IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

CASE No: 813/2020

In the application of:

GOLDFIELDS COMMUNITY FORUM	First Applicant
AUBREY TSOEUTE	Second Applicant
MAVIOUS TAOLE	Third Applicant
SELLO MOLIFE	Fourth Applicant
and	
HARMONY GOLD MINING COMPANY LIMITED	First Respondent
THE STATION COMMANDER: SOUTH AFRICAN POLICE SERVICES, ODENDAALSRUS	Second Respondent
THE PROVINCIAL COMMANDER: SOUTH AFRICAN POLICE SERVICES, FREE STATE	Third Respondent

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APPLICANTS' HEADS OF ARGUMENT

I INTRODUCTION

1 This application for rescission arises as a result of the Judgment and Order handed down by the Honourable Murray AJ on 28 November 2019 in the Free State Division of the High Court under the auspices of case number 813/2020.

2 The first respondent Harmony Gold Mining Company ("Harmony Gold"), opposes this application for rescission and maintains that the Applicants have either misconstrued the Order by Murray J or have misrepresented it to the Court.[1]

3 Goldfields Community Forum ("GCF" or "the Forum") and the leaders of the Forum cited as the second to fourth Applicants (hereinafter referred to collectively as "the Applicants") seek an order in the following terms:

3.1 Condoning the late filing of the application for rescission of the order handed down by Murray AJ;

3.2 Rescinding and setting aside of the whole judgment and order by Murray J granted on 28 November 2019 in terms of Rule 31(2)(*b*) of the Uniform Rules of Court, alternatively, the common law;

3.3 Costs in the event that the application is opposed; and

3.4 Further or alternative relief.

4 These heads are structured as follows:

4.1 **Part II** we highlight the pertinent facts and purpose of this application;

4.2 **Part III** we set out the issues for deliberation;

4.3 **Part IV** we set out the legal that find application in *casu*;

[1] Answering Affidavit, para 40.3, pg. 288

4.4 **Part V** we address the issue of the Applicants authority and power of attorney;

4.5 **Part VI** we conclude.

II THE FACTS AND PURPOSE OF THIS APPLICATION

5 While the background of this matter is more fully set out in the Applicants founding affidavit[2], the below facts bears mention.

6 The Constitution of the Goldfields Community Forum[3] states the objective of the organisation is to capture social and welfare for the people within the community that the Forum serves, to establish and sustain a society that cherishes values of Ubuntu, to assist in eradicating unemployment through well-established relationships with the private sector and to attain and defend the community integrity and its aspirations.

7 The Forum opposes the oppression of all gendered persons, tribalism, regionalism, religious and cultural intolerance, patriarchy, sexism, any discriminatory practices that promote the oppression of anyone, women in particular.

8 In the pursuit of the outlined objectives, the Forum and its members engage in permissible and peaceful forms of demonstrations, pickets and assembly in accordance with their corresponding constitutionally enshrined rights.

[2] Founding Affidavit, Annexure "TPK2", pg.30
[3] Founding Affidavit, pg.13-18, para 37-55

9 On 17 May 2018 and 4 March 2019, in the furtherance of its objectives members of the Forum, including the Applicants, exercised their right to peaceful assembly and held two protests against Harmony Gold.[4]

10 On 30 September 2019, the Applicants gave notice to Harmony in accordance with the requirements of the Regulations of Gatherings Act and indicated their intention to hold another peaceful protest on 11 October 2019, this time with a view to march to the premises of Harmony Gold and hand over a memorandum containing a list of demands.[5]

11 One of the main grievances outlined by the s in the memorandum pertained to the concern by the Forum is that, unlike many other mining companies around the country and other operations in poor, vulnerable and disadvantaged communities, Harmony Gold has failed or was failing to fulfil the obligations contained in its Social and Labour Plan ("SLP").[6]

12 The objectives[7] of SLPs are the following:

"*(a) to promote employment and advance the social and economic welfare of all South Africans;*

(b) contribute to the transformation of the mining industry; and

[4] Founding Affidavit, para 40, pg. 19
[5] Founding Affidavit, paras 41 and 42
[6] Harmony Gold's own Social Labour Plan sets out Human Resource Development, Employment Equity, Migrant Labour, Mine Community and Rural Development and Housing & Living conditions.
[7] Introduced in Regulations 40 - 46 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRD")

(c) ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating."[8]

13 The Applicants on multiple occasions prior to the planned peaceful protest action engaged with Harmony Gold on its shortcomings in relation to the legislatively prescribed SLP. These attempts were met with empty promises. The Applicants made specific reference to promises made at the meeting with the Executive Director on 04 March 2019.[9]

14 For their part, the Applicants were engaging with Harmony Gold and other forums around the possibility of the establishment of an integrated forum comprised of the forums that operated in the various surrounding mining areas, the mine and the municipality.[10]

15 In the main application however, Harmony Gold describes the interplay between the mining company and the community as follows:

"*In the past, community forums have attended at the Mine, asking for jobs and contracts for their members. At first, the Applicant was faced with a multitude of these forums with conflicting demands. Eventually, the Applicant was able to work with them and facilitate a merger of the Forums into one large forum known as the Lejweleputswa Community Development Forum. The Applicant has been working closely with the larger forum for an extended period of time, providing training, employment and the like."*[11]

[8] MPRDA Regulation 41, published under Government Gazette 26275, GN R527, 23 April 2004
[9] Founding Affidavit, para 41, para 20
[10] Founding Affidavit, para 39, pg. 19
[11] Urgent Application, Founding Affidavit, para 6.1, pg. 98

16 At no point in any of these multiple robust engagements did the members of the Forum conduct themselves in an unlawful manner, nor were their gatherings classified as being unlawful.

17 The urgent application (and answering affidavit) deliberately makes no reference to any of the peaceful gatherings held by the Applicants outside the premises of the mine.

18 On 11 October the Applicants on their own accord were accompanied by a significant police presence, headed to the premises of the mine in accordance with the Notice they had served on the Mine the previous month and were met with additional law enforcement in the form of Harmony Gold's security guards.[12]

19 Harmony Gold's General Manager would not come out to meet with the approximately thirty (30) members of the Forum, despite notice having been given. The police maintained a presence to monitor the situation, in the absence of violence, unlawful disruptions or conduct.[13]

20 The General Manager, one Warren Freeman ("Mr. Freeman"), eventually came out to meet with the Applicants, accompanied by the Harmony Gold Head of Security. Mr. Freeman was asked why there had been no response to the memorandum handed to the mine on 06 March 2019.[14] The Applicants were perplexed as to why Harmony Gold would take seven (7) months to respond to

[12] Founding Affidavit, para 43, pg. 20
[13] Founding Affidavit, paras 44 - 47
[14] Founding Affidavit, paras 48, pg. 21

a memorandum that canvassed, *inter alia*, Harmony Gold's obligations to the community inline with its own SLP.

21 No response was forthcoming and once again, the Mr. Freeman, the General Manager made promises and asked that that the Applicants afford him time until 20 November 2019 to respond.

22 It is perhaps apposite at this juncture to note that the First Respondent's in both its main application and answering papers are silent on Harmony Gold's obligations on the SLP and the extent to which Harmony Gold had fulfilled the objectives and aims insofar as the community within which it conducts mining operations is concerned, despite this being route of contention between the parties. This is unfortunately the culture and general attitude of the First Respondents towards the Applicants.

23 On 20 November 2019, Mr. Freeman ignored the Applicants and the members of the community.[15] He did not meet with the Applicants as he had indicated and continued with the same ambivalent attitude towards the Applicants he had exhibited over the seven (7) months that had preceded the date of 20 November 2019.

24 Instead, despite no employees or officials having never previously been subjected to violence or intimidation by the Applicants in their reciprocal engagements, Harmony Gold launched urgent proceedings against the Applicants in this Honourable Court five (5) days later, alleging reasonable

[15] Founding Affidavit, para 49, pg. 21

apprehension of harm and sought an an order prohibiting and restraining the Applicants from, inter alia:

24.1 Unlawfully damaging, obstructing or interfering in the business conducted by Harmony Gold;[16]

24.2 Trespassing on Harmony's property;[17]

24.3 Unlawfully gathering at the entrance to Harmony's property;[18]

24.4 Committing acts of arson;[19]

24.5 Burning Harmony's assets, buildings and infrastructure, equipment and vehicles;[20]

24.6 Intimidating, Threatening or Coercing Harmony's representatives, employees of contractors;[21]

24.7 Blocking the gates to Harmony's mines or the rodas leading to Harmony's mines;[22]

24.8 Stopping, Interfering with, damaging any vehicle travelling to or from Harmony's mines;[23]

24.9 Inciting any person to commit these unlawful acts.[24]

[16] Answering Affidavit, para 6.4, pg. 254
[17] Answering Affidavit, para 6.4 at pg. 254
[18] Answering Affidavit, para 6.4.1, pg. 254
[19] Answering Affidavit, para 6.4.1, pg. 254
[20] Answering Affidavit, para 6.4.1, pg. 254
[21] Answering Affidavit, para 6.4.2, pg. 255
[22] Answering Affidavit, para 6.4.3, pg. 255
[23] Answering Affidavit, para 6.4.4, pg.255
[24] Answering Affidavit, para 6.4.5, pg. 255

25 Harmony Gold also required that the Applicants be interdicted from accessing the Mine property without the *written permission from the company* or the Mine's General Manager.

26 In addition to launching urgent proceedings against them in a Court of law some 150 kilometres away, Harmony Gold then set the matter down for adjudication and afforded the Applicants a mere three (3) days to:

26.1 Secure legal representation;

26.2 Mount a formidable defence and file opposing papers;

26.3 Transport themselves to the Courthouse in Bloemfontein for the hearing.

27 The Applicants, a small mining town community-led forum comprised its leaders and members, most of whom are unemployed lay men and women with very limited financial resources, achieved only one of the above.

28 Not a single one of the Applicants were able to secure legal representation within the impossible time frame afforded by the Harmony Gold. Lack of legal representation then had the knock on effect that no notice of intention to oppose was filed by or on behalf of the Applicants.

29 In a desperate attempt to place their version before a Court of law, twenty-one (21) of the Applicants collected what monies they had and took the trip to Bloemfontein in order to record their appearance, put their version before the Court and defend their rights. Unfortunately, the 21 of them arrived to the

Courthouse and were erroneously directed to and thus made their way to the wrong Courtroom.

30 In light of the fact that no notice of intention to oppose had been filed and the fact of their non-appearance in person within the Courtroom (although present at the Court building), on Thursday, 10h00 28 November 2019 Murray AJ awarded Harmony Gold Mining Company an order as outlined above.

31 Additionally, the Learned Judge made the decision to mulct the three leaders of the Forum cited in the proceedings with the costs of the suit.

32 The purpose of this application is thus to rescinded and set aside in the above Order in accordance with Rule 31(2)(*b*) of the Rules of Court, alternatively, the common law.

33 Section 34 of the Constitution[25] guarantees access to Courts, or, where appropriate, some other independent or impartial tribunal, for the resolution of all disputes capable of being resolved by the application of law. The Constitutional Court has described the right as being of cardinal importance and "*foundational to the stability of an orderly society*' as it '*ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help*".

[25] Hotz and Others v University of Cape Town (CCT280/16) [2017] ZACC 10; 2017 (7) BCLR 815 (CC)

34 The Applicants have been denied this right and are attempting to undue the harm done by seeking a reversal of the adverse orders taken by the Court against in the absence of a wilful default on the part of the Applicants.

35 Harmony Gold has expressed the view that the Order was rightfully awarded, as it interdicts the Applicants only from conduct that is unlawful and that no case has been made out as to how the acts interdicted by the Court limit the right to protest or "are legitimate forms of protests".[26]

36 Harmony Gold mounts a defence that seeks to cast the Applicants as underhanded,[27] misleading,[28] aggressive[29] and un-cooperative[30] members of an organisation that has "ceased to exist"[31] and lacks the requisite *locus standi*.[32]

37 The nub and purpose of this application for rescission is to protect the Applicants fundamental rights.

38 As pointed out by Skweyiya J (as he then was):[33]

"*The right to protest against injustice is one that is protected under our Constitution, not only specifically in S 17, by way of the right to assemble, demonstrate and present petitions, but also by other constitutionally protected rights, such as the right of*

[26] Answering Affidavit, para 6.5, pg. 255
[27] Answering Affidavit, unnumbered paragraph, pg. 268; para 17.3, pg. 269
[28] Answering Affidavit, para 5.5, pg. 260; para 26.5, pg. 275; para 30.1, pg. 280
[29] Answering Affidavit, para 7.2, pg. 256; paras 8.2, 8.3 and 8.6, pg. 257; para 29.11, pg. 280
[30] Answering Affidavit, para 6, pg. 261; para 29.2, pg. 278
[31] Answering Affidavit, para 17.1, pg. 269; para 43.1, pg. 290; para 47.4, pg. 293
[32] Answering Affidavit, paras 17.1 and 17.2, pg. 269
[33] *SATAWU v Garvis and Others* 2011 (6) SA 382 (SCA)

freedom of opinion (s 15(1)); the right of freedom of expression (s 16(1)); the right of freedom of association (s 18) and the right to make political choices and campaign for a political cause (s 19(1)). But the mode of exercise of those rights is also the subject of constitutional regulation.

Thus the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm (s 16(2)(c)). The right of demonstration is to be exercised peacefully and unarmed (s 17). And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people (s 10) and the rights other people enjoy under the Constitution.

In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups and people must recognise this when exercising their own constitutional rights."

39 We submit that this application and the events leading up to the judgment must be viewed in this context.

III THE ISSUES

40 The mudslinging by the First Respondent aside, the requirements in rescission applications are settled law. We therefore submit the issues before this Court are as follows:

40.1 The condonation of the late filing of this application;

40.2 Whether the Applicants have met the requirement of a rescission application;

40.2.1 Good Cause as supported by SLAPP suits and the constitutional to protest (assembly, demonstrate and picket);

40.3 The Applicants standing and or power of attorney;

40.4 Costs in this application.

IV THE APPLICABLE LEGAL PRINCIPLES

Condonation

41 The grounds for seeking condonation are set out more fully in the Applicants founding affidavit from page 6 to page 10.[34]

42 In determining whether the Applicant's condonation application should be granted, this Court should consider the following factors in line with the well-established case of ***Melane v Santam Insurance Co Ltd***.[35]

42.1 The degree of lateness of the referral (17 days in this matter)[36].

42.2 The reasons for the Applicants having delivered the application outside of the statutorily-prescribed time period[37].

42.3 The Applicant's prospects of success with the application (if applicable).

[34] Founding Affidavit; Pg6-10; para 19-36
[35] *Melane v Santam Insurance Co Ltd [1962] 4 All SA 442 (AD)*
[36] Founding Affidavit; Pg6; para 19.3
[37] Founding Affidavit; Pg6-10;19

42.4 Any other relevant factors, including any prejudice that either party may suffer.

43 In ***Lourens v Commission for Conciliation, Mediation and Arbitration and others***[38], the Court noted the SCA *dicta* in relation to applications for condonation:[39]

"*[14] In the judgment the Court also referred to the matter of* ***Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA)*** *[also reported at [2003] JOL 11450 (SCA) – Ed] at para [6] where the Court held:*

> '*One would have hoped that the many admonitions concerning what is required of an Applicant in a condonation application would be trite knowledge among practitioners…condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the noncompliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'*

[15] In the also as yet unreported judgment by the Constitutional Court in the matter of ***eThekwini Municipality and Ingonyama Trust Case No. [2013] ZACC 7*** *the Court said the following:*

> *"As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not*

[38] *Lourens v Commission for Conciliation, Mediation and Arbitration and others [2013] JOL 30981 (LC)*
[39] Ibid at paras 14 - 16

only be satisfactory but must also cover the entire period of the delay."

44 We therefore submitted that this Court, must when considering the condonation application, keep in mind the reasons for the delay in delivering the application late, as set out in the papers.

45 Further to the above, granting condonation of the rescission application in this matter is much like the dismissal of an exception, it does not involve a final dispositive and pronouncement on the main legal issues.[40] For this reason, there is no prejudice on the part of the First Respondent but only on the part of the Applicants if condonation is not granted.

46 We submit whether the rescission succeeds or not the Respondent has other remedies at their disposal. The Respondent may still persist opposing the rescission in this case and the interdict in the main case, whereas if the application for condonation is refused the Applicant's last resort will be gone. This is because the interdict cannot be taken on appeal. Should condonation for the late filing of the rescission be refused the doors of Court will be closed for the Applicant, as they cannot contend against the rescission or the urgent application for that matter.

[40] *Pretorius and another v Transport Pension Fund and others* 2018 at ZACC 10 at para 56. See also *Maize Board v Tiger Oats Ltd* [2002] ZASCA 74; 2002 (5) SA 365 (SCA) at paras 12-4 and *Blaauwbosch Diamonds Ltd v Union Government* (Minister of Finance) 1915 AD 599 at 601 for dismissal of an exception and compare with upholding an exception that is bad in law that is finally dispositive of the legal issue.

47 Even if some small prejudice would be suffered by the First Respondent, that prejudice is far outweighed by that of the Applicants. It is thus in the interests of justice to grant condonation.

<u>The law in Rescission applications</u>

48 Rule 31 of the Uniform Rules of Court applies to those cases in which a party is in default of delivering a notice of intention to defend or a plea.[41]

49 For reasons already explained above, the Applicants did not file a notice of intention to oppose. The rescission envisaged in the Rule therefore finds application as the Applicants were sure to launch their rescission application within the 20-day window after a judgment in default has been handed down.

50 The following requirements are necessary for an application for the setting aside of a judgment in terms of Rule 31 (2)(*b*):

50.1 The judgment must have been a default judgment. This means that it must have been a judgment granted by the Court. It also means that the judgment by default must have been due to the failure to enter appearance or to file a plea;

50.2 The application must be made within twenty days after the defendant obtains knowledge of the judgment; and

50.3 The defendant must show good cause for the rescission of the judgment.

[41] *Louis Joss Motors (Pty)Ltd v Riholm* 1971 [3] SA 452 (T) at 452; See also *Briston v Hill* 1975 [2] SA 505 (N) at 505 H.

51 The requirements for rescission in terms of rule 31 (2) (b) which must be satisfy are well established in ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills***[42].

52 The requirements for bringing an application for rescission under the common were established In ***Chetty v Law Society, Transvaal***[43], the Court set out the requirements for rescission under common law and described "sufficient cause" as having two essential elements. These were later also articulated in ***Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others***[44], where Van Reenen J states:

"In terms of common law, a Court has discretion to grant rescission of judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice of our Courts, two essential elements of "sufficient cause" for rescission of a judgment by default are:

1 That the party seeking relief must present a reasonable and acceptable explanation for his/her default.

2 That on the merits such party has a bona fide defence, which prima facie, carries some prospect of success (See Chetly v Law Society of Transvaal 1985(2) SA 756 A at 765 B - C, Athmaram v Singh 1989(3) SA 953(d) at 954 E-F)."

53 In the case of ***Grant v Plumbers***[45] Brink J at 476 - 477 stated that:

"(*a) He must give a reasonable explanation of his default. It if appears that his default was wilful or that it was due to gross negligence, the Court should not come to his*

[42] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) (2003) 2 ALL SA 113, at para 11; See also *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996(4) SA 411 at page 417

[43] *Chetty v Law Society, Transvaal* 1985 (2) SA 756

[44] *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996(4) SA 411 at page 417*

[45] Grant v Plumbers (Pty) Ltd 1949(2) SA 470(0) at page 476

defence. (b) His application must be bona fide and not made with the intention of merely delaying Plaintiff's claim. (c) He must show that he has a bona fide defence to the Plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour'.

54 Trengove AJA clarifies in ***De Wet and Others v Western Bank***[46] that it is not sufficient if only one of the elements required is established, the Applicant must establish that she has a bona fide defence to the claim which prima facie carries some prospect of success.

Applicants have a reasonable and acceptable explanation for the default

55 The Applicants were unreasonably given three days within which to arrange their affairs and secure legal representation. They could not secure the services of an attorney within the severely restrictive and unfair time period due to their socio-economic difficulties; this cannot be gainsaid by the First Respondent.

56 The Applicants then opted for an in-person appearance and could not have foreseen that they would be directed to the incorrect Courtroom.

57 Harmony Gold's assertion that the Applicants' version on this front is untrue is telling and quite regrettable, especially since it cannot be gainsaid or refuted

[46] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 AD at 1042 H

with any evidence. Why else would a community make an arduous eleventh-hour trip to Bloemfontein for an appearance only to forego the appearance and opt out of appearing? ***Grant v Plumbers***[47] correctly states "*It if appears that his default was wilful or that it was due to gross negligence, the Court should not come to his defence*." This is clearly not the case in this matter.

58 The use of Court processes and the provisions of the Gatherings Act by large mining corporations to subvert protest action have already been recognised and frowned upon by this Honourable Court in ***Patricia Tsoaeli and Others v State***[48] wherein the Court decisively addressed this inappropriate use of the Gatherings Act as a basis for criminal prosecution and "*undermining protestors' rights*".

59 We submit that the factual basis comprehensively set out earlier in these written submission proves that the Applicants have a reasonable and acceptable explanation for the default. It cannot be said to have been wilful. Therefore, the Applicants have satisfied this requirement.

Applicants are bona fide in bringing this application for rescission

60 In light of the fact that the Court mulcted the Applicants with an adverse cost order, it is imperative that the Applicants seek to have this order and judgment rescinded and set aside.

[47] *Grant v Plumbers (Pty) Ltd* 1949(2) SA 470(0) Brink J at 476 - 477
[48] *Patricia Tsoaeli and Others v State* (17 November 2016) Case No: A222/2015

61 One of the most prevalent ways in which large mining and other multinational corporations ensure intimidation is to impose financial burden on the individual or group litigants, by means of incurring legal costs in defending the lawsuit and to silence them from exercising free speech.

62 This type of lawsuit is typically known as Strategic Lawsuit Against Public Participation (SLAPP). These lawsuits are often filed strategically by a corporation against a group or activist opposing certain action taken by the corporation, usually in the realm of an environmental protest.

63 Well-known academics and authors Professors Penelope Canan and George W Pring coined the terms SLAPP, their research focuses almost solely on studying these reprehensible actions by corporations. They contend that "*A SLAPP suit is usually meritless in that it 'is intended to intimidate and silence' a party from engaging in free speech, by burdening them with the cost of a legal defence until they abandon their criticism or opposition*".[49]

64 The Applicants wish to properly ventilate their case in a Court of law and subject the issues for determination in the main application to adjudication by a competent Court of law.

65 Granting the interdict was not appropriate in the Constitutional context. The first Respondent despite their bare denial sought to constrain the Applicants

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[49] Beatty, Joseph W, The Legal Literature on *SLAPPS: A Look behind the Smoke Nine Years after Professors Pring and Canan First Yelled Fire* (9 UFLJLPP 85).

from performing a constitutional right and from advancing the cause for human rights and accountability.

66 Thus, one of the main reason the Applicants bring this application for rescission is that the effect of the order sought by Harmony Gold, as stated above, infringes on they constitutional rights as set out in section 17 of the Constitution, namely, the right to assemble and demonstrate.

67 The Courts have repeated on occasion that protest action is not itself unlawful. Unfortunately, this appears to be the case advanced by Harmony Gold as the order they sought restrains and interdicts ordinary protest actions which are constitutionally protected under the Bill of Rights.

Applicants have a bona fide defense on the merits with prospects of success

68 In order to meet this requirement, the Applicants must show that they have a *bona fide* defence to the main claim by Harmony Gold. It is trite that it is sufficient for a party to make out a *prima facie* defence in the sense of setting out averments which, if established at the trial (urgent application), would entitle them to the relief asked for.

69 In the present matter, the factual and legal basis provided in these written submission indicates a strong basis for the contention that the Applicants have a *bona fide* defence to Harmony Gold's urgent application, much of which is based on a baseless and not reasonable apprehension of harm.

70 We also note that the requirements for an final interdict relied on are what is applicable in traditional final interdict applications.[50] The test however is different where an the interdict is intended to constrain the exercise of a public power, and we submit the vindication of a clear constitutional right.

71 The Constitutional Court eight years ago, saw fit to refashion the test for an interim interdict which constrains the exercise of Constitutional obligations.[51] Should a Court be faced with a request for an interim interdict it must be- *"cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a Court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."*[52]

72 In *OUTA*[53], the Constitutional Court also held that: *"A Court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus Courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a Court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent, but rather whether it is constitutionally appropriate to grant the interdict."*[54]

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50 *Setlogelo v Setlogelo 1914 AD 221.*
51 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (hereinafter "*OUTA*"), para 45.
52 Ibid.
53 Ibid.
54 *OUTA*, para 66.

73 It follows therefore, that an additional consideration is embedded in a request for an final interdict over and above those traditionally considered, when constitutional rights and obligation are at stake.

74 On this premises the Applicants have prima facie prospects of success, which may succeed in the event that the urgent application is properly ventilated and determined in a Court of law in the presence of the Applicants, together with their duly authorised legal representatives.

75 The Applicants thus contend, the Default was not wilful or due to gross negligence, the application is *bona fide* and not made with the mere intention to delay the plaintiff's claim; and there is a *bona fide* defence to the First Respondents urgent application; and a *bona fide* intention to raise the defence if the application for rescission is granted.

Nature of SLAPP Suits

76 The litigation proceedings instituted by the Respondents against the Applicants in the urgent application are a SLAPP Suit (*"a meritless case mounted to discourage a party from pursuing or vindicating their rights")*[55]. The aim of SLAPP suits is to intimidate, scare, or "chill" a person who brings a matter of public concern to light. At the heart of any SLAPP suit is the ulterior intention of the litigator and purpose of the litigation.[56]

[55] T Murombo and H Valentine 'SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 *SAJHR* 82, at 84.
[56] Ibid. at 84

77 We submit the intention in the urgent application was to silence, intimidate the Applicants until they bow out. These suits are frequently brought as defamation claims, interdicts, abuse of process, malicious prosecution, or delictual liability cases[57].

78 It follows from the definition that a SLAPP suit has two elements, both these elements are evident in the urgent application and will be argued fully in the main application.

79 We pause here, only to highlight some of the indicators that the First Respondent's urgent application is a SLAPP suit: (a) the relief sought by the Respondents in their urgent application; (b) the effect of the litigation; (c) the costs order sought by the Respondent's against an indigent community forum and activist leaders; and (d) the First Respondents clear use of the cost order as an intimidation tool and method to exert influence on the Applicants, see letter of 16 March 2020: " Provided that your client withdraws the application as per paragraph 9 above, our client will release your clients from the costs order. However, should your clients fail to do so by the stated date, this offer will be automatically revoked". [58]

80 Further thereto, the Applicants fall in a common class of persons who bear the brunt of SLAPP's. The class may vary from journalists who expose human rights violations and community activists who use social activism and mobilisation to challenge the human rights violations by repositories of powers,

[57] Ibid. at 84

[58] Answering Affidavit; annexure AA1; ENS letter 16 March; Pg 5; para 11

and sometimes even lawyers who use the law as a means of redress or prevention.

81 The only judgment in our law reports which mentions SLAPP suits in particular, bears mention: In ***Waypex (Pty) Ltd v Barnes and Others*** "The defendants also made reference to the belligerent tone of Plaintiff's attorney's letters, which were calculated to intimidate and create enmity. There is much justification for this view taken by the defendants. The generally weak merits of the cases became obvious during the trial. The statements complained of were generally made to public officials, mostly in the course of administrative procedures. In some instances the allegations were trivial. Counsel likened the case to what is known in other jurisdictions as 'SLAPP'. The acronym stands for Strategic Litigation Aimed against Public Participation. No instances of cases so described are to be found in local law reports, but the concept of vicariousness corresponds very closely with the features of a SLAPP suit."[59]

81.1 The Court made the following notable observation in *Waypex, (which bears mention here)* the decision makes it clear that:

81.1.1 SLAPP suits relate to (but have not been found to be identical to) vexatious litigation;

81.1.2 SLAPP suits have not been disallowed by our Courts.

82 Notably, the absence of specific legislation, and limited jurisprudence on the subject inevitably leads to a substantial reliance on foreign law. Be that as it may, we submit that our current jurisprudence acknowledges that SLAPP suits

[59] *Waypex (Pty) Ltd v Barnes and Others* 2011 (3) SA 205 (GNP), at 207B-207C.

find application in our law and in terms of section 39(1)(c) when interpreting the Bill of Rights, a Court, tribunal or forum may consider foreign law. In this regards nothing turns on the limited jurisprudence on SLAPP suits.

The Nature of Freedom to Assembly, Demonstration, Picket and Petition

83 When the drafters of our Constitution penned the Bill of Rights, they took cognisance of the fact that the right to freedom of assembly played an essential role in the attainment of our democracy. The constitutional right to protest (assembly, demonstration and picket) is a gateway right to access and realise other fundamental human rights, it is essentially the right to fight for other rights.

84 Protest is a tool used by our people to hold institutions, private or public, accountable. This is a constitutional guarantee in terms section 17 to assemble peacefully and unarmed.[60] A non-peaceful assembly is one which consists of conducts of physical violence against a person or property.[61] Another modifier is the 'unarmed' requirement.[62]

85 Even, International law recognises the right to freedom of peaceful assembly as the right to gather publicly or privately in order to collectively express, promote, pursue and defend common interests. These core rights and freedoms are recognised in all the major international and regional human rights treaties,

[60] The Constitution of the Republic of South Africa, 1996.

[61] Currie I & De Waal J The Bill of Rights Handbook (Juta, 2013) 384.

[62] See note 41 above.

including the International Covenant on Civil and Political Rights (ICCPR)[63], which South Africa has ratified.

86 The constitutional right to protest and peaceful assembly is also regulated by the Regulation of Gatherings Act (RGA).[64] Section 9(1) of the RGA provides as follows: "if a gathering or demonstration is to take place, whether or not in compliance with the provisions of this Act, a member of the Police- may prevent people participating in a gathering from proceeding to a different place or deviating from the route specified in the relevant notice or any amendment thereof or from disobeying any condition to which the holding of the gathering is subject in terms of this Act".

87 A protest shall not lose the protection of the Constitution because an individual resorted to violence. RGA puts forward limitations placed on the right to freedom of assembly and how the police have the power to ensure that an assembly remains lawful.

88 It is common cause that the Applicants took police with them to these protests, the interdict was therefore not to prohibit any "unlawful" conduct, which could have been handle by police if took place, it was merely to avoid accountability. The interdict is aimed at suppressing the Applicants from creating a large space for dissent against mine and democratically engaging in dialogues with the mine.

[63] The United Nations General Assembly (1966).

[64] 205 of 1993.

V STANDING, AUTHORITY AND POWER OF ATTORNEY

89 The first respondent, Harmony Gold, took issue with what it terms as the lack of authority by CALS to act or bring these proceedings on behalf of the Forum on the basis of a wildly misconstrued interpretation of the applicable Rule.

90 We respectfully submit this is a none issue at this stage of the litigation. The object of the rule is to eliminate the issue about authority because it is assumed that persons will not litigate who do not have the necessary authority.

91 A power of attorney is a declaration in writing in which the client authorises an attorney to institute or defend legal proceedings and to do all necessary steps in connection therewith as the client's representative. Its object is to prevent the litigant from afterwards repudiating the proceedings by denying his authority to have issued the process in question.

92 That said however, even if this Honourable Court is not with us on that front, the first respondent assented to the so-called lack of authority in filing their answering affidavit, this court will note that the First Respondents specifically communicated their contention and stated they would not file an answering affidavit if the issue of authority and power of attorney was not remedied pursuant to it filing its Rule 7(1) Notice.

93 In response thereto, the Applicants filed the necessary supplementary affidavit, which was accordingly followed by the First Respondents answering affidavit.

Costs in this Application

94 The Applicants pursued this application in order to protect and vindicate the constitutionally entrenched and statutory rights to protest and freedom of expression and their right to access to Court. It is thus submitted that the Applicants should despite the outcome of this application also be protected by the rule established in the matter of ***Biowatch Trust v Registrar Genetic Resources and Others***.[65] "as a general rule in constitutional litigation an unsuccessful Applicant in proceedings against the state ought not to be ordered to pay costs."

95 We submit that no costs order should be made against the Applicants if this application is unsuccessful. The Applicants should be protected by the rule established in the matter of *Biowatch*.[66] Although we accept that this case, unlike *Biowatch*, is not one brought by aggrieved individuals against the state.

96 Our submission is that the principles established in Biowatch apply in this case and similar case wherein vulnerable groups seek to enforce their constitutional right through litigation. The trite principle laid out by the Constitutional Court in the *Biowatch case* are that: *"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many Courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might*

[65] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC)
[66] *Ibid*

ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."[67]

VI CONCLUSION

97 Harmony Gold has not sustain a defence against the rescission, it has actually done little to show that the Applicants' absence in the Courtroom on the day that the order was granted is tantamount to wilful default, except to say the explanation by the Applicants for the default is unreasonable and unacceptable.

98 All the above considered, it is clear that the first respondent does not have a valid defence and cannot meet the Applicants' case for rescission, save to make baseless accusation against the Applicant in a bid to silence and intimidate them from continuing to hold the mine accountable, for failing to implement SLP's in a manner that contributes to development of all those in the community, not a select few.

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67 *Ibid* at para 23.

99 The Applicants have shown good cause in that they were not in wilful default, they are bona fide in bringing this application for rescission and they have a bona fide defence against the first respondent's case in the urgent application with good prospects of success.

100 In the premise, this application for rescission of the order granted by Murray AJ on 28 November 2019 must succeed and the Applicants given an opportunity to level their defence against the merits of the respondent's urgent application.

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20 September 2020