



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 921/2024

In the matter between:

NKWE PLATINUM LIMITED

FIRST APPELLANT

NKWE PLATINUM SA (PTY) LTD

SECOND APPELLANT

and

GENORAH RESOURCES (PTY) LTD

FIRST RESPONDENT

**MINISTER OF MINERAL RESOURCES
AND ENERGY**

SECOND RESPONDENT

**DIRECTOR GENERAL OF THE DEPARTMENT
OF MINERAL RESOURCES AND ENERGY**

THIRD RESPONDENT

**REGIONAL MANAGER: LIMPOPO REGION
OF THE DEPARTMENT OF MINERAL RESOURCES
AND ENERGY**

FOURTH RESPONDENT

Neutral citation: *Nkwe Platinum Limited and Another v Genorah Resources (Pty) Ltd and Others* (921/2024) [2026] ZASCA 27 (11 March 2026)

Coram: ZONDI DP and SCHIPPERS and HUGHES JJA and DAWOOD and NORMAN AJJA

Heard: 12 November 2025

Delivered: 11 March 2026.

Summary: Company Law – amalgamation agreement between holder of mining right under Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and foreign companies – whether conclusion of amalgamation agreement resulted in cessation or deregistration of holder of mining right within the meaning of s 56 of the MPRDA – whether conclusion of agreement resulted in transfer or disposal of interest in mining right or change in control of right holder.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Mokose J, sitting as court of first instance):

- 1 The appeal is upheld, with no order as to costs.
 - 2 The orders of the high court contained in paragraphs (i) to (vii) are set aside and replaced with the following order:
'The application is dismissed with no order as to costs.'
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JUDGMENT

Dawood AJA (Zondi DP and Schippers and Hughes JJA and Norman AJJA concurring):

Introduction

[1] This is an appeal against the judgment and orders of the Gauteng Division of the High Court, Pretoria (the high court). The appeal is with the leave of the high court. Before the hearing of the appeal, on 12 November 2025, the first appellant, Nkwe Platinum Limited (Nkwe) and the first respondent, Genorah Resources (Pty) Ltd (Genorah) concluded a settlement agreement. This resulted in the first respondent withdrawing its opposition to the appeal.

[2] In terms of the settlement agreement, the parties agreed to jointly seek from this Court an order:

- (a) upholding the appeal, with no order as to costs; and
- (b) replacing the orders contained in paragraphs (i) to (vii) of the high court's order with an order dismissing the application with no order as to costs.

On 12 November 2025, this Court granted an order without reasons and indicated that the reasons would be furnished in due course. These are the reasons for the order.

Brief background facts

[3] Nkwe and Genorah hold a 74 per cent and 26 per cent interest, respectively, in a mining right (the Garatouw mining right) granted to them as joint holders in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The dispute concerns the effect of an amalgamation agreement concluded between Nkwe and various other parties, in terms of which Nkwe, a Bermuda-registered company, amalgamated with another Bermuda-registered company in accordance with the provisions of the Companies Act of Bermuda.

[4] Following the conclusion of the amalgamation agreement, Genorah launched an application and sought relief on the basis of its contention that the conclusion of that agreement resulted in the transfer of the Garatouw mining right. Alternatively, it alleged that the agreement constituted a change in the control of Nkwe, without the approval of the second respondent, the Minister of Mineral Resources and Energy (the Minister), as contemplated in s 11 of the MPRDA. Consequently, so it was contended, such a transfer or change of control was void, Nkwe had been deregistered within the meaning of s 56 of the MPRDA, Nkwe's undivided shares in the Garatouw mining right had lapsed, and Genorah was the only eligible applicant for Nkwe's 74 per cent share in that right. Genorah also sought a final order interdicting Nkwe from holding itself out as the holder of an undivided share in the Garatouw mining right.

[5] Nkwe opposed the application and relied upon the expert opinion of Mr David Chivers QC and a judgment of the Chief Justice of Bermuda to support its view that the amalgamation agreement concluded in Bermuda did not lead to a deregistration or transfer of its controlling interest in the Garatouw mining right. Nkwe submitted that there was nothing that rendered ss 11 and 56 of the MPRDA applicable to the amalgamation.

[6] The high court effectively accepted that Genorah had made out a case for most of the relief it sought and accordingly made the following order:

(i) the conclusion of the Amalgamation Agreement and its implementation constitute a transfer and/or change in control of the Garatouw Mining Rights for the purposes and within the meaning of Section 11 of the MPRDA;

(ii) the transfer and/or change in control in (i) above is void by virtue of the absence of the necessary consent in terms of Section 11 of the MPRDA from the Minister of Mineral Resources and Energy;

(iii) that the first respondent has been deregistered within the meaning and for the purposes of Section 56 MPRDA following upon the conclusion and implementation of the Amalgamation Agreement;

(iv) the undivided shares of the first respondent in the Garatouw mining right have lapsed;

(v) the undivided shares in the Garatouw mining right which previously belonged to the respondents shall be referred back to the Minister or his delegate to determine who they should be granted to;

(vi) the respondents are interdicted from holding themselves out as the holder of the undivided share in the Garatouw mining right;

(vii) the first and third respondents jointly and severally pay the costs of this application, including the costs of two counsel;

(viii) the seventh and eighth respondents jointly and severally pay the costs of the counter application, including the costs of two counsel.'

[7] The parties to this appeal concluded a settlement agreement in terms of which, amongst other things, they sought an order setting aside the orders of the high court, which included an order *in rem*, namely that the undivided shares of Nkwe in the Garatouw mining right have lapsed. The parties were *ad idem* that, since the matter involved setting aside an order *in rem*, this Court would have to determine the merits of the matter before considering whether to grant the orders sought in the settlement agreement.

[8] In *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others*,¹ Froneman J stated as follows:

'This judgment makes clear two legal propositions. The first is that a judgment *in rem* may not be set aside by only a settlement agreement between the litigating parties in an appeal against that judgment. For a judgment *in rem* to be set aside by a settlement agreement, the court hearing the appeal must give its sanction to the agreement being made an order of court on the basis that the setting aside is justified by the merits of the appeal. The second is that the court sanctioning the settlement agreement should give its reasons for doing so.

A judgment *in rem* determines the objective status of a person or thing. . . .

Our law already recognises that judgments *in rem* are not subject to mere settlement on appeal. In the context of intellectual property law the Supreme Court of Appeal held, in *Marine 3 Technologies*, that the judgment appealed against was "one *in rem* in that it [affected] a public register, . . . notwithstanding the settlement of the matter, [Marine 3 was] constrained to proceed with the appeal". The implication is clear: unless the appeal court determines that the merits of the appeal accords with the outcome of the settlement agreement it cannot make the settlement agreement an order of court. And a court must give reasons for its decisions, especially when it gives its approval to a settlement agreement on appeal that sets aside a trial court's judgment *in rem*.

This is an application of what this Court held in *Eke* to be one of the requirements for a settlement agreement to be made an order of court, namely that "its terms must accord with both the Constitution and the law [and] must not be at odds with public policy". (Footnotes are omitted)

Issues for determination

[9] The issues on this appeal are the following:

- (a) whether the conclusion of the amalgamation agreement resulted in the cessation or the deregistration of Nkwe within the meaning of s 56 of the MPRDA; and
- (b) whether the conclusion of the amalgamation agreement resulted in the transfer or disposal of Nkwe's interest in the Garatouw mining right, or a change in the control of Nkwe for the purposes of s 11 of the MPRDA.

¹ *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) paras 1-4.

Deregistration/cessation

[10] Section 56 of the MPRDA reads as follows:

‘Any right, permit[, or permission [or licence] granted or issued in terms of this Act shall lapse, whenever –

(c) a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused.’

[11] It is common cause that Nkwe was not registered in South Africa and accordingly, there was no registration or deregistration of Nkwe in terms of South African law. Genorah relied on the expert opinion of Mr David Kessaram SC, whose report stated with regard to Nkwe that: ‘it did not cease to exist by virtue of being dissolved, which is the only way for a Bermuda incorporated company to cease to exist (after being struck off the register of companies or wound up)’. Mr David Chivers QC, who compiled an expert report on behalf of Nkwe, concluded that upon amalgamation under the Bermuda Companies Act the amalgamating companies (Nkwe and Gold Mountains (Bermuda) Investment Limited (Bidco)) did not cease to exist but instead continued within the amalgamated company (Amalco).

[12] Nkwe also referred this matter to a court in Bermuda, where the Chief Justice, Hargun CJ made the following order:

‘(1) The nature of an amalgamation of Bermuda companies under Bermuda law pursuant to those sections of the Act relating to amalgamation, in particular section 104 to section 109 is such that:

- (i) The amalgamating companies continues to exist following the amalgamation as one amalgamated company.
- (ii) Upon issuance of a certificate of amalgamation, the property of each amalgamating company becomes the property of the amalgamated company and accordingly assets that were held by one of the amalgamated companies prior to the amalgamation become the property of the amalgamated company by operation of law and not by way of transfer or by operation of contract.
- (iii) The assets of Nkwe prior to the Amalgamation continue to be its assets notwithstanding the Amalgamation.’

[13] There has accordingly been no deregistration of Nkwe either under South African law or Bermuda law. Nkwe's share in the Garatouw mining right accordingly did not lapse in terms of s 56 of the MPRDA.

Disposal or transfer of Nkwe's interest

[14] Section 11(1) of the MPRDA provides as follows:

'A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.'

There is no dispute that Zijin Mining company (Zijin) held 60.47 per cent of Nkwe's share capital prior to amalgamation. Post-amalgamation, it held 74 per cent of the shares, ensuring that it remained the majority shareholder in Nkwe, both pre- and post-amalgamation.

[15] Given that Zijin retained the controlling interest in Nkwe, there are no factors that trigger the applicability of either s 11 or s 56 of the MPRDA. The purpose of s 11 has not been undermined, nor has a controlling interest in the mining operation changed. Therefore, the high court ought to have dismissed the application.

[16] The order of the high court arose mainly on account of its incorrect interpretation of the amalgamation agreement and its effect on Nkwe's undivided share in the Garatouw mining right. The order *in rem* (para (iv)) followed from the court's analysis of the amalgamation agreement and its application of the Company law of Bermuda. Once Genorah accepted that the high court was wrong in its interpretation and thus on the merits of its application (which affect the declaratory orders in paras (i), (ii) and (iii)), it follows that the order *in rem* in para (iv) cannot stand. This is reinforced by Genorah's withdrawal of its opposition to the appeal.

[17] Accordingly, Genorah's acceptance in the settlement agreement that the amalgamation did not result in the transfer or change in control of the Garatouw mining

right held by Nkwe for purposes of ss 11 and 56 of the MPRDA, was correct. There was no deregistration of Nkwe, and no new majority shareholder acquired control of Nkwe.

[18] Nkwe made out a case for upholding the appeal and setting aside the orders of the high court. Accordingly, an order was made as sought in the settlement agreement in the following terms:

- 1 The appeal is upheld, with no order as to costs.
- 2 The orders of the high court contained in paragraphs (i) to (vii) are set aside and replaced with the following order:

'The application is dismissed with no order as to costs.'

FBA DAWOOD
ACTING JUDGE OF APPEAL

APPEARANCES

For appellants: MA Chohan and A Milovanovic-Bitter
Instructed by: Edward Nathan Sonnenberg Inc., Johannesburg
Webber Attorneys, Bloemfontein

For first respondent: BA Morris
Instructed by: Malan Scholes Inc., Johannesburg
Claude Reid Inc., Bloemfontein.