ANGLO PLATINUM – BLINKWATER (SEKURUWE)

Importance:	This case is unusual in that it relates to the construction of a tailings dam on community property, rather than mining *per se*. It raises issues regarding the extent to which expectations regarding public participation can be applied to actions completed in terms of the Minerals Act 50 of 1991. It also raises important issues regarding the representation of the community in negotiations aimed at providing compensation for environmental degradation and loss of access to natural resources, the management of perceptions during such processes, and the adequacy of compensation ultimately determined.
Alleged Facts:	This case relates to the construction of a tailings dam on the farm Blinkwater 820 LR, situated in the Mokopane magisterial district, Limpopo Province. Although the pleadings listed in the paper trail relate to an application for urgent interdictory and declaratory relief launched during November 2010, the regulatory and other arrangements that have led to a dispute between Potgietersrust Platinums Ltd (PPL, a wholly-owned subsidiary of Anglo Platinum) and the Sekuruwe Community occurred much earlier. PPL held an old order mining right for minerals in the platinum group in respect of a number of farms situated in the Mokopane magisterial district. The origin of this mining right, in turn, was based on a notarial deed of cession of mineral rights to PPL granted in 1926 by the then Chief of the Langa Tribe in respect of the farm Zwartfontein, which lies adjacent to Blinkwater. Following protracted negotiations Chieftainess Langa granted PPL a lease over the farm Zwartfontein, as well as the adjacent farms of Vaalkop and Overysel. PPL commenced with consultations with the communities who lived on these properties in 1998 with a view to facilitating their relocation to other areas, compensation for the loss of grazing and crop rights and relocation of graves. (The relocation process was subject to review by the South African Human Rights Commission as well as investigations and reports by international NGOs which concluded that the relocations were not always carried out in conformity with internationally accepted norms and standards.) Conversion of the old order right was granted (date unknown) and notarially executed on 23 July 2010. The mining area for the converted right does not include the farm Blinkwater 820 LR. The inclusion of this farm in the overall mining complex originates in an amendment to the approved Environmental Management Programme for the PPL Mine approved on 6 November 2003 in terms of s 39 of the Minerals Act 50 of 1991. In terms of the amendment, PPL was authorized to construct a tailings dam complex with a footprint of approximately 270 ha on the farm Blinkwater 820 LR. It was envisaged that the tailings dam would be constructed over a period of 45 years with an initial capacity of 600 ktpm for the first 25 years and 1 000 000 tpm for a further 20 years. The amendment to the EMP provides for a number of mitigation measures aimed at the impact of the tailings dam in terms of water quality and dust generation. An integrated water use licence for the PPL mine (which includes the use on Blinkwater 820 LR) was granted on 23 March 2007. This licence lays down a number of additional conditions relating to the construction, operation and maintenance of the tailings dam complex (in Appendices I and II). Construction of the tailings dam commenced in January

	2009 and pumping of tailings into the dam commenced on 15 July 2010. The Sekuruwe community resides in a village located on the farm Blinkwater. The community consists of approximately 1500 adults, many of whom are migrant workers who return home only on weekends and holidays. According to the community, the farm is used for grazing of cattle and various forms of subsistence farming. It appears that the community were aware of the proposed construction of the tailings dam since at least January 2009 when they attempted to bring an urgent application on 16 January 2009 against PPL and the Minister of Rural Development and Land Reform preventing the latter from concluding a lease agreement with PPL in respect of the portion of Blinkwater which was to be utilized for the construction of the tailings dam. The lease agreement between the then Minister and PPL was signed on 19 January 2009. Review proceedings relating to the granting of this lease were subsequently launched (case number 78195/09, North Gauteng High Court) against the signing of this lease (documentation for this process is unavailable). According to PPL, however, they commenced a consultation process with the Sekuruwe community in early 2005 when it became evident that their mining operations would require expansion into the Blinkwater property. During 2005 the community appointed attorney B Daya and advocate S Nthai SC to represent them in negotiations with PPL. Toward the end of 2005 the community, duly assisted, incorporated a s 21 company which was intended to be the formal vehicle for negotiations between it and PPL for purposes of obtaining compensation. Aware of the controversy which had dogged the formation of s 21 companies on other farms within the PPL mining complex, the negotiator appointed by PPL allegedly undertook to have broader and more representative meetings with the Sekuruwe community, as opposed to dealing only with the relevant s 21 company. Between March and December 2006 a number of 'mass meetings' were allegedly held between representatives of PPL and the Sekuruwe community, culminating in a meeting on 9 December 2006 (also attended by officials of the Department of Land Affairs and the Limpopo Provincial Land Reform Office) at which the community members present voted 'unanimously' in favour of relinquishing the rights they had to the affected portion of Blinkwater against compensation. A once-off compensation amount was subsequently paid during 2007 to most community members, including the applicants in the subsequent review and interdict proceedings (who each received compensation between R15 000 and R38 200). It is not clear whether the community members who attended these meetings understood that the purpose of the proposed lease agreement – which allows for the destruction of all grazing, crops and other improvements to the land, as well as the relocation of graves – was for purposes of constructing a tailings dam. In PPL's pleadings it is indicated that 'salient' terms of the proposed lease agreement were presented to the community. An application for urgent and interdictory relief against PPL, the Minister of Water and Environmental Affairs, the Minister of Mineral Resources, the Minister of Mineral Development and Land Reform, the MEC for Economic Development, Environment and Tourism (Limpopo) and the Sekuruwe Section 21 company was launched by four community members during November 2010. The application was based on allegations that the construction of the

	tailings dam facility on Blinkwater was in non-compliance with regulation 69(5) of the regulations passed in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) (which relates to the construction of a sand dump or slimes dam on the banks of a wetland) as well as environmental authorizations required in terms of the National Environmental Management Act 107 of 1998 (NEMA).
Forum:	Review and interdict proceedings in the North Gauteng High Court.
Issues for decision:	This case raises the following issues: • **Relationship between MPRDA and NEMA.** There is a dispute between the community applicants and PPL regarding the application of NEMA to the construction of the tailings dam complex on Blinkwater, with the latter alleging that NEMA has no application. • **Adequacy of public participation and consultation, including access to information.** The nub of this case, however, would seem to relate to the manner in and time at which the Sekuruwe community were consulted as regards the construction of the tailings facility on their farm. As is evident from the EMP amendment, a decision to use the Blinkwater property for this purpose had already been taken and authorized in 2003. Section 39 of the Minerals Act, 1991 did not require the same level of public participation and consultation in relation to an EMP as is currently required under the MPRDA. When PPL began engaging with the Sekuruwe community in 2005, therefore, they were doing so not with a view to determining *whether* the community was in consensus regarding the construction of the tailings facility, but *how* the impacts of a decision which was already a *fait accompli* could be managed. This is problematic given the construction of public participation and consultation recently endorsed by the Constitutional Court in the *Bengwenyama* matter, where emphasis was laid on the good faith requirement of all consultation processes. It is also not clear, from the documentation available, what information regarding the tailings facility was made accessible to the community during the 'mass meetings' held during 2006. Further, it is unclear why the issue of the tailings dam was not addressed during the conversion from the old to the new order right, as this process should have entailed a review of the EMP, which could have included some form of public participation. The granting of the integrated water use licence presented another (and missed) opportunity to ensure some level of public participation on the part of the Sekuruwe community in the authorization process. • **Adequacy of negotiation processes leading to compensation.** The case also raises complex broader issues relating to the representation of communities in processes of compensation with mining companies; the role played by misperceptions and misunderstandings between the parties, for instance, the possibility that community members construed the compensatory payments made by the mine as *ongoing* rather than *once-off*; and the extent to which such misperceptions were integral in the community granting its consent to the mining

	company's use of its land. The authority vesting in the Minister of Rural Development and Land Reform to lease property used by a community would also appear to be problematic.

Document	**Author /Originator**	**Date**
Approval of addendum to EMP for Potgietersrus Platinum Mine (in filed titled 'first batch')	Department of Minerals and Energy	6 November 2003
Integrated water use licence (in file titled 'first batch')	Department of Water Affairs and Forestry	23 March 2007
Notarial execution of converted mining right	Department of Minerals and Energy/ PPL Mine	23 July 2010
First respondent's heads of arguments in the application for urgent interdictory and declaratory relief	CDA Loxton SC P Lazarus	18 November 2010
Applicants' heads of arguments in the application for urgent interdictory and declaratory relief	Geoff Budlender Steven Budlender Tembeka Ngcukaitobi	19 November 2010
Wetland delineation report	Environmental Impact Management Services	23 November 2010
First Respondent's answering affidavit	Etienne Jacobus Espag	October 2010 (unsigned)
First Respondent's supplementary affidavit	Etienne Jacobus Espag	25 November 2010
Affidavit	Jacobus Hendrik Pieters	25 November 2010