly incidental thereto*".

[35] In terms of section 1, ODIMWA defines "Owner" as:
'In relation to a mine or works, includes the lessee of the mine or works and any person who has the right, or has, by virtue of any law or any agreement with the owner of the mine or works, acquired the right, to exploit a mine for his or her own benefit or to operate a works for his or her own benefit; and if the question arises whether a person is, for the purposes of this Act, the owner of a mine or a works, the Minister shall make a decision on such question.'

[36] The Applicant is of the view that ODIMWA definitions advance its case in that, firstly the Retained Operations fall within the definition of extended mining area, or in the alternative, what is carried out at the Retained Operations related to the act of mining and matters directly incidental thereto. It is common cause that the extended definition of ODIMWA would encroach the First and or Second Respondents' scope of work unto Retained Operations, but the crucial question is whether with the application of ODIMWA in the Retained Operations, does that implicate MHSA? To my mind it would defy logic to conclude the application of MHSA against ODIMWA as the latter usurps the functions of insurance for the entire mining sector, whereas MHSA is primarily a regulatory instrument.

[37] In applying the reasoning in *Terra Bricks and another v Regional Manager, Limpopo Region Department of Minerals and Energy and others*[22], the core business and works at the Retained Operations is *inter alia* to process, recover, extract, concentrate, refine, calcinate, screen, wash, smelt or gasify mineral (processing under both the MPRDA and MHSA) and remains incidental and/or ancillary to mining, as it was before the sale of mining rights and business restructuring.

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[21] Act 78 of 1973, as amended.
[22] [2013] JOL 30635 (GNP) at 13.

[38] Meanwhile, the Applicant's further submission is that the Minister is empowered by the provision of section 13(1) of ODIWA to issue notice in the gazette declare to be risk work any particular work or all work performed in or at or in connection with any mine or works or part of a mine or works, or at a particular place or under particular circumstances in or at or in connection with any mine or works. Whilst on same analysis, it is suffice to state that despite the Third Respondent's being so legislatively empowered, there is no evidence that the Retained Operations are so declared. In a nutshell, the Applicant's contention is that the actual activity carried out at the Retained Operations is the continuance or furtherance of mineral processing and that Second Respondent is a mining company.

[39] Without any contradiction and before further details, it is noteworthy that both the Third and Fifth Respondents are constitutionally recognized structures in terms of inter alia section 85 of the Constitution[23] which vested the executive authority of the Republic in the President, who exercises the said authority together with the other members of the Cabinet for example, implementing national legislation.

[40] In terms of section 91, the President is empowered to appoint the cabinet Ministers and Deputies in order to assist the President in execution of executive powers. It is conclusively clear that the State President of the Republic of South Africa may delegate powers to any member of Cabinet to perform competency functions on a specific portfolio. It is trite that the Constitution is the supreme law of the Republic[24], as it stands the Fourth Respondent's existence is subject to the appointment or authority of the Third Respondent as contemplated in section 48 of MHSA, and is actually another important office serving under the auspices of and accountable to both the Third and Fifth Respondents accordingly. In other words, when exercising its powers ought to account for both parties, respectively. To put it differently, the Director General or the accounting officer as per dictates of legislative frame-works like the Public Finance Management Act hereinafter referred to as PFMA of the Fifth Respondent has delegated the necessary authority to the Third and Fifth Respondents, and upon perusal and due consideration, both parties duly

[23] Act 108 of 1996.
[24] Section 2 provides that the *"Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled"*.

served and filed notice to abide. However, despite such unambiguous pleadings or position to abide by the proceedings, the Third Respondent nevertheless without hesitation filed an explanatory statement in favour of the Applicant which contradicts its executive authority's position of migrating the Retained Operations unto the Seventh Respondent's jurisdiction and further appeared as observer status, that continued or opted to canvass the Applicant's case. Despite appearing as an observer, the Third Respondent still applied for indulgence to make a submission, nevertheless as influenced by one of the fundamental rules of natural justice being known as *audi alteram partem* rule, the Court offered the Fourth Respondent's opportunity. For now, it is sufficing to state that the Third and Fifth Respondent's position has been materially contradicted by the Fourth Respondent.

[41] In the face of these findings, a word of caution is perhaps not out of line, in that the Fourth Respondent's conduct including "*defence shopping*" is likely undesirable to compromise the Fifth and or Third Respondents' legislative or executive mandate, more especially that terms of the letter referred, *supra*, as Annexure FA10 by the Applicant, both the Fifth Respondent (being the executive authority to the Fourth Respondent) and Seventh Respondents have decided that Retained Operations falls under the auspices of OHSA with the Seventh Respondent as the executive overseer. Therefore, the Fourth Respondent shall comply with the executive decisions as constitutionally obliged, and avoid unnecessary disrepute.

[42] Reverting to the determination of what constitutes a "*mining operation"* is important and whereas Dale*, South African Mineral and Petroleum Law Issue 24* at paragraph 42.8 referred to above Dale states as follows:

'As was held in Commissioner of Taxes vs Nyasaland Quarries and Mining Co Limited 24 SATC 579 at 583, in the context of fiscal legislation, the intention of the legislator in enacting the definitions of mine and mining operations is to give those expressions an extended meaning which would cover the processing by the mining company of the mineral into its pure form.

… On an analysis of the phrase "including any operation or activity incidental thereto" in the definition of mine as a verb it appears that any such operations or activities which are directly or indirectly incidental thereto will be included, and then by reference to the definition of mining operations, additionally to the direct and indirect operations and activities covered by the definition of mine as a verb will be matters directly related to such directly or indirectly incidental operations and activities.'

[43] Dale *supra* referred to *Albertonse Stadsraad v Briti BK*[25] when dealing with the definition of what a mine is as a noun:

'In Albertonse Stadsraad v Briti BK the court interpreted the word mine as a verb as defined in section 1 of the Minerals Act. The Appellant had alleged that use of certain clay by the respondent constituted mining, requiring the appellant to have held a mining authorisation as contemplated in the prohibition in section 5 (2) of that Act. On the facts, the court held that the clay had already been mined; and that the further processing thereof for purposes of rendering it ready for use and the transport of it to a manufacturing plant did not fall within the definition of mine.'

[44] In *Terra Bricks and Another v Regional Manager, Limpopo Region, Department of Minerals and Energy and Others*[26] *(Terra Bricks)*: Fourie AJ stated as follows:

'The meaning of the definition is clearly not the whole of the mining area. Only if part of the mining area or buildings etcetera. are used or intended to be used in connection with such searching, winning, exploiting or processing of a mineral, do they form part of the mine. I am of the view that this phrase qualifies both mining area and the buildings situated in or on the mining area. On the basis set out above I am of the view that the brick making activities are not activities aimed at searching or winning a mineral or exploiting a mineral deposit. The clay is searched for, won and exploited ("ontgin") at the clay quarry.

The next question is whether the activities at the brick factory are not possibly connected with "processing" of a mineral. The word "process" is defined in the Minerals Act to mean "in relation to any mineral the recovering, extracting, concentrating, refining, calcining, classifying, crushing, screening, washing, reduction, smelting or gasification thereof.

…

[25] 2003 (5) SA 157 (SCA); [2003] JOL 10839 (SCA).

[26] [2013] JOL 30635 (GNP) at 13 - 14.

I am of the view that upon a proper interpretation of the definition of "processing", it includes only processes which are aimed at winning a mineral in its pure form and that a distinct process which is aimed at the manufacturing of a new product such as bricks, no longer constitutes processing of a mineral as contemplated in the definition.'

[45] *"At page 19 the learned Judge added*[27]*:*

'3. It is declared that the brickmaking activities conducted on the aforesaid abandoned area do not constitute a 'mine' or 'mining' in terms of the statutes aforementioned.'

[46] In respect of Occupational Health and Safety Act, Dale at page 58 para 44.1.1 states:

'In terms of Section 1 (3) of the OHSA, that Act does not apply in respect of a mine, a mining area or a works, as defined in the Minerals Act, excepting so far as the Minerals Act provided otherwise or in respect of any person present on or in any such mining area… Accordingly, the reference in Section 1 (3) of Occupational and Health and Safety Act to a mining area as defined in the Minerals Act is now to be construed as a reference to the definition of mining area in Section 1 of the MPRDA. Section 103 of the Mine Health and Safety Act 29 of 1996 in turn provides that the Occupational Health and Safety Act is not applicable to any matter in respect of which any provision of the Mine Health and Safety Act is applicable. As appears from its long title, the Mine Health and Safety Act provides for the protection of the health and safety of employees and other persons at "mines".

[47] The scope of relations between the two legislative instruments suggest that MHSA's purpose is aimed at the mining jurisdiction, whereas OHSA is likely applicable wherever MHSA lacks authority to regulate. To simplify it further, it means if the MHSA does not apply to Retained Operations, therefore by implication, OHSA may be applicable.

[27] *Misty Falls 45 (Pty) Ltd and Another v Access World (Pty) Ltd and Others* [2019] ZANCHC 45 at para 33.

[48] In *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another*[28] the Honourable Court held that:

> '[116] Another powerful consideration is that the requirements stated in s 23 for the grant of a mining right, and the obligations imposed on right-holders stated in s 25, do not seem compatible with having two (or more) joint holders of a single mining right. Section 23 refers, in the singular, to 'the mining work programme' and 'the prescribed social and labour plan' which any successful applicant for a mining right must have.
> [117] No provision is made for the case where the applicant's mining work programme or social and labour plan must be reconciled with an existing right-holder's programme or plan in respect of the same mine. Section 23 also requires that any successful applicant, in order to be successful, have the ability to comply with the Mine Health and Safety Act, s 3 of which refers, in the singular, to 'the employer' of any mine. Again, no provision is made for more than one employer in a given mining area. Finally, s 25 imposes an obligation upon all right-holders to comply with 'the approved environmental management programme' they submitted upon application in terms of s 39. No provision is made to reconcile the environmental management programme submitted by an applicant with the existing programme of an existing right-holder.
> [118] For these reasons, the MPRDA simply does not contemplate two right-holders in respect of the same mineral and land. The only case where an applicant's programmes and plans will be automatically consonant with those of the existing right-holder is where they are one and the same: in other words, where the applicant is the existing right-holder.'

[49] In *United Manganese of Kalahari (Pty) Ltd v Commissioner, South African Revenue Service*[29] it was held that minerals that have been mined and processed axiomatically have to be stockpiled, packaged and transported in order to complete the mining process. In respect of this judgment, the suspensive condition to

[28] 2014 (2) SA 603 (CC); [2013] ZACC 45 at paras 116 – 118.
[29] 2018 (2) SA 275 (GP) at paras 3 – 4.

complete the mining process incorporate the following factors: "*stockpiled, packaged and transported*".

[50] Section 5 (2) (b) of the MHSA entrenched an obligation to *"ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety"*.

[51] Proper interpretation of the above section suggests that there are persons who may be affected by any activities within the mining area and to "mine" in general. It therefore implies that both the First and Second Respondents including its employees as liability can be impacted through vicarious liability in conducting Retained Operations and are obliged to ensure that third parties and such persons *"are not exposed to any hazards to their health and safety"*. Upon further reading, it may invoke indirect application of MHSA, albeit not conclusive.

[52] So far is suffice to state if the First and Second Respondents are found to be the owner(s) of the mining right and employer(s) in same context would be obliged to comply with *inter alia*, sections 2 (1) (a)(i), 5 (1) and (2), 7 (1)(b), of the MHSA which provide:

> '2. Employer to ensure safety.
>
> (1) The employer of every mine that is being worked must-
>
> (a) ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped-
>
> (i) to provide conditions for safe operation and healthy working environment'
>
> …
>
> 5. Employer to maintain healthy and safe mine environment.
>
> (1) As far as reasonably practicable, every employer must provide and maintain a working environment that is safe and without risk to the health of employees.
>
> (2) As far as reasonably practicable, every employer must –
>
> (a) identify the relevant hazards and assess the related risks to which persons who are not employees may be exposed; and

(b) ensure that persons who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.'

…

7 Employer to staff mine with due regard to health and safety.

(1) As far as reasonably practicable, every employer must-

…

(b) institute the measures necessary to secure, maintain and enhance health and safety.'

[53] Since the Minerals Act has been properly repealed and so replaced by the MHSA, it means any reference to the Minerals Act should be read as is substituted by the MHSA, accordingly.

[54] The Applicant's failed to take this Court into confidence or so advance any meaningful submission to the Respondents position that concentrate is not a mineral because it does not occur naturally in or on the earth. As outlined by the First and Second Respondents mine processes raw ore at their concentrator plants, whereas the Retained Operations simply put, processing concentrate which has gone through a multi-step industrial concentrator process and also more concentrated than raw ore.

[55] In these circumstances, it is reasonable to conclude that there is no contention that the Retained Operations constitute a mine in terms of sub-paragraph (i); however, the contest is whether they constitute a mine in terms of sub-paragraph (ii) as per extended definition.

[56] Even though the concept of "*mining area*" is defined widely, it must however have borne in mind that a mining area is not necessarily a mine in terms of the extended definition. It is clear that for it to constitute a mine, it must then form part of *"any other place where a mineral deposit is being exploited"*. This proposition is well narrated in Le Roux: *Mine Health and Safety Law* volume 1 (Le Roux) at COM-47, paragraph 2.5, where the use of the word "including", does not have an accumulative effect, but is in any way inclusive.

[57] Pursuant to re-consideration of both terms "*mine"* and "*mineral*" in accordance with the provisions of section 102 of MHSA, it is important to note that by the definition of "mineral", concentrate is not a mineral.

[58] In *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others*[30], where the Court was entrusted with responsibility to decide whether diamonds in tailings dumps constituted a mineral as defined in the MPRDA. The Court's approach commenced by recognizing two requirements under the definition of a mineral as, firstly that the occurrence must be natural and secondly that it must have been formed by or subjected to a geographical process. It went on and decided that, since in this case, the mineral is in a stockpile, it cannot be said to occur naturally in or on the earth, simply because "*minerals in a stockpile have already been severed from the earth*".

[59] The Court at paragraph 68 respectively, proceeded to clarify the reasons why diamond tailings dumps were correctly, not subjected to MPRDA provisions, including that diamond tailings are merely movable and not natural occurrence as stated, *supra*.

[60] In applying the aforementioned *ratio* to the facts, it suggests that the product being processed at the Retained Operations does qualify to be called as "mineral" in accordance with the statutory definition in the MHSA, because it does not occur naturally in or on the earth. Instead, it is subjected to different processes or alternatively, end result of it.

[61] On the other hand, the Retained Operations does not satisfy further requirements since the operations in question cannot be said to be a kind of a place where a mineral deposit is being exploited, as indicated *supra*. Therefore, the statutory definition of "mineral" cannot complement the activities associated with the Retained Operations.

[30] [2007] ZAFSHC 74 at para 57.

[62] Further to the above definitions, it is also a specific requirement that the "*mining area*" shall be related or incidental to mining operations. When closely reading the definition of a "mine" in terms of section 102 together with section 1 of the MPRDA when the definition of "mining area" is under consideration, it is clear that a mining area is identified with reference to a mining right or permit, with it being the area on which the extraction of any mineral has been authorized and for which that right is granted. On the other hand, the Applicant's did not contend that the Retained Operations fall within the ambit of this definition, whereas the First and Second Respondents have denied possession of any rights or permits in accordance with provisions of the MPRDA.

[63] Secondly, the scope of the definition provides that in relation to the other purposes, a mining area includes land or surface "adjacent or non-incidental" to the mining right and also upon which related or incidental operations are being undertaken. Effectively, a party has the mining right area, and then an extended mining area for other purposes.

<u>Related or incidental to mining</u>

[64] The Applicant's case emphasized more on the Retained Operations being related or incidental to mining in the sense that subsequent to business restructuring; the Second Respondent purchases raw ore from Sibanye for purposes of processing at the Retained Operations which are adjacent to the Sibanye mines; that the Retained Operations are and remain incidental and or ancillary to mining; that the Retained Operations are and remain related to the mining operations of the party to whom the mining right was transferred. It further proposed that the processing of minerals by the Retained Operations is incidental and or associated or connected to the mining activities of the third parties; and that the third party holding the mining rights mines the ore and the Retained Operations receive and process the mineral.

[65] It went on and specifically held that the processing operations are undertaken by the Second Respondent at the Retained Operations as are associated and or connected to the mining activities of a third party currently holding the mining right.

[66] As is often reflected in this judgment, Dale proved to be a reliable authority in this context and notes that the main area and extended mining area must be operated by the same person, whereas the discontinuance of processing by the likes of Sibanye completes its mining of the mineral and any further processing. In terms of given facts, the Retained Operations are not related or incidental to Sibanye's mining operations, instead they are separate, distinct and independent from them. Therefore, as wrap up, do not amount to mining operations.

[67] On the other hand, the Applicant's reliance on the extended definition of a mining area as found in MPRDA as well as mining operation is vague in that it openly refers to operations relating to the act of mining and matters directly incidental thereto. The aforesaid referral without a reasonable attempt to provide the interpretation in context, cannot assist the case, any further.

[68] The First and Second Respondents contended that the Applicant's case in so far as it provides that the Retained Operations fall within the extended mining area of Sibanye and other mines are within the vicinity, is incorrect for the reasons as stated underneath. Firstly, according to Dale, for the extended definition to be triggered; the adjacent/non-adjacent surface or land must be operated by the same person *"who operates the mine itself"*[31]. Whereas on the Applicant's submission, that is not the correct position since the terms of its reference are that Sibanye or other parties operate the mines, and the Second Respondent is responsible to operate the Retained Operations.

[69] Furthermore, the phrase any land or surface adjacent or non-adjacent to the area as contemplated in subsection (a) but upon which related or incidental operations are being undertaken, requires an operational link between the adjacent/ non-adjacent land and the mining right. On the other hand, the First and Second Respondents' submissions contend that the Retained Operations are not related or incidental to the mining operations of the third parties including Sibanye conducted in the vicinity. They further submitted that Sibanye and other third party mines in the vicinity are involved in the extraction of the mineral, which is the process that is

[31] Dale at MPRDA-64 at para 44.1.3.

completed once the raw ore is brought to the surface and put through the concentrator process, their mining is clearly regulated by the relevant mining rights or permits issued to them under MPRDA is completed at this point and may discretionarily sell concentrate to Second Respondent, whereas the latter may then engage into independent industrial process, in respect of which no rights or permits are applicable under the MPRDA of producing PGM's to meet its targeted market requirements.

[70] In terms of the submissions, the Second Respondent does nothing whatsoever that is related or incidental to the extraction by the mines of the mineral. Therefore, it seems that the two set operations are separate and distinct as opposed to being related or incidental.

[71] The First and Second Respondents position may likely find favour with Dale[32] where it was outlined that the discontinuance of processing at any stage by the mining company would complete its mining of the mineral and any further processing, whether in the form of reduction or smelting, would not if undertaken by a third party, amount to mining operations.

[72] Whereas in *Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others*[33] the Court held with authority that:
'The second applicant's brick making operation is clearly not a borehole or excavation made for the purpose of searching for or winning clay; a place where a mineral deposit is being exploited or a 'works' (as defined in the MHSA). Even if the extended meaning of 'mining area' in the MPSDA is applied, the brick yard is not an area in respect of which a mining right or permit has been granted or a surface of land on which operations related or incidental to the extraction of clay are being undertaken. I therefore cannot disagree with the reasoning and conclusion of the court in the Terra Bricks judgment.

<u>Processing</u>

[32] Dale at MPRDA-56 at para 42.2.3, fn 265
[33] [2012] ZAGPPHC 11 at para 7.

[73] As a point of departure, the Applicant contends that the Retained Operations are involved in the processing of a mineral and to that effect relies on the referred case law, *supra* of *Terra Bricks* where it was held that processing ends when the mineral is won in its pure form and that the manufacturing of a new product thereafter does not constitute processing. It further submits that mining is a core business in the context of the Retained Operations and also indicates that the Retained Operations do not produce a finished and final product like jewellery or bricks and are thus much involved in processing.

[74] As it stands and after considering the relevant authorities, the common understanding should proceed on the basis that processing activity ought to be conducted as part of mining, and not separate from it. So in that assessment, the definition of "mine" in terms of section 102 of the MHSA wherein the term processing is specifically enlisted in part (a)(ii) as per extended definition within the overall phrase "*processing of mineral*". The word "*processing*" is clearly defined as:
'the recovering, exctracting. concentrating, refining, calcining, classifying, crushing, milling, screening, washing, reduction, smelting or gasification of any mineral.'

[75] Upon closer look, it transpires that the issue of whether the Retained Operations are involved in processing only arises if it is discovered that (i) concentrate is a mineral; the retained Operations are in an area where a mineral deposit is exploited in situ; and (iii) the retained Operations are involved in operations that are related or incidental to those performed on the mining right area. On the other hand, the Applicant's submissions failed to convince this Court that the above requirements exist and are met. So as conclusively necessary, the word processing cannot be defined in the Applicant's context and favour.

[76] In the aforementioned case of *Terra Bricks*, the Court held that the manufacturing of bricks after clay had been processed, fell outside of processing and thus mining. However, it noted that the position stood to be compared with that in the case of the Supreme Court of Appeal in *Albertonse Stadsraad v Briti BK*[34] where it interpreted the word "mine" in the context of clay. It held that in the circumstances

[34] 2003 (5) SA 157 (SCA); [2003] JOL 10839 (SCA).

where the mineral had already been won, the further processing thereof for purposes of rendering it ready for use, fell outside of the definition of "mine". As in the present matter at issue, the ore is won by the mines and thereafter processed by them in order to form concentrate. Therefore, the Retained Operations are only involved in the further processing and that on its own, renders it ready for use.

[77] I therefore concur that the process involved the activity of processing which is conducted separately from mining and is also not regulated in the MPRDA. So the Retained operations from the same perspectives are separate ring-fenced industrial operations.

[78] Lastly, having considered the relevance of the definition of "works" in accordance with the provisions of section 102 of the MHSA, I for purposes of this case deemed it unnecessary to discuss it, simply because it does not assist the legal question.

Consultation on the migration process

[79] In terms of the Applicant's version, the First Respondent on 10 November 2022 had invited stakeholders such as the Applicant, Eight and Ninth Respondent's to presentation regarding migration. Whereas on or about 5th of December 2022 the Applicant acquired knowledge of a crucial letter[35] dated and emanating from the Seventh Respondent's and addressed to the First Respondent (also copied to its attorneys) and also directed to the Fifth Respondent.

[80] At this stage, it is important to note that the undertaken consultations are, in terms of the Applicant's submission irrelevant to statutory interpretation, save to provide the background of the dispute. Whilst also on the same stance, it further indicated that the confirmation of the Fifth Respondent in that the EMPRs applicable to the Retained Operations are not related to a mining operation does not make the migration lawful.

[35] The letter reads: *"Confirmation of migration of Rustenburg Platinum Mines Processing and refining operations to be under the jurisdiction of the department of employment and labour subsequent to the sale and transfer of related mining rights by Rustenburg Platinum Mines limited in the Rustenburg and Northam Regions*".

[81] Upon perusal, the referred letter confirmed that pursuant to five meetings which were held during 2021 and 2022, between the Fifth and Seventh Respondents regarding the legal impact pertaining to the sale of mining rights previously held by the Second Respondent is finalized to the effect that the Retained Operations fall under the jurisdiction of Seventh Respondent.

[82] The referenced letter was further confirmed to be attached to a High Court application as instituted by the Eight Respondent against the First and Second Respondents, in which the Applicant and other parties cited in this application are properly joined. Further to be noted and of concern, is that the relief sought by the same parties remains the same, albeit the current Applicant is substituted with the 9th Respondent in respect of the same question of law. The relevant annexure is attached for ease of reference as Annexure FA10, under case number: 054197/22 at High Court of South Africa: Johannesburg.

[83] As properly digested, the above consultative process raises at least two important points, firstly being that consultation was initiated, and relevant parties were engaged, irrespective of the outcomes thereof. Secondly, and costly so, the same parties deliberately instituted legal proceedings in at least two different courts (High Court and Labour Court) seeking the same relief. For a given moment, Nugent AJA (as he then was) in the matter of *Nestle (South Africa) (Pty) Ltd vs Mars Inc*[36] stated the following:

'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it this suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'

[36] 2001 (4) (SA) 542 (SCA); [2001] ZASCA 76 at para 16.

[84] It is worth mentioning that the requirements for a successful reliance on the plea of *lis pendens* are *inter alia* that the litigation is between the same parties; that the cause of action is the same and the same relief is sought in both sets of proceedings. As already indicated, it is given that either the referred similar case is either provoking *lis pendens* or migrated to *res judicata* depending on stage of the said High Court application.

[85] Even though the Respondents did not raise the said points in law, I deemed it of importance that this Court is inclined to consider the submissions as evident from the Applicant's case in order to avert the potential abuse of court processes which may ultimately have vexatious litigious elements, or cause of unnecessary litigation costs and where possible, parties shall be reprimanded accordingly.

[86] As is the case, after due analysis and for some judicial discretion, I would not dismiss the application on the basis of either *lis pendens* or *res judicata.* However, for purposes of this judgment, I may draw some inferences when considering possible ward of costs in accordance with relevant provisions of section 162 of the LRA.

<u>Migration</u>

[87] On the other hand, the Applicant's contended that the concept of "migration" from the MHSA to the OHSA does not exist in the current legislative frame-work and further suggested that it is unlawful. In so answering, the First and Second Respondents narrated that the phrase was simply used as an internal nomenclature for the process through which the OHSA was complied with, and systems relating thereto put in place at the Retained Operations. They further denied any element relating to unlawfulness in that regard. After due consideration and analysis, it is clear that it is merely employed as more convenient and ordinary grammatical term to indicate the process from MHSA to the OHSA in order to ensure compliance with applicable legislation. Therefore, it does not infer unique legislative obligations, other than those already provided for.

<u>Exemption application from MHSA provisions</u>

[88] Section 79 of MHSA provides that:

> ‘(1) he employer of a mine may request an exemption from the Minister, and if satisfied that the employer has consulted appropriately with the affected employees or their representatives, the Minister may exempt the employer from any or all the provisions of this Act or from a notice or instruction issued under this Act. An exemption may be -
>
> (a) general or particular;
>
> (b) for any period; and
>
> (c) on any conditions that provide the same overall protection which would result from the full application of this Act.
>
> (2) When an exemption is granted under subsection (1), the Minister must issue a certificate of exemption to the employer, specifying the scope, period and conditions of the exemption.’

[89] The contention that the First and Second Respondents shall have invoked the provisions of section 79 by applying for exemption, stems from an incorrect premise and cannot be sustained unless the MHSA provisions are found to be applicable to Retained Operations. The Respondents correctly contended that they could not apply to the regulator to request an exemption from an Act that has no application at the Retained Operations. In my view, the suspensive condition shall pre-exist as a form of prerequisite to be eligible for exemption.

<u>Jurisdiction of Labour Court</u>

[90] It is trite so, that the jurisdiction of the Labour Court arises from *inter alia* section 157 of the LRA, whereas it specifically provides that the Labour Court has exclusive jurisdiction in respect of matters that elsewhere in the LRA or in terms of any other law are to be determined by the Labour Court.

[91] On the other hand, section 158 of the LRA spells out the powers that it may exercise if jurisdictional requirements are met.

[92] Section 82 of MHSA provides that the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of this Act except where this Act provides otherwise. It was also confirmed in the Constitutional Court judgment of *Baloyi v Public Protector & others*[37] that the exclusive jurisdiction of the Labour Court is engaged where relevant legislation mandates it.

[93] On the other hand, OHSA does not have a similar empowering provision, and so acting *ultra vires* is an option. It is therefore conclusive that with this section in *casu* as well as sections 157 and 158 of the LRA, the Labour Court is clothed with jurisdiction to entertain the declaration in respect of MHSA and its regulations. However, it is imperative to state that the necessary jurisdictional requirements are lacking in respect of OHSA, as not conferred by the statute or Act of Parliament.

[94] It is also self-evident that the Labour Court is a creature of statute[38], and unlike the High Court, Supreme Court of Appeal and Constitutional Court which are constitutionally empowered in terms of 173 of the Constitution with inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[95] Furthermore, section 170 of the Constitution provides that:
'All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'

[96] So obvious is the fact that the Labour Court falls into the category of other courts which may decide any matter as determined by an Act of Parliament and section 158 of LRA which empowers it to decide on declaratory order when read with section 82 of MHSA, is evident to that effect. On the other hand, is also fair enough to state that the legislature has taken a conscious decision not to clothe the Labour Court with the necessary jurisdiction to entertain the interpretation and application of

[37] (2021) 42 ILJ 961 (CC); [2021] 4 BLLR 325 (CC) at para 44.
[38] Labour Court is established in terms of section 151(1) as a Court of law and equity.

the provisions of OHSA, but instead to entrust the Third Respondent with the executive versus judiciary powers in terms of section 80 of MHSA may declare that any provision of OHSA and its regulations must apply to a mine.

[97] Embedded in this conclusion, is the universal principle of separation of powers which is the cornerstone of South Africa's democratic pillar, and so as provided in the Constitution and other legislative frame-works, the judiciary shall not invade the territory of other organs like the executive or legislature. In my view, pursuant to answering the merits the Respondents could have raised a special plea in which some point *in limine* is invoked in relation to jurisdiction against the declaration of OHSA like in the case of *PPWAWU & others v Nasou-Via Afrika a Division of the National Education Group Pty Ltd*[39].

[98] Upon analysis of the factual and legal exposition to the exclusion of OHSA as this Court is not legislatively empowered, *in casu*, it impressed that the First and or Second Respondents mining rights were consolidated and sold. Further to that, the Second Respondent's application for amendment of certain environmental authorisations in relation to the Retained Operations was approved by the Fifth Respondent as far as the year 2017 who confirmed that it will no longer be the competent authority.

[99] On the other hand, minerals processed at the retained assets from the adjacent operations are sold to the Second Respondent, therefore ceased to be owned by the *"employer"* so to relates in the legislative context, and are no longer connected or incidental to the mining operations of the employer in respect of those operations.

[100] In essence, and in the absence of a mining right or permit held by the Second Respondent for these or related operations, the statutory definition of an employer as in the MHSA is not satisfied, whereas the retained Process Operations are not "*mines*" as defined by MHSA.

[39] (1999) 20 ILJ 2101 (LC); [1999] 10 BLLR 1092 (LC).

<u>Conclusion</u>

[62] Having construed the relevant provisions, I conclude the following:

[63] That the application satisfied the accepted normal requirements of declaration in respect to MHSA, and dismally fails on OHSA for lack of jurisdiction.

[64] That indeed MHSA provisions are more beneficial for the health and safety scope of the First and Second Respondent's Retained Operations. However, the tools of interpretation of statutes including the purpose, explanatory notes and application of the Act, are clearly not supportive of the Applicant's version. The conclusion, therefore I reach is that MHSA cannot be applicable to Retained Operations of the First and or Respondents, respectively.

[65] The Applicant's application cannot succeed.

<u>Costs</u>

[66] This application concerns important questions of law pertaining to *inter alia* the fundamental rights applicable within the mining industry and also a matter of public interest, therefore costs shall be determined in the same context. Furthermore, the refusal to determine the application and or the interpretation of OHSA for lack of jurisdiction. Moreover, I am also inclined to consider the First and or Second Respondents' potential costs of having to litigate in both the High Court and Labour Court in respect of the same matter by the same parties against the same relief.

[67] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs, having regard to the requirements of the law and fairness including all of the relevant facts and circumstances.

[68] The Labour Appeal Court has since confirmed the sentimental approach in a matter of *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*[40], per Zondo JP (as he then was), held that "*the relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness*".

[69] In exercising its judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*[41], reaffirmed the principle set in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[42], with regard to costs in employment disputes and stated that "*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties".*

[69] Taking account of all the relevant facts and circumstances, costs shall be granted, with due consideration of the potential impact of Rule 76A of the Uniform Rules of Court as came into effect recently on the 12th of April 2024, just before delivery of this judgment, and after hearing. As read through the aforesaid amendment, it confirmed its *sui generis* approach in exercising judicial discretion on costs. However, I carefully decided that in the interest of justice that the default position shall be maintained.

[70] In the premises, I make the following order:

<u>Order</u>

1. Declaring that the Mine Health and Safety Act, 29 of 1996 and its regulations are not applicable to the Retained Operations of the First and or Second Respondent.
2. The declaration on Occupational Health and Safety Act (OHSA) and its regulations are dismissed for lack of jurisdiction.
3. The application is dismissed with costs, including of two counsels.

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[40] [2007] ZALAC 34; (2008) 29 ILJ 1707 (LAC) at para 19.
[41] [2019] ZACC 7; (2019) 40 ILJ 965 (CC) at para 30.
[42] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 25.

B. J. Dikotla

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv.P.L Carstensen SC & Adv.M.Shakung
Instructed by:	Bester & Rhoodie Attorneys
For the First & Second Respondents:	Adv A Myburgh SC & Adv. R Itzkin
Instructed by:	Webber Wentzel
For the Fourth Respondent:	Adv.F.A Boda SC
Instructed by:	State Attorney
For the Eight Respondent:	Adv. J.G Rautenbach SC
Instructed by:	Cheadle Thompson & Hayson INC.