REPUBLIC OF NAMIBIA

"Reportable"

CASE NO: A 140/08

IN THE HIGH COURT OF NAMIBIA

In the application of:

OTJOZONDU MINING (PTY) LTD **APPLICANT**

and

PURITY MAGNESE (PTY) LTD **RESPONDENT**

CORAM: DAMASEB, JP

Heard on: 05 October 2009

Delivered on: 26 January 2011

JUDGMENT

DAMASEB, JP: [1] By way of Notice of Motion dated 5 June 2008, the applicant sought relief in the following terms:

> 1. Dispensing with the forms and service provided for in the rules of Court and hearing this matter as one of urgency;
>
> 2. Directing that a *rule nisi* be issued calling upon respondent to show cause, if any, at 9h30 on Friday 27 June 2008, why an order should not be made:
>
> 2.1. interdicting and restraining respondent from performing any mining or similar or related operations of whatsoever nature, including the exploitation, mining or the removing of any existing or old dumps of stockpiled or otherwise accumulated rock or ore, in, on or under any land in respect of which applicant holds prospecting rights in terms of exclusive prospecting licence 3879;
>
> 2.2. interdicting and retraining respondent from dealing with, disposing or removing any ore bearing rock or excavated material, stored, dumped or stockpiled in any format, on or on the area of land covered by applicant's exclusive prospecting licence 3879, pending; the recording by respondent, within 10 days of date of this order, of all data and particulars contemplated by section 101(1(a)(i)(bb) , (cc) and (dd) of the Minerals Act, No 33 of 1992 relating to: the period from 28 January 2008 to 6 June 2008; and /or bearing rock and/or material mined, excavated, recovered or won in the area contemplated by paragraphs 2.1 and 2.2 above; and the making available of the above data and particulars to applicant within 5 days of the date upon which respondent complied with the order set out in the aforegoing paragraphs; and the expiry of the period of 30 business days from the date of compliance by respondent with the order set out in the aforegoing paragraph.
>
> 3. Granting to applicant such further and/or alternative relief that this honourable court may deem fit;
>
> 4. Directing respondent to pay the costs of this application.
>
> 5. Directing and ordering that, pending the finalisation of this matter, the orders set out in paragraph 2.1 and 2.2 above shall serve as an interim interdict with immediate effect.
>
> 6. Directing and ordering that, in the event that respondent intends opposing the relief sought by applicant: respondent is to serve and file its opposing papers, if any, but no later than noon on Friday 13 June 2008; applicant is to serve and file replying papers not later that noon on Friday the 20th June 2008; the parties are to serve and file their heads of arguments by no later than close of business on Tuesday 24th June 2008.
>
> 7. Granting to applicant such further and/or alternative relief as this honourable court may deem fit." (My underlining for emphasis)

[2] As is recorded in the heads of argument filed on behalf of the applicant[1], the urgent application was set down for hearing on 6 June 2008.It was opposed but the parties having

1 Dated 11 September 2009, paragraphs 10-17.

come to a *modus vivendi*[2] by the respondent undertaking to suspend the disputed mining activity until the case was heard on the merits, the urgent relief was not moved. In the event, it was set down for argument and argued before me on 7 October 2009 when judgment was reserved. What follows is my judgment in the matter.

The parties

[3] The Applicant is Otjozondu Mining (Pty) Ltd, a private company with limited liability duly incorporated in accordance with the company laws of Namibia. The respondent is Purity Manganese (Pty) Ltd, a private company with limited liability duly incorporated in accordance with the company laws of Namibia.

Common cause facts

[4] It is common cause that the applicant holds an exclusive prospecting licence ("EPL") 3879. The respondent holds a mining licence ("ML") 35 A, B and C. The area where the

2 The respondent undertaking that *"pending the further hearing and finalization of this matter, not to perform any mining or similar operations or activities, of whatsoever nature, including the removal of material in, on, under and/or from the area of land in respect of which applicant holds rights in terms of EPL3879"*.

respondent conducts its mining operations forms part of a larger land area covered by the applicant's EPL 3879.

Essence of dispute

[5] The applicant characterises the source of the dispute between the parties as follows:

> "The effect of the locations of the areas of respectively EPL 3879 and ML 35B is that the respondent may only exercise its mining rights strictly within the parameters of the area to which such mining licence relates, and may not encroach upon the area of land to which applicant's EPL 3879 relates".[3]

> During the period of 26 - 29 May 2008 applicant established that respondent was unlawfully conducting mining activities outside the parameters and borders of the area to which ML35B relates, and on the area to which applicant's EPL 3879 relates, in contravention of the rights of applicant and contrary to the provisions of the Minerals Act set out in paragraphs 5 to 7 above."[4]

APPLICANT'S EVIDENCE

Founding affidavit of Mr. David Saul Shimwino

[6] The main supporting affidavit on behalf of the applicant is deposed to by Mr. David Saul Shimwino, a director of the applicant who avers that he is duly authorised to depose to the founding affidavit and to bring the present proceedings.

---

3 Applicant's heads of argument dated 11 September 2009, para 4.

4 Ibid, paragraph 8.

[7] According to Shimwino, the applicant is the holder EPL 3879, granted on 28 January 2008 by the Ministry of Mines and Energy ("the Ministry") in terms of the Minerals Act, No. 33 of 1995 ("the Act").[5] EPL 3879 , which is under the hand of the Minister of Mines, states that it is *"over a certain portion of land situate in Otjozondjupa region, Registration Division 'D', magisterial district Okahandja as more fully depicted in the attached diagram No. 3879".* Diagram EPL 3879 is drawn to the scale 1: 100 000 and covers an area of 1,430.50 ha on Map: 2116/2118 and is defined by Latitude and Longitude lines of Bessel 1841Spheroid.

[8] Shimwino asserts that EPL 3879 entitles the applicant to explore, inter alia, the base metal manganese in the area covered by the EPL or in close proximity thereto. According to Shimwino, the respondent on the other hand, holds three mining licences ("MLs") with numbers 35 A, B and C entitling it to mine for the base minerals manganese in the areas to which those licences relate. Shimwino avers that to his knowledge no present mining activities are taking place within the areas covered by the respondent's MLs 35 A and C.

---

5 Section 3 states:

> *'subject to the provisions of this Act, no person shall-*
>
> > *carry on any....mining operation in, on or under any land of Namibia, except under and in accordance with a non-exclusive prospecting licence, mining claim or mineral licence, as the case may be.....*

Whereas section 133 (a) and (f) states that:

"any person who, without reasonable excuse, obstructs, hinders or prevents the holder of any non existence prospecting licence, mining claim or mineral licence, from exercising or performing any right, power, duty or function conferred or imposed upon him or her by or under any provision of the Act; or intentionally or negligently transgresses the boundaries of his or her mining area while carrying on mining operations shall be guilty of an offence and on conviction, be liable to a fine not exceeding N$ 8000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.''

[9] According to Shimwino, the respondent's mining activities have been assessed and described as being 'poor' by the Mineral Rights Committee of the Ministry in a report dated 7 March 2006, in respect of respondent's application for an exclusive prospecting licence *"not related to the areas of MLs 35A, B and C* and that a mine owned by the respondent had been described by the mining Commissioner as *'one of the biggest failures in Namibian mining history.'* The committee also reported in a report dated 27 April 2006 that the mining licence areas of the respondent were completely under-utilised and that the plant is operating substantially below capacity despite the high demand for manganese. Shimwino asserts that these findings demonstrate that the Ministry considers the respondent to be an under-achiever in the mining industry. The Commissioner had recommended to the Minister not to renew respondent's licences or to grant it new ones because of underperformance.

[10] According to Shimwino, the respondent had in the past resorted to dishonest and unlawful activities in relation to the areas over which the applicant holds EPL's 3456 and 3537 -such as removing stock piles of manganese bearing ore, or Alluvial manganese ores ('nodules'). Shimwino states that these activities of the respondent have the effect of undermining the endeavours of applicant to establish itself as a successful mining enterprise in the areas to which its EPL's relate and are in breach of section 3 and section 133 respectively of the Act. Shimwino states that these illegal activities of the respondent demonstrate its capacity to employ unlawful methods to undermine the rights of competitors.

[11] To deal with the illegal activities of the respondent, Shimwino asserts that he, on behalf of the applicant, wrote a letter to the Mining Commissioner on 26 March 2007 bringing to the Commissioner's attention the violations by the respondent which includes the removal of stockpiles of manganese from areas covered by the applicant's EPL's 3456 and 3537. On

behalf of the Commissioner, the Government Attorneys then responded on 2 April 2007 stating that the matter was under consideration and that the respondent had been asked to refrain from interfering in any manner whatsoever with the rights held under EPL's 3537 and 3456, failing which the Minister will take appropriate action against the respondent.

[12] Shimwino testifies that during the course of 26-29 May 2008 he was informed by Mr Carel van der Merwe, a former production manager of the respondent, now in applicant's employ, that the respondent was illegally mining outside its ML licence area.

[13] To buttress the allegation about the respondent's illegal mining activities on the applicant's EPL 3789, Shimwino relies on a sketch plan prepared by van der Merwe, a geologist, purporting to show the boundaries of the areas covered by the respective licences of the parties and in respect of which either party should exercise their rights in terms of their respective licences. Shimwino asserts that ML 35B falls within the ambit of EPL 3879 which - according to van der Merwe- shows that the respondent was unlawfully conducting mining activities outside the parameter of ML 35B and encroaching on the applicant's EPL 3879 in contravention of section 133 (f) of the Act.

[14] Shimwino further deposes that the land area on which the respondent's alleged illegal mining activities were being carried out was determined by van der Merwe by the use of a hand-held satellite GPS navigational system whose accuracy is a margin of error of a maximum of 10 meters. By reference to annexure 'DS 6', he says that this exercise established that the respondent's mining activities occurred at locations 1-5; that the

activities in locations 3 and 5 was lawful but that those in locations 1, 2 and 4 are between 150 and 250 meters outside the parameters of mining licence ML 35B of the respondent and within the areas covered by the applicant's EPL 3879. Activities at location 1, 2 and 4 were in breach of the applicant's EPL 3897 rights and thus constitute criminal conduct in terms of sections 3 and 133 of the Act.

[15] According to Shimwino, section 67(c) (iii) and (iv) of the Act entitles the applicant, as holder of an EPL and with the written permission of the Commissioner, to remove any mineral or group of minerals, for purposes of sale or disposal, from any place where it was found or incidentally won in the course of such an unlawful prospecting operation; and to further sell or otherwise dispose of any such materials or group of minerals. For that purpose, the applicant desires to establish the extent to which the respondent had prejudiced and unlawfully 'fleeced' the resources of the applicant by analysing the stockpiles to establish the mass , volume and manganese content removed in order to fulfil its obligations under sec 101 of the Act.

[16] Shimwino's affidavit is accompanied by the supporting affidavit of Mr. Heino Hamman and the confirming affidavit of Mr. Carel Lodewyk Van der Merwe, respectively.

Supporting affidavit of Mr. Heino Hamman

[17] Hamman alleges that he was the production manager for the respondent before his employment was terminated on account of it being unable to pay his salary because of cash flow problems. Hamman states that, while in the employ of the respondent, he supervised a

project, introduced by a certain Mr. Bannai, which included mining activities beyond the boundaries of the respondent's MLs and on the applicant's EPL, in contravention of the Act. Hamman deposes that these mining activities, carried out during February to May 2008, were under his supervision accompanied by Bannai, resulting in a total of 42.7 manganese shipments and 40.8 grade alluvial materials (nodules) being excavated by the respondent and being shipped to various overseas destinations. According to Hamman, these infringements against the applicant's EPL were done with the full knowledge of Bannai who showed little consideration for the applicant's rights. According to Hamman, the respondent kept no mining records for the period 1 February to 16 May 2008 as required by section 101 of the Act.

The confirming affidavit of Mr. Carel Lodewyk Van der Merwe

[18] Van der Merwe confirms that he is a geologist in the employ of Creo Design (Pty) Ltd who provide geological and mining services to the applicant. He had been performing services of a *"geological nature on site at the location where the applicant currently explores for predominantly manganese ...in terms of EPL 3879".* Van der Merwe states that during 26 to 29 May 2008 he was requested by the applicant to plot and record the GPS coordinates of locations where the respondent had conducted mining activities during the period 1 February 2008 to 16 May 2008 in the area encompassed by EPL 3879. He performed the task with the assistance of Hamman who had been in the respondent's employ until May 2008 as production manager. He plots locations 1-5 on annexure CVM1 as the ones where the respondent allegedly carried out mining activities.

[19] Van der Merwe's evidence is that the plotting that he conducted to determine the boundaries of the respective licences of the parties and the alleged illegal mining by the respondent is was determined in the report at location 5 by reference to coordinates

0806019 and 7647848, at location 3 by reference to coordinates 0806168 and 7647572, at location 1 by reference to coordinates 0806040 and 7647396; at location 2 by reference to coordinates 0806067 and 7647472; at location 4 by reference to coordinates 0805719 and 7647557. Locations 5 and 3, he states, are outside the parameters of EPL 3879 but that locations 1, 2 and 4 are within the area covered by the applicant's EPL 3879.

[20] Hamman deposes that the respondent's actions were likely triggered by financial and commercial considerations such as that locations 1, 2 and 4 represent a continuation of manganese mineralisation containing substantial deposits of manganese from the area under EPL 3879 to ML 35B. The inducement could have been the fact that these deposits are recovered or excavated by a relatively inexpensive opencast mining process as shallow as merely one metre below the surface of the land. Additionally, locations 1, 2 and 4 are closer to the public road which renders the transportation of the excavated ore less onerous and less expensive. Van der Merwe also states that the remainder of the land indicated on Annexure 'CVM 1' left and right of location 5 no longer contain substantial deposits of manganese bearing ore or nodules.

THE RESPONDENT'S CASE

Answering affidavit of Mr. Asaf Eretz

[21] This deponent is a Project Advisor of the respondent who sates that his denials of the applicant's allegations are done in consultation with Mr. Boris Bannai, who because he was out of the country could not file an affidavit and that same is expected to be filed upon his return and before the hearing of the matter.

[22] Eretz states that the grounds relied upon by the applicant's witnesses are based on incorrect and misleading information. Eretz alleges that the applicant does not make out a case for the grant of an interdict by failing to allege that irreparable harm will be suffered by the applicant in the absence of the order being granted. Eretz denies the content of the assessment report dated 7 March 2007 issued by the Ministry of Mines and Energy and alleges that the use by the applicant of such assessment is aimed at painting a negative picture about the respondent. Eretz states that the assessment report is in any event the subject of a review application against the Ministry (under case no A4/07) and is therefore irrelevant to the present proceedings.

[23] Eretz denies that the respondent was involved in dishonest and unlawful activities; disputes the Commissioner's conclusions and characterises the response from the Government Attorneys dated 2 April 2007 as irrelevant.

[24] He denies that Van der Merwe was qualified to offer an opinion on the aspect of land surveying and denies all allegations of encroachment by the respondent on the applicant's EPL 3879. Eretz's substantiates the respondent's stance that it is not encroaching on EPL 3879 with a survey report rendered by land surveyors from Strydom & Associates (annexed to the answering papers) and the confirmatory affidavit of Reinhard Steyn which shows that the respondent's operations are lawful and within the boundaries of mining licence ML 35B. S& A's findings and conclusions purport to prove that the report by Van der Merwe is unfounded to the extent it suggests that the respondent illegally mined on the applicant's

EPL 3879. The deponent denies any allegations inconsistent with the findings of S & A to the effect that the respondent's findings were confined to its ML- and prays for a punitive costs order against the applicant.

Ad the affidavit of Heino Hamman

[25] Eretz denies that Hamman was employed by the respondent or that the termination of his employment was due to cash flow problems being experienced by the respondent. He states that Hamman was employed by Islandsite Investment 122 (Pty) Limited in terms of a secondment agreement. The deponent states that the termination of Hamman's employment was due to the cancellation of the secondment agreement between the respondent and Islandsite as a result of the respondent rationalising its staffing requirements and that Hamman was retrenched by *Islandsite.*

[26] Eretz denies Hamman's allegation that during the latter's tenure with the respondent it engaged in illegal mining on the applicant's EPL and enriched itself at the expense of the applicant. He asserts that all mining activities conducted by the respondent are taking place on its ML. He states that Hamman is a disgruntled employee spreading falsehoods about the respondent and that Steyn's evidence shows that the respondent is mining in its licence area.

[27] Eretz denies that any manganese shipments were excavated from the area covered by the applicant's EPL 3879. He also denies that the respondent failed to submit any reports to the Ministry of Mines and asserts that the respondent maintains records in terms of its ML.

Ad affidavit of Carel Lodewyk Van der Merwe

[28] The witness avers that Van der Merwe is a geologist and not a land surveyor and

therefore not qualified to give opinion evidence in a matter involving demarcation of land. Eretz questions the process used by van der Merwe to calculate the coordinates and refers the Court to the affidavit of Steyn.

[29] Eretz disputes the time spent by Hamman at the alleged illegal mining sites and the reason why critical information relating to the respondent's activities were not brought to the applicant's attention before Hamman's employment by the applicant -factor states indicates that van der Merwe was not aware of what the true state of affairs and is fabricating facts to favour the applicant's cause. He denies that Van der Merwe correctly calculated the coordinates and points out that he does not inform the court exactly what process and methodology he applied to set up the coordinates by reference to which he assessed the alleged illegal mining activities of the respondent. He disputes the points plotted by Van der Merwe as constituting the spots were the respondent's alleged illegal activity took place. Eretz does so by reference to Steyn's affidavit and the conclusions about Van der Merwe's work annexed to Steyn's affidavit which forms part of the respondent's answering papers.

Confirmatory affidavit of Mr. Reinhard Steyn

[30] Steyn is a land surveyor and a partner in the firm Strydom & Associates (S&A). He states that S&A Land Surveyors is a well established land surveying firm in Namibia with extensive experience in all fields of surveying within Namibia and internationally, including South Africa, Angola, Mozambique and Equatorial Guinea. Steyn qualifies himself as a professional land surveyor having obtained a Bachelor of Science in Geomatics from the University of Cape Town in 2001. From February 2002 to date he has been practising with S&A. He is registered with SURCON as a professional land surveyor since June 2007. Steyn states that he had read the affidavits deposed to by Shimwino, Heino and Van der Merwe

and dispute those allegations regarding the land survey conclusions they infer therefrom.

[31] PML 2 was prepared by the two partners of S&A on 26 June 2008. It states that S&A were appointed by Purity Manganese (Pty) Ltd to determine the position of certain points in relation to their mining licence areas 35A, B and C, and to further establish whether those point locations are located within the mining licence areas. It specifically purports to comment on the affidavits annexed as E (Van der Merwe and F (Hamman), both executed on 4 June 2008 in connection with the relief the applicant seeks in the present proceedings. The report states that its authors were involved in the original demarcation survey of the mining licence areas. It sets out the methodology used in performing that task pointing out the difficulties performed in the process. It states that that work resulted in *a 'survey' which is filed in the office of the "Surveyor General with survey record reference number S.R. NO. E 290/2007. Filing and submitting any survey makes access to the information easy and possible to the public. Filing and submitting this particular survey ensures that there is a permanent record of the mining licence areas as surveyed."* It adds:

> "We have to mention that submitting survey records for such a survey is not standard procedure and was done on insistence of Purity Manganese (Pty) Ltd in order to have these records transparent, readily available and securely filed. Since this is also not a standard cadastral survey it was presented in the form of a farm beacon verification survey with all mining licence beacons placed shown as survey working points."

[32] The report states that in performing this task, S&A used the Bessel 1841 spheroid which is more accurate compared to the WGS 84 - with a difference of 100-200m in positioning. It records that the Bessel 1841 uses physical structures as reference points that

can be used to determine the relationship between the outcomes of the previous survey and the present one.

[33] The report records that in May 2008 S&A were requested by the respondent to survey certain points and establish if the points are located inside the mining licence areas or not. Certain points were shown to them by a representative of the respondent - one Mr Guy whose further particulars are not furnished. Those points were surveyed by means of a hand-held GPS with an accuracy of within 10 meters. It states that points were surveyed on the WGS 84 system and then converted to the Namibian LO 22/17 system and plotted relative to the mining license area boundaries.

[34] The report offers the following critique of the applicant's witness Van der Merwe:

> "Van der Merwe refers to Annexure "CVM1" extensively in his attached affidavit. He refers to locations 1, 2.3,4 and 5 on said annexure. With reference to his affidavit and the mentioned annexure: Co-ordinate datum or reference ellipsoid is not given.
>
> Reference is made (E5 point 11) to marked pegs / beacons but not explained. There is no mention of the nature of points or locations surveyed. If there was any physical point or feature surveyed that could be used as a reference point it would have been quiet(sic) easy to determine a relationship between what was surveyed then and later by us ,thus relating the two surveys to each other, as discussed in 2 above. The map attached as Annexure "CVM1" furthermore shows only a scale bar and it is a plot super-imposed on a 1: 50 000 map sheet with an approximate scale of 1: 43 000. The co-ordinates as shown are UTM Zone 33 co-ordinates, with no indication as to a reference ellipsoid. Normally this reference ellipsoid will be WGS 84, but it is also possible that the Bessel 1841 ellipsoid could have been used. The difference in the location or position of the plotted points could probable be 100m-200m using

the different ellipsoids. Using an UTM map projection introduces a scale on the central meridian of 0.9996 which translates to a 0.4 metre scale correction per kilometre. Scaling off of this map can also possible (sic) be in the accuracy of 50m-100m considering that a 0.001 metre error made when measuring off a 1: 50 000 map represents 50m on the ground."

[35] The report concludes:

> *"Surveyed values of points pointed out to us and surveyed by means of handled GPS are accurate within approximately 10 metres. Surveyed point locations as shown on the map are all within the mining licence areas with the closest distance between a point location and a mining licence boundary being 78 metres. With an accuracy of approximately 10 meters, one can obviously conclude that the closest surveyed point location is well within the mining licence areas boundary."*

APPLICANT'S REPLY

Shimwino

[36] Shimwino alleges that the affidavit of Eretz is vague and constitutes inadmissible hearsay as the averments affecting Bannai are not confirmed by Bannai. Shimwinodisputes that Eretz's in his stated position of Project advisor was possessed of sufficient personal knowledge to depose to the facts he does.

[37] Shimwino avers that the applicant became aware of the unlawful mining activities of the respondent during 26-29 May 2008.

Ad affidavit of Steyn

[38] Shimwino deposes that the respondent and Steyn failed to properly identify 'Guy' who is alleged to have shown the locations to the surveyors on behalf of the respondent and that whatever Steyn did on that basis is hearsay as there is no confirmatory affidavit by Guy: The context of the 'certain point' pointed out to Steyn is unclear and it is doubtful that such points are the locations in dispute. Shimwino points out that Steyn failed to substantially disprove the content of Van der Merwe's affidavit relating to the facts whether respondent's unlawful activities were within or without the area covered by EPL 3879. Shimwino reiterates that the conclusions reached in Steyn's report are meaningless, especially given the paucity of information relating to what had been pointed out to them and what they had been instructed to establish. He also states that given that the application was brought in May but that Steyn's report was prepared in June shows he is not dealing with the present application. Shimwino reiterates that the applicant established that the respondent is violating applicant's rights in respect of EPL 3897.

[39] According to Shimwino, Van der Merwe's report was not presented as an expert's opinion but of a person who can employ a hand-held GPS navigational system for purposes of demarcating the respondent's unlawful mining sites. Shimwino points out that, in any event, the affidavit of Mr. Deintler Engelhard of Volkmann Land Surveyors confirms the accuracy of the method used by van der Merwe.

[40] Shimwino makes the point that the affidavit of Steyn refers to services of Strydom & Associates being employed on May 2008 while the application was only brought on the 6 June 2008. It is therefore impossible that the investigations by the Land Surveyors would have been in response to the applicant.[6]

[41] Shimwino states that on respondent's version Hamman was employed by the respondent in terms the secondment agreement and that he is, in all respects, an employee of the respondent and that it is contrived to say that Hamman was untruthful in stating that he had not been employed by the respondent. The evidence that Hamman is disgruntled, spreading misinformation and is not being candid with this honourable court is bold and farfetched.

Affidavit by Carel Lodewyk Van der Merwe

[42] Shimwino deposes that he personally met with Messrs Engelhard and Sell, of Volkmann Land Surveyors at applicant's site on 9 July 2008. The physical locations of the sites cited as location 1, 2 and 4 were pointed out as stated in the affidavit dated 4 June 2008 and as indicated by annexure 'CVM1 '. The deponent further states that the sites 1, 2 and 4 are confirmed by Hamman as being the locations where the respondent had conducted mining activities during his employment by the respondent.

Affidavit of Mr Diether Engelhard

[43] This deponent is a land surveyor employed by Volkmann Land Surveyors. He was mandated to establish whether the sites indicated as point 1, 2 and 4 on Annexure CVM1 to

6 Not much can turn on this point. The context of the answering papers is clear. The report specifically refers to the affidavits of Hamman and Van der Merwe and is specifically directed at the allegations made in those affidavits. As regards when the instruction was given, it is so obvious on the papers that the dispute between the parties predates this application. It is perfectly reasonable to assume that the preparatory defensive work commenced when the dispute first surfaced.

the affidavit of Van der Merwe, fell within the area of ML 35B or EPL 3879. Engelhard sates that he conducted his survey the 9 July 2008 by the use of the trigonometrically beacon system. That beacon uses the Bessel 1841 ellipsoid as its reference ellipsoid.

[44] He concludes that using the boundary line of ML35 B as determined by S&A using the methods set out in the affidavit of land surveyor Steyn will bring differing results. Accordingly, the locations 1, 2 and 4 would to a minor extent fall within the parameters of ML35 B, but predominantly (about 90%) will fall outside the perimeter and into the area covered by EPL 3879. However, due to the differences between the boundary line determined by Steyn and that determined by the Mining commissioner, the deponent maintains that the latter's boundary line should prevail, resulting in location 1 falling entirely outside the area of ML35B and in the area of EPL 3879. Location 4 falls, to the extent of 54%, within the area of EPL 3879. If the boundary line as surveyed by Steyn is used, location 4 would fall almost entirely outside the area of ML 35B. Engelhard concludes that location 2 does not fall within the area of EPL 3879. However, if the boundary line surveyed by Steyn is to be used, location 2 would be entirely outside the area of ML 35B. Decrypted, his conclusion is that the respondent's mining activities at the sites pointed out by to him occurred on the land area falling within the applicant's EPL 3879.

ORAL ARGUMENTS SUMMARISED

Respondent's challenge to Shimwino's authority to bring application

[45] The respondent asks for the striking out of Shimwino's affidavit. The case for striking out is based on the failure by Shimwino to produce a resolution by the applicant, a corporate body, authorising Shimwino to bring these proceedings. In the opposing affidavit of Eretz the issue was raised in the following terms:

> "Shimwino fails to attach a resolution authorising him to depose to the founding affidavit. I, accordingly, deny that Shimwino is duly authorised to depose to the founding affidavit on behalf of the applicant and put Shimwino to the proof thereof."

[46] In the founding affidavit Shimwino had stated:

> "I am a director of applicant and duly authorised, in such capacity, to depose to this affidavit and launch these proceedings on behalf of applicant."

[47] In reply Shimwino did not produce a resolution. He stated as follows in reply:

> "[T]he bold, unsubstantiated and sweeping denial of my authority does not, I submit carry sufficient weight for the purposes of constituting any denial to which I have to respond."

[48] Although at the onset of oral argument Mr Bava submitted that lack of authority is not being raised as a point in limine, it remains a relevant issue because it is sought to be relied upon as a basis for seeking a special costs order against the applicant.

[49] The respondent takes the view that where, as here, the authority of the person launching an application is questioned, a resolution must be furnished. Mr Bava, on behalf of the respondent cites authority in support of the position adopted by the respondent. The first line of authority is to the effect that a company involved in litigation can only act through agents and can only take decisions by passing resolutions. (See *Pretoria City Council v Meerlust Investments Ltd* 1962 (1) SA 321
(A) at 325D; *South African Milling Co (Pty) Ltd v Reddy* 1980 (3) SA 431 (SE); *Mall (Cape) (Pty) ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351H and *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 625G-H.)

[50] The second line of authority is in support of the proposition that once authority is challenged, the party challenged must produce proof of authority. Mr Bava cites the following cases: *Baeck and Co SA (Pty) Ltd* v *Van Zummeren and Another* 1982(2) SA 112(W) and *Smith v Kwanonqubela Town Council* 1999(4) SA 947 (SCA).

[51] I don't think anyone can possibly fault Mr Bava's propositions as applicable principles of law in our jurisprudence when it comes to corporate entities engaging in litigation. All that the cases demonstrate however is the established principle that a company has no soul of its

own and acts through human beings who must be authorised to act on its behalf; and, secondly, if there is undisputed evidence that no such authority existed, the purported actions by persons purporting to act on its behalf are invalid. The latter gives rise to the principle that where there is a challenge to authority, those relying on it must prove it. But it is not any challenge; and that is where Mr Bava misses the point: I apprehend, the question is not so much whether in the face of a challenge to authority and being afforded the opportunity to prove of it, Shimwino failed to produce a resolution authorising him; rather it is this: was the respondent, on the facts of this case, justified to question the indubitably necessary allegation by Shimwino that he was duly authorised to act on behalf of the applicant in launching this application?

[52] It is now settled that in order to invoke the principle that a party whose authority is challenged must provide proof of authority, the trigger - challenge must be a strong one. It is not any challenge: Otherwise motion proceedings will become a hotbed for the most spurious challenges to authority that will only protract litigation to no end. This principle is firmly settled in our practice. It was stated as follows in *Scott v Hanekom* & Others 1980 (3) SA 1182 at 1190EG:

> "In cases in which the respondent in motion proceedings has put the authority of the applicant to bring proceedings in issue, the Courts have attached considerable importance to the failure of the respondent to offer any evidence at all to suggest that the applicant is not properly before the Court, holding in such circumstances that a minimum of evidence will be required from the applicant..This approach is adopted despite the fact that the question of the existence of authority is often peculiarly within the knowledge of the applicant and not his opponent. A fortiori is this approach appropriate in a case where the respondent has equal access to the true facts." (My emphasis; and footnotes omitted).

[53] It is now trite that the applicant need do no more in the founding papers than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge

the averments regarding authorisation. When the challenge to the authority is a weak one, a minimum of evidence will suffice to establish such authority: *Tattersal and Another v Nedcor Bank Ltd,* 1995 (3) SA

228J-229A.

[54] The *Ganes* case Mr Bava relies on states clearly (at 624FH, para. 19):

> "In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised."

[55] I have shown the way in which the respondent challenged Shimwino's authority. It is indeed a weak challenge. Eretz does not challenge or deny Shimwino's allegation that he was duly authorised to bring the present application - only that he was not authorised to depose to the affidavit. *Ganes* tells us *that* is a worthless challenge. In reply Shimwino reiterated he had authority. I am satisfied that the averments meet the minimum-evidence requirement. The challenge to Shimwino's authority is a bad one and I reject it. In fact, in light of especially the dicta in *Ganes,* a case also relied on by Mr Bava, the challenge borders on the frivolous.

RESPONDENT SAYS APPLICANT HAS NO CAUSE OF ACTION

[56] In oral argument Mr Barnard on behalf of the applicant reinforced the applicant's case to be: it has an EPL whose land area encompasses the land area constituting the ML of the respondent. The respondent is required by law to confine its mining activities to the land area covered by the ML and not to transgress on the wider area of the applicant's EPL. Mr Barnard argued that the applicant's case is that the respondent in fact carried out mining activities outside its ML and on the land area covered by the applicant's EPL entitling the applicant to stop such mining activity. He argued further that Steyn's report is unconcerned with wether the respondent's mining activity falls within the mining area of the applicant and that there is no nexus between the report by Steyn and the locations of the alleged violations by the respondent. Mr Barnard argued that the respondent's illegal mining is amply proved by the evidence of Shimwino, Hamman and Carel Van der Merwe and confirmed by the affidavit (in reply) of land surveyor Diether Engelhard.

[57] He summarises this evidence as follows:

1. Van der Merwe was informed by Hamman, the former production manager of respondent, of the unlawful mining by respondent on the land area of applicant's EPL; Hamman personally pointing out the locations of such unlawful mining sites to Van der Merwe;

2. Hamman had personal knowledge of these locations, as the unlawful mining at such sites had been conducted under his personal supervision.

3. Significantly, Hamman's personal knowledge of the locations of respondent's mining sites was admitted and conceded in respondent's opposing affidavit;

4. Van der Merwe plotted and recorded these locations of the unlawful mining sites in May 2008 as respectively locations 1, 2 and 4 , where mining had been conducted by respondent during the period of 1 February 2008 to 16 May 2008;

5. The plotting and recording was done with the assistance of a handheld GPS navigational system, such system conceded by respondent itself to be "accurate to within plus minus 10 m";

6. The land surveying firm Volkmann and Associates, acting through Engelhard and Mr Sell, subsequently and in July 2008, conducted a survey to establish the accuracy of Van der Merwe's plotting of the locations of the unlawful mining;

7. The locations established by Van der Merwe in May 2008 were personally pointed out to Engelhard and Sell by Van der Merwe, and Engelhard confirmed that such locations bore evidence of mining activities;

8. Having made some generous assumptions in favour of respondent, surveyors Engelhard and Sell established and confirmed that locations 1 and 4, as plotted by Van der Merwe, fell within the area of applicant's EPL, and therefore amounted to a violation of applicant's rights.

DOES APPLICANT'S EVIDENCE SUSTAIN A CAUSE OF ACTION?

[58] Mr Barnard argued that the "plotting" done by Van der Merwe did not require expert evidence but was in any event confirmed by land surveyor Engelhard. He maintained that Hamman, as a former employee of the respondent, confirmed illegal mining activity by respondent in the area shown by van der Merwe to fall within the EPL of the applicant and

beyond the ML of the respondent. He says such statement by Hamman is a confession and a declaration against interest because he speaks to activities that occurred while he was in the respondent's employ.

[59] The respondent urges this Court to find that the applicant had singularly failed to establish a cause of action entitling it to the relief that it seeks and that the application stands to be dismissed on that basis. The respondent maintains that the applicant failed to establish an evidentiary basis for the relief it seeks against the respondent. This argument is based on the denial in the answering papers that the report rendered by van der Merwe, a geologist, is correct or that he was qualified to render an opinion on a matter involving land surveying. The respondent asserts that only a land surveyor could have conducted the exercise that Van der Merwe set about doing when, according to Shimwino, van der Merwe was tasked to plot the locations where the respondent had allegedly illegally carried out mining activities on applicant's EPL in breach of the Act.

[60] Van der Merwe himself states he was mandated by the applicant in May 2008 to plot and record the GPS coordinates of locations where the respondent conducted mining activities; and to record the GPS coordinates of five locations where the respondent had conducted extensive mining operations. He sets out such locations by reference to a diagram marked "CV1"; determines the borders and draws the inference that such locations fall within the area to which the respondent's mining licence relates. Van der Merwe concludes:

> "It thus appears, in my view and as confirmed to me by Hamman, that the conducting of mining activities by respondent in and on the area of land to which applicant's EPL 3879 relates, followed upon deliberate and intentional decisions of respondent underpinned by financial and commercial considerations, rather than being activities pursued in ignorance of what either applicant's rights, or those of respondent, entailed."

COMMENT

[61] As I have shown, the applicant's case is premised on the allegation that the respondent is unlawfully mining on its (applicant's) EPL. It is obvious from the papers that an exercise requiring some skill is required to determine the precise location of the land area covered by the respective licences of the two parties relative to the other. That exercise is technical in nature and requires specialist insight. The first question is, what sort of skill? The applicant's case appears to be that any person able to use a hand-held GPS navigating system device could perform that function; whereas the respondent states that a qualified land-surveyor would be required to establish the precise location and boundaries of the land areas falling under the licences of either party.

[62] It is important to correct what I perceived during argument to be a serious conceptual confusion about the true purpose of opinion evidence on the question whether or not there was illegal mining by the respondent on the applicant's EPL 3879. That is what is sometimes referred to as the *ultimate issue.* The question whether or not the applicant established illegal mining by the respondent on its EPL is the ultimate issue the Court has to decide- not a witness. Witnesses tender in evidence their observations, and where required by the Court, an opinion either as lay witness or expert witness. The Court is not bound by such opinion. The conclusions of either van der Merwe or Steyn on the ultimate issue are only that -opinions, nothing more! Those opinions, although they do not bind the Court, can be received if they give the Court 'appreciable help' in determining the ultimate issue. In this

case we are concerned not only with the interpretation of documents[7], being EPL 3879 and ML's 35 A, B and C, but also with words[8] with a special or technical meaning appearing on those documents; including whether- which is the ultimate issue- in light of those documents, properly construed, the applicant makes out the case that the respondent carried out illegal mining activities on EPL 3879. It is the Court that determines that ultimate issue. The opinion of the witnesses is not the last word on that issue.

[63] It is a notorious fact that when it comes to surveyed land, the precise boundaries and extent of disputed land is best determined by the deployment of land surveyingtechniques and methods interpreting cadastral[9] maps. It is, in my respectful opinion, not a matter on which a Court can come to a conclusion one way or the other without the assistance of expert evidence by a person with the skill and expertise in cadastral demarcation. Such expertise is, it is equally notorious, the province of the profession of land surveyor. A 'geologist' [10] is not qualified to perform the task of land surveying. If one has regard to the EPL 3879s specification under the hand of the Minister, it becomes apparent that special skill is required to read and interpret certain words bearing special and technical meaning. Similarly, Steyn's evidence as to his qualifications and experience shows that land surveying is a specialist field of study.

[64] In reply Shimwino concedes that Van der Merwe is not a land surveyor and states that

---

7 On which a witness is not allowed to give an opinion as it is the prerogative of the Court: *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) 589; *International Business Charted Accountants (SA) v Securefin Ltd & Anor* 2009 (4) SA 399 (SCA) at para 40.

8 On which opinion evidence is permissible: *KPMG Chartered Accountants (SA) v Securefin Ltd and Anor, supra, at para 40.*

9 The Concise Oxford English Dictionary defines the adjective 'cadastral' as: ''of a map or survey) showing the extent, value, and ownership of land, especially for taxation.

10 The Concise oxford English Dictionary defines the noun 'geology' as: '' the science which deals with the physical structure and substance of the earth.

his evidence was not presented as that of a land surveyor. Shimwino in reply states that Van der Merwe's evidence was presented as evidence from a person who could employ a handheld GPS navigational system, and who did so for purposes of demarcating the locations of respondent's unlawful mining sites. As Mr Bava correctly submits, this does not avail the applicant because nowhere in the applicant's founding papers is the allegation made that Van der Merwe is *"a person qualified to operate a hand-held GPS navigational system."*

[65] It is an elementary rule for the production of opinion evidence that a basis is laid for it and the methodology used and the processes undertaken in reaching it be laidbare.[11] Above all, a witness proffering an opinion must be competent to give one on the subject matter.[12] All *that* ought to have been included in the founding papers but was not - and it is fatal! What Van der Merwe did was therefore a meaningless exercise which the court cannot rely on. Even assuming it was included, it still would not be relevant because it does not emanate from a person qualified as a land surveyor on a matter the court considers required expert opinion evidence to assist it in arriving at a considered decision on the ultimate issue in dispute.[13] Expert evidence is relevant and must be called for to provide the court information and elucidate issues of a technical nature.[14] On the facts of this case, I am satisfied that the expert evidence called for is that of a land surveyor and that the applicant's failure to call one is fatal to its case.

---

11 "...an opinion, unaccompanied by the foundation on which it is based, is again of no value to the judicial officer who has to make a finding on it'': Per De Villiers AJP in *R v Theunissen* 1948 (4) SA 43 (C) at 46.

12 *S v Bertrand* 1975 (4) SA 142 (C) 149B-C; *S v Van den Berg* 1975 (3) SA 354 (O) 357; *S v Adams* 1983 (2) SA 577 (A) 586A.

13 The test of the admissibility of the opinion of a skilled witness is whether or not the court can receive ''appreciable help'' from that witness on the issue in question. The test is a relative one, depending on the particular subject and the particular witness with reference to that subject: per Trollip JA in *Gentiruco A.G v Firestone SA (Pty) Ltd* 1972 (1) SA 589 at 616H.

14 *Ruto Flour Mills (Pty) Ltd v Anderson* (1) SA 235 (T) 237; *R v Van Schalkwyk* 1948 (2) SA 1000(O) at 1002

[66] The attempt by the applicant to introduce the report of land surveyor Engelhard in reply - apparently to give van der Merwe's report a veneer of acceptability - is not permissible in motion proceedings. That should have been done in the founding papers. In motion proceedings the affidavits constitute both the pleadings and the evidence and the applicant cannot make out a particular cause of action in the founding papers and then abandon that claim and substitute a fresh and different claim based on a different cause of action in the replying papers: *Johannesburg City Council v Burma Thirty Two (Pty) Ltd* 1984 (2) SA 87 (T) at D-E; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A). A *cause of action* ordinarily means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court: *Mackenzie v Farmers Cooperative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 838 E-G.

[67] I therefore cannot accept Engelhard's evidence - as support by a qualified land surveyor - of the correctness of the allegations made by Van der Merwe on the central question in dispute: Did the respondent conduct illegal mining activities on the applicant's EPL 3789? The applicant must stand or fall by its founding papers and its application stands to be decided on the basis of the evidence of Van der Merwe as filed in the originating papers.

[68] The applicant takes issue with the affidavit of Steyn, a land surveyor engaged by the respondent to counter the report by Van der Merwe which concluded that the respondent is illegally mining in the EPL of the applicant. The applicant seeks the striking of the entire affidavit and report of Steyn on the following grounds:

1. The only relevance that the affidavit and report of Steyn could have had would be that of disproving or refuting the evidence of applicant to the effect that the locations of respondent's unlawful mining, as plotted by Van der Merwe, do not fall within the area of land to which applicant's EPL3879 relates;

2. The basis upon which Steyn's entire report and affidavit were premised was the mandate to locate "certain points as "shown to (Steyn)... by a representative of Purity Manganese (Pty) Ltd by the I name of Guy";

3. The evidence and report by Steyn are thus exclusively of a hearsay nature, based on what a person "by the name of Guy had conveyed to Steyn. In the absence of any confirmatory affidavit by "Guy" Steyn's evidence, in its entirety, falls to be struck out as hearsay;

4. Apart from the evidentiary value that Steyn's affidavit and report purported to have relating to the locations pointed out to him by "Guy such report and affidavit would have no other evidentiary value and would, to the extent of any other matter not relating to the pointing out of the locations of the mining sites, be irrelevant.

5. The evidence of Steyn is furthermore irrelevant, in its entirety, in the context as presented, in that:

6. No endeavour was made to link the locations plotted by Van der Merwe to the locations in respect of which Steyn purported to come to his conclusions;

7. No endeavour was made to suggest that "Guy' had any knowledge of the specific locations of the sites plotted by Van der Merwe;

8. Steyn himself complained that the locations plotted by Van der Merwe were impossible to determine.

THE APPLICATION TO STRIKE CONSIDERED

[69] Steyn's affidavit has two evidential purposes: The first is his competence and

qualification to express an opinion on the matters before Court and the second is his expert opinion on the central issue before court: did the respondent act illegally in relation to the applicant's EPL 3789? Each has probative value on the facts before me. The sweeping characterization of Steyn's affidavit as inadmissible hearsay loses that important perspective. I will consider the objection against Steyn's affidavit closely. As is apparent from reading the application to strike, the objection against Steyn's affidavit covers the second element of the evidential issues raised by Steyn's affidavit. It fails to deal with the first. The first is relevant in this sense: the applicant has the evidential onus in respect of its cause of action: i.e. the alleged unlawful interference by the respondent with the applicant's exercise of its rights under EPL 3879. To prove *that* interference requires admissible evidence as to the exact extent of applicant's EPL boundaries relative to that of the respondent - including the illegal mining activity by the respondent, contrary to law and in breach of the applicant's rights.

[70] As to the hearsay nature of the allegations in Steyn's affidavit *a propos* the merits of the case, the applicant's objection thereto is not without substance. The alleged pointing out by Guy was the basis on which Steyn says S&A did the work on the site to determine if the respondent was mining illegally on EPL 3879. Guy does not confirm such pointing out. The allegations relating to him, and in particular his alleged pointing out, therefore remain unconfirmed hearsay. The failure to explain why he could not file an affidavit is troubling. It calls for an adverse inference againstthe respondent: The failure to call an available witness may call for an adverse inference and creates the risk of the *onus* being decisive: *Ralisphawa v Mugivhi & Others* 2008 (4) SA 154 at 157, para 15.[15]

15 See also: *Brand v Minister of Justice &* Another 1959 (4) SA 712 (A) at 715F-716F.

[71] Although Steyn's evidence as to the extent, location and boundaries of the parties' respective licences - coming as it did after a pointing out by Guy - was hearsay , Steyn's evidence cannot be hearsay as to the following:

a) That the exercise required to plot the extent and boundaries of the areas covered by the respective licences required the skill of a land surveyor; and

b) That Steyn is a qualified land surveyor and accordingly qualified to critique the work done by van der Merwe which forms the basis for the claim that the respondent acted unlawfully in relation to the applicant's EPL.

[72] In respect of these two matters, Steyn's evidence is neatly summed up as follows by Mr Bava in his heads[16] of argument and I adopt it with approval:

> "In dealing with Van der Merwe's affidavit, Steyn indicates: co-ordinate datum or reference ellipsoid is not given; reference is made (E5.11) to mark pegs/beacons but not explained; there is no mention of the nature of the points or location surveyed. If there was any physical point or feature surveyed that could be used as a reference point, it would have been quite easy to determine a relationship between what was surveyed then and later by us thus relating the two surveys to each other, as discussed in 2 above; the map attached to Van der Merwe's affidavit marked
>
> Annexure "CVM1" furthermore shows only a scale bar and it is a plot super-imposed on a 1:50000 map sheet with an approximate scale of 1:43000; the co-ordinates as shown are UTM Zone 33 co-ordinates, with no indication as to a reference ellipsoid. ... The difference in the location or position of the plotted points could probably be 100 metres - 200 metres using the different ellipsoids; using a UTM map projection introduces a scale on the central meridian of 0.9996 which translates to a 0.4 metre scale correction per kilometre. Scaling off of this map can also possibly be in the accuracy of 50 m - 100 m considering that a 0.001 metre error made when measuring off a 1:50000 map represents 50 metre on the ground."

16 Respondent's heads of argument dated 18 September 2009, paragraph 44.

[73] This critique by a qualified land surveyor shows how unreliable it is to place reliance on Van der Merwe's opinion - based on the work he did using the handheld GPS navigational system for which he had laid no proper basis or disclosed the methodology used and the reasoning underlying his conclusions.

[74] I agree with the respondent's position that, as a geologist, Van der Merwe could not determine - and was not qualified to assist the Court in coming to a conclusion as to the exact boundaries and extent of the land areas covered by the respective licences of the parties; and that the respondent had unlawfully carried out mining operations on the land area covered by EPL 3789 of the applicant and that such activity fell outside the ML 35B belonging to the respondent. These are issues that called for expert opinion evidence by a land surveyor and the opinion on it by a geologist does not offer the court "appreciable help".

[75] I am compelled to agree with Mr Bava's submission that even if there was no answer by the respondent - simply on the applicant's papers and its reliance on the report of a geologist, it does not make out a case that the respondent illegally mined outside its ML and encroached on the applicant's EPL. There is merit in Mr Bava's argument that to plot and record GPS of coordinates is an activity not within the expertise of a geologist. Land surveying is a specialised field. He argued, and I agree, that Engelhard's affidavit in reply is a tacit acceptance by the applicant that the plotting done by van der Merwe ought to have been done by a land surveyor. Otherwise why would he have to verify what the geologist had done?

[76] The applicant had therefore failed to make out the case that the respondent injured it in its rights over EPL 3789 in the manner suggested by van der Merwe. There was no acceptable such evidence to found a cause of action against the respondent. The application stands to be dismissed on that basis and it becomes unnecessary for me to deal with the other objections and issues raised by either party.

COSTS

[77] The respondent asks that I impose a special costs order against the applicant on the scale as between attorney and own client, because- it says- the applicant abused the process of the Court in launching these proceedings. One reason given is that the applicant came to this court on urgent basis when that was not justified. If that were the case I am unable to understand why the respondent did not have that issue argued when the urgent application was set down, but instead agreed to cease the mining activity complained of until the case was heard.

[78] The other basis suggested is that the applicant came to seek relief based on the report of a person (a geologist) who was not qualified to lay the evidential basis for the cause of action underlying the application- and seeking -impermissibly- to do so in reply. I do not think the latter constitutes a special circumstance justifying departure from the normal rule that punitive costs should only be awarded in exceptional cases. If that were an exceptional circumstance, this Court would be granting such orders in almost all cases where it finds that, as the respondent says "no proper case has been made out in the founding affidavit".

That could discourage people from coming to Court. It also needs to be said that the respondent itself had relied on hearsay evidence relating to "Guy" whose full name is not even provided to found the basis for a critical part of their case. They have fortuitously escaped the grave consequences of that reliance because the person (Van der Merwe) on whose testimony the applicant relied was not qualified as an expert to lay the basis of its cause of action.

[79] The other reason given for ordering punitive costs is that the applicant's Shimwino, when challenged, failed to produce the resolution authorising him to act. I have rejected that argument. The facts show that in pursuing it the respondent was acting frivolously.

[80] There is on the papers no demonstrable reprehensible conduct on the part of the applicant to induce me to make a punitive costs order against it.

[81] Accordingly, I make an order in the following terms:

> The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

DAMASEB, JP

ON BEHALF OF THE APPLICANT:	Mr T A Barnard

Instructed By:	**Koep & Partners**
ON BEHALF OF THE RESPONDENT:	Mr A Bava
Instructed By:	**H D Bossau & Co**