

SOUTH AFRICA / JUDGMENT

Anglo American Platinum Ltd and Others v Pienaar and Others (89567/2014) [2016] ZAGPPHC 656 (29 July 2016)

[2016] ZAGPPHC 656

COURT

North Gauteng High Court, Pretoria

BEFORE

NP Mali

CASE / FILE NUMBER

89567/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

29/7/16

Case Number: 89567/2014

In the matter between:

ANGLO AMERICAN PLATINUM LTD

First Applicant

RUSTENBURG PLATINUM MINES LTD

Second Applicant

NKANGETSANG GILBERT MATLHAKO

Third Applicant

MTATENI ZINGQUBE

Fourth Applicant

PETRUS MALEFETSA MMETI

Fifth Applicant

MZONKE DYAKOPU

Sixth Applicant

DAVID THABO KHUNOU

Seventh Applicant

HLOMANI DONALD MAKHUBELA

Eight Applicant

BONAKELE NTABANKULU MTIMBA

Ninth Applicant

and

RUDOLPH JOHANNES PIENAAR First

Respondent

FGL ASSOCIATES Second

Respondent

WALTER VERMAAK ATTORNEYS

Third Respondent

BRIGDE DEBT (PTY) LTD Fourth

Respondent

E4 COLLECTIONS (PTY) LTD

Fifth Respondent

J U D G M E N T

MALI J:

- [1] This is an interlocutory application to join the first to fifth respondents, as the fifth to ninth respondents in the main application. In the main application which was brought to this honourable court on 22 December 2014 the applicants seek various declaratory reliefs relating to the proper interpretation and application of the administration regime created by sections 74 to 7W of the Magistrate Courts Act 32 of 1944 ("MCA"). The second to fifth respondents are not opposing the application.

PARTIES

[2] The first and second applicants in this application, are respectively, Anglo American Platinum Ltd ("AAP") and Rustenburg Platinum Mines Ltd ("RPM"), both public companies, duly registered and incorporated in accordance with the Laws of the Republic of South Africa they both share their registered addresses at 13th

Floor, [... M. S.],

Johannesburg.

[3] The third to ninth applicants are all adult male employees currently employed by the second applicant/ RPM. The fourth and fifth

applicants are under administration by the first respondent. The fourth and fifth applicants are employed by the second applicant as Pump Team Supervisor and Cleaner respectively.

[4] The first respondent is Rudolph Johannes Pienaar, an adult male administrator employed by the second respondent.

[5] I first had to deal with the issue of affidavits. The first respondent's complaint is that the applicants filed affidavits without the leave of the court, and without condonation, therefore they should be disregarded as non pro scripto. The said affidavits are confirmatory affidavits of the fourth and the fifth applicants. The first respondent did not make submission as to prejudice attendant upon the filing of the said affidavits. I ruled that it is in the interests of administration of justice to have the affidavits admitted.

[6] The first to ninth applicants in the main application brought an application against the first to fourth respondents. The first

respondent in the main application is an adult female practising attorney who is also the director of the both the second and third

respondents.

[7] The second respondent in the main application is a law firm, trading as H VAN DER MERWE INC or HVDM Attorneys and/or Hannatjie van der Merwe Attorneys. The third respondent in the main application is a company with its registered name as HVDM administrators (PTY) LTD. It is not in dispute that the company of the second respondent specialises in debt review remedies and administration applications. The second respondent has been appointed as administrators to the third to ninth applicants in the present application. The fourth respondent, in the main application, at the time was known as the Minister of Justice and Constitutional Development, the executive authority responsible for the administration for the MCA and the National Credit Act 34 of 2005 ("NCA").

[8] The first and second applicants on their standing as employers of third to ninth applicants ("miners") brought the main application on behalf of their employees who are mine workers and in the interest of their employees as well. According the first and second applicant the report of the research carried out by the University of Pretoria Law Clinic in 2013 miners

have been found to agree to emoluments attachment orders , due to financially illiteracy, as they did not understand the full financial risks, costs and obligations of the agreements they entered into.

- [9] It is apposite to refer to the context within which the main application is brought according to Mr Christopher Ivan Griffith

("Griffith"), the deponent to the founding Affidavit. Griffith states that he is the Chief Executive Officer of the first

applicant as well as an Executive Director of the second applicant.

- [10] The first applicant submits that the respondents are collecting fees in excess of the amount allowed to them under the MCA regime. They allegedly deduct more than 12.5% allowed to them, in terms of section 74 L[1]; They further circumvented the 12.5% cap by outsourcing some of their duties to administration companies and they treat the said administration companies as creditors. The respondents should recover those fees as part of their administration fees.
- [11] In the main application it is submitted that a company called Summit contracted by the first and second applicants has analysed the distribution accounts statements filed by the respondents in respect of the third to ninth applicant's estates. Summit's finding are that the respondents are deducting between 23% and 96% of the payments that they receive from the debtor as their costs and remuneration under section 74L.
- [12] The main application was brought on 22 December 2014 against the abovementioned respondents. On or about 23 March 2015, the first and second respondents filed answering affidavits, and the third respondent filed separate answering affidavits. In the first and second respondent's papers they submitted that they are not the administrators of the fourth and fifth respondents. They stated that Mr Rudolph Johannes Pienaar ("the first respondent") is the administrator of the fourth and fifth applicants; hence this application.

ISSUE

- [13] The issue to be determined is whether the first respondent has a direct and substantial interest in the main application, alternatively a sufficient interest that the joinder will be convenient, both to the first respondent and the court.

LAW

- [14] Joinder of parties is governed by Rule 10 of the Uniform Rules of Court. Rule 10(3) provides; "Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action".

[15] Granting of administration orders is governed by section 74 and particularly section 74E regulates the appointment of the administrator. Section 74J (1) and (5) of the MCA lists the duties of the administrator as follows:

- (1) An administrator shall collect the payments to be made in terms of the administration order concerned and shall keep up to date a list (which shall be available for inspection, free of charge, by the debtor and creditors or their attorneys during office hours) of all payments and other funds received by him from or on behalf of the debtor, indicating the amount and date of each payment, and shall, subject to section 74L, distribute such payments pro rata among the creditors at least once every three months, unless all the creditors otherwise agree or the court otherwise orders in any particular case.
- (5) Every distribution account in respect of the periodical payments and other funds received by an administrator shall be numbered consecutively, shall bear the case number under which the administration order has been filed, shall be in the form prescribed in the rules, shall be signed by the administrator and shall be lodged at the office of the clerk of the court where it may be inspected free of charge by the debtor and the creditors or their attorneys during office hours.

[16] In *MAKHANYA v UNIVERSITY OF ZULULAND* [2] (at page 25 paragraph 61 it was held;

"As I pointed out earlier, it is true that a litigant who has a single claim that is enforceable in two courts that have concurrent

jurisdiction must necessarily make an election as to which court to use. In that respect the law specifically allows for 'forum shopping' by allowing the litigant that

choice...." At paragraph 65 it is stated "Clearly a court may not thwart the assertion of a right by denying access to a court in which to do so. It would be no answer to say that it really will not matter because the claimant has another right that is just as good. If the claimant asserts two right -..... then both must have a forum in which to be asserted. That is what the Constitution guarantees. "

[17] Section 74 of the MCA provides:

"74 Granting of administration orders

- (1) Where a debtor-
- (a) is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has

not sufficient assets capable of attachment to satisfy such judgment or obligations; ..."

[18] The first respondent opposes the application on various grounds. Although I will deal with some of the grounds raised by the

respondent, I will not deal with them in the sequence submitted by the first respondent.

LACK OF JURISDICTION BY THE HIGH COURT

[19] It was submitted on behalf of the Counsel of the first respondent that the prayers relating to the first respondent in respect of the fourth to the ninth applicants are not declaratory orders and can be dealt with by the Magistrate Court. Counsel referred to numerous case law in this regard, the most notably being the case of *AFRICAN BANK v VAN DER MERWE BOOYSENS*[3] where it was held:

"...the High Court does not have jurisdiction to adjudicate on the complaints of a creditor relating to the administration of a debtor's estate, at least until such time as the creditor has exhausted his remedies before the Magistrate who is after all, the supervisor of the administration. In my view the fact that a creditor such as the Applicant who has a large number of debtors whose estates are under administration may complain of a particular course of conduct by the administrator does not entitle that creditor to short circuit, or by-pass, the provisions of the Magistrate's Court Act."

[20] My view is that the judgment in *AFRICAN BANK* supra is superseded by the judgment of *MAKHANYA* supra.

[21] It was further submitted that the concerned applicants were not entitled to litigate at all as section 74 provides them with

administrative remedies, including taxation of bills of costs. It is not disputed by the first respondent that taxation of bill costs precedes the payment of monies. In casu the case is about the monies which have already been expended and allegedly expended inappropriately through the ambiguous mechanisms.

[22] It was contended on behalf of the applicants that section 74 does not provide adequate relief. It was further stated that other prayers sought in the main application have the effect of questioning the implementation and running of the administration orders. One of the examples is that there is no provision under the MCA that taxation of costs is free in the event that the applicants were obligated to follow it. The only remedy which is unambiguously free is a judicial review.

[23] Furthermore the provisions are not clear as to who has the right to institute the taxation of bills, whether it is the debtor under administration and his/ her administrator. The applicants sought itemised bill from the administrators. Albeit this request is in reference to other administrators with the exception of the first respondent the applicants were told there the itemised bills did not exist and even if they did they were not entitled to them. Section 74 does not make provisions in respect of the producing of the itemised bills to the debtors. The applicants hold the view that their administrators owe them a duty of care. I fully agree with this contention.

[24] The first respondent's submissions are that in the event that the debtors have problems with how their estates are run they should approach the Magistrate to tax the bills of costs. It seems as if this argument disregards the whole purpose of introducing the MCA and NCA. One of the reasons the Administration orders were put into place was to assist debtors who

are financially stressed. It is highly likely that any form of litigation and or enquiry involves spending money whether in the form of transport costs and or other manner. Furthermore, it is likely possible that in the event a dispute occurs between the representative and its client relations might be strained. The strained relations may result to the compromise of the good intended to be achieved.

- [25] Another issue raised by the applicants is the disjuncture between MCA and NCA. It is not clear to what extent the administrators are required to comply with the NCA. This is a question that cannot be entertained by the Magistrate's Court. It was argued on behalf of the applicants that while the debt counsellors under the NCA operate in a heavily regulated sphere, administrators, by and large, do not.
- [26] The first respondent limits the issue to the dispute in respect what it calls 'small' change claimed by the fourth and fifth applicants. The amounts referred to as small change are R3 423.09 and R1 688.51. Taking into account that these are the amounts allegedly overcharged to the mine workers, they are by no means trivial whether this is raised in the context of the relevant jurisdiction. I cannot agree more that one of the major issues pertain to the interpretation of law and the existence or lack of mechanisms.
- [27] The Supreme Court of Appeal in Makhanya has clearly decided the issue of the High Court jurisdiction. It has been established that the High Court has no discretion to dismiss the matter before it whether it is wrongly brought. It is trite law that bringing a matter in a wrong forum can be visited through a proper costs order.
- [28] Having regard to the above the first respondent's point in limine must fail.

MISJOINDER OF CAUSES

- [29] It was submitted on behalf of the first respondent that the prayers sought by the fourth and fifth applicants had no bearing on him and or that he is not part of some of the causes. Counsel for the applicants submitted that all prayers but for prayer four are applicable to the first respondent. I now turn to deal with some of the prayers sought. It is noted that there is an overlap of facts pertaining to the prayers sought.
- [30] In respect of the first declaratory that the first respondent be obligated to furnish on request and free of charge, full and itemised accounts of all expenses and costs that they have incurred in the administration of the third to ninth applicant's estates under their administration the first respondent's response is that the section 74 J (5) and (6) provide the remedies. Section 74J(5) and (6) provides as follows:

"5. every distribution account in respect of the periodical payments and other funds received by an administrator shall be numbered consecutively, shall bear the case number under which the administration order has been filed, shall be in the form prescribed in the rules, shall be signed by the administrator and shall be lodged at the office of the clerk of the court where it may be inspected free of charge by the debtor and the creditors or their attorneys during office hours".

"6. a distribution account referred to in subsection (5) shall at the request of any interested party be subject to review free of charge by any judicial officer".

- [31] It is apparent from the above that subsection 5 or 6 deal with the distribution account and not the itemised accounts of all expenses and costs that are incurred in the administration of the debtor's estate is provided. It has been submitted on behalf of the fourth and fifth applicants that because of the alleged overcharging by the first respondent it is necessary to have full and itemised account.
- [32] Furthermore subsection 6 provides for review to be instituted by any interested party. The first respondent's contention that this remedy is available to the fourth and fifth applicants is at odds with the intention of the legislature, in that the debtors need to be assisted by the administrators. I understand that the fourth and fifth applicants are the interested parties meant in section 6 above. Having regard the position the fourth and the fifth applicant hold at their workplace, I can safely conclude that they are not sophisticated and that their literacy levels are below standard.
- [33] The above is supported by their Counsel's submission that they could not attest to the confirmatory affidavits in English. As gleaned from the papers their affidavits are in ISIXHOSA and SETSWANA respectively. From the above it becomes apparent that they might not have the capacity to pursue any legal processes, let alone a review procedure despite being free of charge. My view is that some of the applicants need the assistance of representative despite the adequacy of the legal provisions.
- [34] In prayer two, of the main application, a declaratory is sought that the first, second and third respondents have unlawfully deducted fees and remuneration in excess of the 12.5% cap imposed by section 74L(2) of the MCA read with Part II of Table B of Annexure 2 to the Magistrate's Court Rules.
- [35] To the above it was submitted on behalf of the first respondent that the applicants could have referred the matter for review to the Magistrate's Court. As stated earlier it is not reasonable to expect the concerned applicants to prosecute the review proceedings without assistance. In the circumstances it appears that it is impractical for their administrator to assist them because the complaint is against the administrator. It seems as if they would be obliged to seek the services of a legal representative or some form of professional help. I reiterate that the route which appears to be suggested by the first respondent defies the spirit of the intention of the legislation.
- [36] In the third prayer it is sought that the first, second and I or third respondents pay into the third to ninth applicants' estates the amounts identified in the schedule attached hereto as "A", being the amount of fees and remuneration deducted in excess of the statutory cap. The amounts claimed in respect of the fourth and fifth applicants are R3 423.09 and R1688.51 respectively. The first respondent's argument is that the amounts in question fall

within the Magistrate Court jurisdiction. The jurisdiction of the amounts is not disputed. It has to be borne in mind that this prayer is not sought in isolation. It is sought with other prayers wherein the Magistrate Court does not provide remedy and is sought within the context of the interpretation of legislation. It is therefore convenient to join this prayer with other reliefs sought.

[37] Having regard to the above I am satisfied that the first respondent should be sued jointly with other respondents to the causes of action complained about by the fourth and fifth applicants because the issues raised pertain to the same questions of law and

facts.

[38] I therefore find that the applicants have successfully made a case for the joinder of the first respondent to the main application.

COSTS

[39] The first and second applicants seek punitive costs at High Court scale. The applicants submitted that when they launched this

application they advised the respondents that if the application for joinder is not opposed they would not seek costs. They further

advised that if the application is opposed they would seek costs. I am inclined to grant the applicants costs as sought.

ORDER

[40] As a result the following order is made:

40.1 It is ordered that the first to fifth respondents in the interlocutory application is joined as the fifth to ninth respondents

in the main application them being:

33.1.1 Rudolph Johannes Pienaar,

33.1.2 FGL Associates,

33.1.3 Walter Vermaak Attorneys,

33.1.4 Bridge Debt (PTY) LTD,

33.1.5 E4 Collection (PTY) LTD

40.2 The first respondent is ordered to pay costs of this application on attorney and client scale including costs of counsel.

NP MALI

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicants: Adv. I Goodman

Instructed by:

BAKER & McKENZIE

Counsel for the 151 Respondent: Adv. C. J. Mouton

Instructed by:

BOSHOFF INC

Date of Hearing: 18

April 2016

Date reserved: 18

April 2016

Date of Judgment:

29 July 2016

[1] Section 74 L (2) of the Magistrates Court Act 32 of 1944 provides that: The expenses and ----

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[2] 218/08) [2009] ZASCA 69 (29 May 2009)

[3] 2003(4) ALL SA 247 (D)

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