

SOUTH AFRICA / JUDGMENT

Lonmin Ltd and Others v CG Steyn Inc t/a Steyn Attorneys and Others (M619/16) [2018] ZANWHC 10 (26 April 2018)

[2018] ZANWHC 10

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

M619/16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: M619/16

In the matter between:

LONMIN
LTD 1st
Applicant
ANGLO AMERICAN
PLATINUM
LTD 2nd
Applicant
THE MINISTER OF
FINANCE 3rd
Applicant
Q-LINK
(PTY)
LTD 4th
Applicant
AND
CG STEYN INC t/a STEYN
ATTORNEYS 1st
Respondent
EMERALD DUNES
INVESTMENTS 57 CC t/a
WOZA CASH ADVANCE,
PAYDAY CASH ADVANCE 2nd
Respondent

MIDNIGHT SPARK TRADING
400 CC 3rd
Respondent
WEST POINT TRADING 13
BK t/a
BAPONG CASH
LOANS 4th
Respondent
BITLINE SA 510 CC t/a
LOAN TECH FINANCIAL
SERVICES & CASH
CARD SALARY ADVICE 5th
Respondent
HOLOGRAPHIX PROPERTIES
512 BK
t/a PLATINUM CASH
ADVANCE, CASH TODAY 6th
Respondent
GREENVILLE TRADING 7
BK t/a PLATINUM CASH
ADVANCE,
CASH
TODAY 7th
Respondent
D EN AG FOURIE BK t/a
CASH FOR CASH 1, CASH
FOR CASH 2, TLAYANG
FINANCIAL SERVICE,
CITY FINANCIAL
SERVICES, LETHABO FINANCIAL
SERVICES 8th
Respondent
EASTERN BLUE
INVESTMENTS 186 BK
t/a
FAST CASH FINANCIAL
SERVICES 9th
Respondent
BLUE RAINDROPS TRADING
59 CC t/a
READY
CASH 10th
Respondent
EUNEVER TRADING t/a
SEVCO FINANCE 11th
Respondent
TUBA
FINANCE 12th
Respondent
THE MINISTER OF
JUSTICE AND CORRECTIONAL

SERVICES 13th
Respondent
THE MINISTER OF TRADE
INDUSTRY 14th
Respondent
THE NATIONAL CREDIT
REGULATOR 15th
Respondent
ASSOCIATION FOR DEBT
RECOVERY AGENTS 16th
Respondent
THE LAW SOCIETY FOR
THE NORTHERN PROVINCE 17th
Respondent
THE GENERAL COUNCIL OF
THE BAR 1st
AMICUS CURIAE
NEDBANK 2nd
AMICUS CURIAE
CIVIL MATTER
KGOELE
J
DATE OF HEARING: 06
MARCH 2018
DATE OF JUDGMENT: 06
MARCH 2018
DATE REASONS
REQUESTED: 7th MARCH 2018
DATE REASONS
DELIVERED: 26 APRIL 2018
COUNSEL
FOR APPLICANTS: Adv. H N De Wet (with him Adv. D M Lubbe)
COUNSEL
FOR RESPONDENTS: 1st:
Adv. P F Louw SC (with him
Adv S M Van Vuuren)
15th:
Adv. N Mbelle
17th:
Adv. M C Badenhorst SC
FOR
AMICUS CURIAE: 1st Amicus Curiae: GCB
Adv.
J H F Pistor SC
2nd
Amicus Curiae: Nedbank
Adv.
C Loxton SC (With Him Adv. Milovanovic)

REASONS FOR JUDGMENT

- [1] In terms of Section 65J of the Magistrates Court Act No. 32 of 1944 (the MCA), a credit provider can obtain an Emoluments Attachment Order (EAO) which allows for the repayment of a debtor's outstanding debt through deductions from his salary by his employer. This application was meant to focus on the costs that are charged and collected from the moment that the consumer defaults in terms of the credit agreement, through the execution process, until final payment.
- [2] The application was instituted by the fourth applicant (Q-LINK), who is a Private Company with limited liability incorporated in terms of the Company Laws of the Republic of South Africa (RSA), and who provides comprehensive management of garnishee orders and other Court deductions to a large group of employees, including the employees of the first (LONMIN), second (ANGLO AMERICAN) and third (THE MINISTER OF FINANCE) applicants, who have authorized the fourth applicant to act on their behalf in this application. I may hasten to say that the third applicant, who was cited in his capacity as the Head of the National Treasury, later withdrew its application before the application was heard in this Court.
- [3] In terms of Section 65J (5) of the MCA, employees may question the existence and the validity of, as well as the outstanding balance on the EAO's. This is exactly what Lonmin, Anglo American and the Minister of Finance before his withdrawal, were trying to achieve with this application. They claim that employers have a duty toward their employees to only make valid deductions from their salaries. As a result, they claimed, employers must critically scrutinize all EAO's, and other requests for deductions from their salaries.
- [4] There were a myriad of reliefs sought by the applicants which can be summarized as follows:-
- 4.1 That the EAO's of the identified employees at Lonmin, Anglo American and the Government be rescinded and set aside and referred back to the Rustenburg Magistrate Court to allow for proper judicial oversight over the execution process;
- 4.2 That Steyn Attorneys for the first respondent be limited to the legal fees and collection costs applicable to the National Credit Act 34 of 2005 (NCA);
- 4.3 That the amount outstanding owed by the execution debtors be recalculated to take into account:-
- 4.3.1 the amounts that have already been paid thus far to Steyn Attorneys, as representative of the Execution Creditors;
- 4.3.2 the correct application of Section 103 (5) of the NCA;
- 4.3.3 The limitation of legal fees and collection costs in accordance with the NCA;

4.4 That pending the conclusion of this application, the payments to be paid by the applicants in terms of the EAO's be suspended.

[5] The first, fifteenth and seventeenth respondents opposed this application, whereas the fourth up to the eleventh respondents,

including the thirteenth and the fourteenth respondents filed notices to abide. The General Council of the Bar (GCB) and Nedbank applied to be admitted as Amicus Curiae and their application was duly granted. Although there were several Points in Limine raised by the different opposing parties including the Amicus Curiae, the issue of Non-Joinder of other parties that have a material interest in this matter was the matrix that cuts across of all the Points in Limine raised, hence the application was decided on this point alone.

[6] The application was argued on the 6th March 2018 and the following Order was granted on the same date:-

1. THAT: The application be and is hereby dismissed with costs due to non-joinder of the parties that have a direct and substantial interest and/or parties that have a vital interest in the litigation and possible result;
2. THAT: The applicants (first, second and fourth applicants) are ordered to pay the costs jointly and/or severally on an attorney and client scale, the costs should include costs reserved previously and those consequent upon the employment of two Counsel where applicable.

[7] On the 7th of March 2018, the applicants (first, second and fourth) filed a request for written reasons in terms of Rule 49 (1) (c), and the

reasons thereof follows hereunder.

[8] The following served as a background to the current litigation. The first applicant (Lonmin) is the employer of a number of people listed in Annexure "CG4" and the second applicant (Anglo American), of those listed in Annexure "CG5". The total number of these people with the exclusion of those that were listed in Annexure "CG6" being employed by the Government (as the Minister of Finance), who is no longer a party to this proceedings is six hundred and ninety four (694). The EAO's had previously been granted against these employees for the collection of debt, pursuant to Court Orders, granted in the Rustenburg Magistrate's Court.

[9] The loans which form the subject matter of this application were all small credit agreements as defined in the NCA. All of the credit consumers defaulted on their loan obligations. The first respondent was the firm of Attorneys prior to the launch of the proceedings for the collection of these loans. The applicants complain and claim that the interest was first allowed to run up to the capital amount and judgment was thus granted on double the original outstanding loan amount.

[10] The applicants further alleged that the judgment that was granted included an order for costs on an attorney and client scale. It appears that this cost order originated from a specific contractual term in the credit agreement. The matters were mostly

undefended and the orders were obtained through a default judgment. Following the granting of the default judgments, EAO's were then sought and obtained. In most instances, the judgment debtor consented to the granting of the EAO's. The EAO's includes a further order for costs on an attorney and client scale. The EAO's costs were never taxed: The EAO's were initially honored by the applicants, but were later unilaterally terminated on the allegation that they fall to be set aside.

[11] The applicants quoted in their papers two cases as an illustration of the consequences which apparently follow the enforcement of these EAO's and their cost orders. They claim that these two examples, which are by no means exceptional, are specifically

mentioned because they are exactly a replica of all the other cases of the employees they represent. They are:-;

D T Motlhabane

Original loan amount

R1900,00

Interest at 5% / month from 08/12/2010 R1900,00

Expenses

R 679,63

Legal Fees

R5 864,84

VAT

R821,08

Monthly EAO installment

R 400,00

Payments received to date (including 5%

Paymaster commission)

R8 800,00

Total outstanding as on 5 January 2016 R2 365,55

F Makhasi

Original loan amount

R4 500,00

Interest at 5% / month from 03/12/2012 R4 500,00

Expenses

R566,12

Legal Fees

R5 614,03

VAT

R785,95

Monthly EAO instalment

R1 300,00

Paymaster commission)

R10856,88

Total outstanding as on 08 January 2016 R5 109,22

[12] Therefore, according to the applicants, Motlhabane has paid R8 800,00 towards the repayment of an original loan of R1900,00 at a rate of R400 per month. After 5 years, he still owes R2 365,55 which is more than the original loan amount. Makhasi has paid R10 856,88 towards the repayment of an original loan of R4 500,00 at a rate of R1 300,00 per month. After 3 years, he still owes R5 109,22 which is also more than his original loan amount.

[13] The applicants' case as advanced in their papers is that they will argue at the hearing of the main application that a declaratory order to the effect that collection costs, as referred to in Section 101 (1)(g) and as defined in Section 1 of the NCA, includes all legal fees incurred by the credit provider to enforce the credit agreement. More specifically, it included all Attorneys' fees charged before as well as during litigation, and all Advocates' fees (where one is used) charged before as well as during litigation. The applicants further alleged that if this interpretation is accepted, then it will mean that the Attorney's and Advocate's fees would also be included in the limitation of what can be collected from a consumer in terms of Section 103(5) of the NCA.

[14] Succinctly put, the applicants' contention is that the manner and quantum of the charges being levied are unlawful for three reasons:-

14.1 Firstly, Section 103(5) of the NCA limits the maximum amount of charges (the various types of charges are mentioned in Section 101), which may be levied during a consumer's default. Section 101(1)(g) pertains to "collection costs". They content that all legal fees (pre-litigation, during litigation and post litigation including execution costs until final payment) incurred by the credit provider and charged in terms of the credit agreement from part of "collection costs";

14.2 Secondly, untaxed costs, in the absence of an agreement, cannot be collected;

14.3 Thirdly, cost orders, insofar as they relate to the ongoing execution process, were made without the necessary judicial oversight. The applicants then also suggest appropriate measures that can be taken by judgment creditors to assist the Court in this regard.

Non Joinder of Magistrates / Clerk of the Court

[15] The first respondent as already indicated above raised several pre-liminary issues, including the issue of Non-Joinder of the

issuing agent of these EAO's, whether it be a Magistrate or a Clerk of the Court. In developing this argument, Advocate Louw SC submitted on behalf of the first respondent that each and every one of the EAO's in issue in this matter was issued by a competent Magistrate Court. The effect of the present application would indeed be to review the EAO's in issue. He maintained that it is far-reaching to review administrative or judicial conduct without joining the administrative or judicial body as a party to the litigation.

[16] The first Amicus Curiae, the GCB, in their submissions supported the contention of the first respondent regarding Non-Joinder of the Magistrate and/or the Clerk of the Court. Advocate Pistor SC submitted on their behalf that our Courts have in no uncertain terms indicated that an application will not be considered in the absence of a necessary party. Further that, the grounds on which an order of a Magistrate's Court can be reviewed and set aside are set out in Section 22 of the Superior Courts Act 2013 (No 10 of 2013). He added that, Rule 53 of the Rules of Court also provides specifically and expressly for a procedure that has to be followed when an order of a Magistrate is taken on review. Lastly that, apart from the fact that the applicants have failed to cite the relevant Magistrate as a party to these proceedings, the applicants have elected not to comply with the provisions of the said Rule.

[17] In an attempt to rescue the applicants' ship which was clearly sinking when the above arguments were made, Advocate De Wet indicated at the onset of his submissions that the applicants are no longer proceeding with prayers 1, 2 and 3 of their notice of motion. These are the prayers that mainly dealt with the reviewing and setting aside of the EAO's.

[18] In the case of the Dean of the Law Faculty of the University of North West and Others v Masisi (297/2013) [2014] ZASCA 2; 2014 (6) SA 61 (SCA) (20 February

2014) the following was said by the Supreme Court of Appeal (SCA):-

“[10] It is undesirable and inappropriate for Courts to make orders declaring statutory provisions and policy directives thereunder

invalid without providing relevant organs of state an opportunity to intervene. Indeed, it is undesirable for Courts to make

orders

affecting any party without affording such party an opportunity to oppose the relief being sought. In the present case, the Minister of Education has a direct abiding and crucial interest in the issues that arise from the respondent's complaint and which are affected by the order referred to above. In similar vein Rule 10A of the Uniform rules of Court provides:

10A. If any proceedings before the Court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings and shall in the case of a challenge to a rule made in terms of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), cause a notice to be served on the Rules Board for Courts of Law, informing the Rules Board for Courts of Law thereof.”

[19] The concession made by the applicants' Counsel by way of not proceeding with the prayers dealing with the review and setting aside of the EAO's was correctly made as the applicants had no leg to stand on to answer the strong case facing them as to why they did not join the agents that issued the EAO's, and furthermore, not following the Rules. This concession, however, has far reaching consequences as it will become clearer later in this judgment.

Non-joinder of credit consumers

[20] In their supplementary heads of argument and during the submissions in Court Advocate Badenhorst SC submitted on behalf of the seventeenth respondent (The Law Society of the Northern Provinces) that, there is no acknowledged procedure of rescinding and setting aside, collectively, a set of Court Orders or in particular, emoluments attachment orders, without complying with the Rules of Court in this regard and without notice to the consumers who were subjected to these orders. In the premises, Advocate Badenhorst SC continued, this Court should not entertain this application in its current form where the credit consumers who agreed to the EAO's are not cited as parties to the application and the relief sought therein not served on such credit consumers together with the application.

[21] The GCB including the first respondent also supported this contention.

[22] Advocate De Wet conceded on behalf of the applicants to the submissions raised above but contended that, unlike the first concession, the Non-Joinder of credit consumers is not fatal to their application as they can be properly joined later if the Court is not satisfied with the newspaper advertisement they published.

[23] I fully agree with the submissions made by Advocate Badenhorst SC that the consumers (the people listed in Annexures “CGS”)

have a right to be notified of the application to set aside the emoluments attachments orders to which they probably have consented

to. It is not open to acceptance that they would simply support the rescission of the orders, and accordingly, that there is no need to notify them of the application and to serve same on them. The converse is also true that, some may have opted to abide by EAO's for the sake of the conduct of their future businesses. I also agree that the applicants' attempt to rectify this anomaly by way of a certain belated newspaper advertisement which was recently published in the national newspaper is not sufficient. The applicants were correct in my view although belatedly so, to also concede through their Counsel during the submissions to this issue raised. Although they conceded to this issue, the applicants submitted that the order of the Court can be suspended pending joinder of these consumers. I will come back to this issue and will become apparent later in this judgment why the suspension of the order pending joinder of these consumers could not be sustained/ordered.

Non-Joinder of other parties

[24] Advocate Badenhorst SC also raised on behalf of the seventeenth respondent the issue of Non-Joinder of several organizations and institutions, which all have a real and substantial interest in the outcome of this application. He cited some of them, and they are:-

- (a) The Regional Law Societies apart from the Seventeenth respondent;
- (b) The Law Society of South Africa;
- (c) The Black Lawyers Association;
- (d) The National Association of Democratic Lawyers, and;
- (e) The Council of Debt Collections.

[25] The fifteenth respondent (the National Credit Regulator) also supported the above submissions. Their Counsel, Advocate Mbelle, submitted that key role players in the credit consumer

industry that will be affected materially by the declaratory relief ought to have been joined. She indicated that the declarator

will have a huge impact on the credit providers, debt collectors, the banking institutions, et cetera.

[26] In reply, the applicants contend that the fact that the orders sought will impact on these bodies, does not necessarily mean that they are having any direct interest to be joined. But above all, Advocate De Wet submitted on behalf of the applicants that, the GCB, Nedbank and the Law Society of South Africa cannot complain as they are represented today, and that

they know about this application. The same applies to the Debt Collectors as although they are not party to these proceedings, their CEO was in Court. All these bodies mentioned above, according to Adv De Wet, represent the umbrella body of the other parties or Association complained of, and in particular, the applicants sent e-mails to them notifying them about this application. In short, he argued, their interest is already and properly catered for.

[27] I am of the view that the breadth of the declaratory order sought by the applicants affects an exceptionally wide range of parties. It should be borne in mind that the nature and the consequences of this case are of vital importance to the credit providers, the various entities involved in debt collections, including legal bodies / societies in the whole of the Republic.

[28] Herbstein and Van Winsen in the book “The Civil Practice of the High Courts of South Africa”, 5th Edition, volume 2, at page 1442 remarked:-

“As stated the Court will not make a declaration of rights unless there are interested persons upon which the declaration would be binding in the sense of res judicata because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding”

AND ALSO

“It follows that the interested persons against whom or in whose favour the declaration will operate must be identifiable and must have had an opportunity of being heard in the matter. Inherent in the concept of a right is the idea that it resides in a determinate person and the persons interested in a right are those in whom it inheres or against whom it avails”

AND FINALLY

“All interested persons should be joined in an application for a declaration of rights. A declarator cannot affect the rights of persons who were not parties to the proceedings”. [Emphasis added: Footnotes and references to cases excluded]

[29] Rule 10A provides:-

- (1) “If in any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law must join the provincial or national executive authorities responsible for the administration of the law in the proceedings.
- (2) Where a challenge referred to in subrule (1) is made against the rule made by the Rules Board for Courts of Law, the party challenging the rule must, at the time when the challenge is made, serve on the Rules Board for Courts of Law, a notice which the challenge is referred to”.

- [30] Although Nedbank, The Law Society of the Northern Provinces, The Association for Debt Recovery Agents, and the GCB were represented in Court, there are many other interested parties in the consumer credit industry that have a legal interest that were not joined in these proceedings. The fact that e-mails were sent to them cannot constitute sufficient proof that they are aware of this application and decided not to come to Court. In addition, Rule 10A above provides how the executive authorities responsible for the administration of the said law should be joined or brought to Court if the subject matter affects them. Besides, if one looks at the e-mails sent, they are general e-mails and we do not have a follow-up as to what happened to them, and/or whether they were received. We furthermore do not have a notification from all that were sent emails and are not before Court that they will abide by the decision of this Court.
- [31] In terms of the Law and the Rules, the applicants' notices are not sufficient. The manner of notifying interested parties to be joined must make the Court to sanction the party who does not come. This Court cannot accept that the manner in which the parties were purportedly joined by means of emails and/or publications in the Newspaper was sufficient. Before an order can be granted, the Court must be satisfied that a person is willingly not coming to Court. But of importance, is the fact that if the applicants do not do it properly in terms of the law and Rules, they must apply for condonation to deviate from compliance. The submissions by the applicants do not have merit as well in respect of the Non-Joiner of the other entities in the credit industry.

Appropriate Order

- [32] Advocate De Wet submitted on behalf of the applicants that even though the applicants were to concede to the Non-Joiner of the other parties as well, the consequence of this should not be overstated. He indicated that the concession of the Non-Joiner of the Magistrate / Clerk of the Court has been taken care of by the abandonment of the prayers they initially sought relating to the setting aside of the EAO's. Further that, whether the EAO's are set aside or not, there will still be a need that a recalculation of the amounts the consumers are liable for should be made, because the prayers sought in the application are not dependent on one another.
- [33] In as far as Non-Joiner of the consumers they represent is concerned, he submitted that this matter can be postponed for two weeks so that they can join and serve the papers on them by means of substituted services because they are many, and the papers to be served are bulky. He lastly submitted that should they fail to do that in two weeks time, it is then that the application can be dismissed.
- [34] As far as Non-Joiner of other parties in the credit industries, e.g. the Banks, is concerned, he indicated that the applicants will not have any objection to their joinder.

- [35] Advocate De Wet pleaded and made the above submissions because all of the Counsel representing the respondents who opposed the application, together with those that represented the Amicus Curiae were singing one and the same tune that the application should be dismissed in toto. They further submitted that the dismissal of the matter will be in the best interest of all the parties as the matter will have far reaching consequences, and needs to be properly dealt with. They argued that the clumsy manner in which the applicants dealt with this matter and even their proposed way-forward cannot be allowed.
- [36] They further emphasized the fact that this issue of Non-Joinder of the interested parties was raised a long time ago during the inception of the application. There was also an order of Court to that effect which the applicants failed to adhere to.

Furthermore that, the applicants were given ample chance already to get their house in order, and cannot be given another chance as they misused the first two chances. According to them, a postponement of the matter has already and will still continue to prejudicially affect the respondents, and more especially, the Amicus Curiae financially. Whereas on the other hand, the applicants still have a chance of bringing a fresh and properly couched application as no one can in the circumstances of this case, raise a defense of *res judicata*.

- [37] Advocate Louw SC representing the first respondent was more vocal in urging this Court to dismiss the application, contending amongst others, that his clients are the ones that are feeling the pinch far more than the other respondents because they can no longer function by collecting money because of what the applicant did.
- [38] I fully agree with the submissions made by all the Counsel representing the respondents and the Amicus Curiae that this is a typical case in which the Court can exercise its discretion to dismiss the application on Non-Joinder only. There are more reasons that persuaded me to come to this conclusion in addition to the submissions made by the various Counsel for the respondents and the Amicus Curiae above:-

38.1 The prayers that were abandoned by the applicants constitutes the heart of the applicants' application. The applicants

furthermore relied heavily in their prayers on the review and setting aside the EAO's to claim their locus standi. The results of the abandonment of these prayers means that the applicants have to make a fresh application with reformulated prayers and factual averments to support same and their locus standi;

38.2 The order that they seek will definitely affect the credit industry country wide. In dealing with declaratory orders, the non-joinder is taken seriously by the Courts, and is not only dilatory. Before making a declaratory order, the Court must be satisfied that all the parties who have a material and legal interest are present or represented;

38.3 One other question which the applicants need to deal with and that cannot be simply brushed aside is whether Section 65J(5) of the MCA does not give the applicants the relief they seek, which issues might affect the main application;

38.4 The issue of substituted service proposed by the applicants cannot also salvage the predicament they found themselves in. Firstly, the withdrawal of the Minister of Finance from this application is crucial to their application because they cannot be claiming to be representing these other employees (79 consumers) of the Government. Secondly, it is unrealistic to expect the applicants to be able to draft papers regarding the application for substituted service for about (six hundred and ninety four (694) consumers within two weeks, let alone an application being brought to Court within these limited time period suggested (two weeks). The applicants had already intimated that the papers are voluminous. The applicants clearly so want to again employ short cuts and/or shoddy work in dealing with this matter which will not do justice to the magnitude of the issues raised. Surely this cannot be tolerated.

38.5 Another question that was raised during the submissions which cannot also be overlooked is whether the application was brought to this Court in the appropriate manner taking into account the number of consumers that were listed (about 773 in total). If regard is had to the number of the consumers involved taken together with the nature of the reliefs sought, it appears that this application is in effect a class action in the form of a test case. Our law has now developed complex rules for non-constitutional class actions. One of the requirements to be complied with is that the party seeking to represent the class must apply to Court for it to certify an action as a class action. Amongst other things the Court will have to consider in hearing the application, is whether the entity bringing the action is the correct entity to drive the litigation. A properly drawn class action would have avoided the amount of money already spent for legal fees so far in this matter by the various parties.

[39] Taking into account all of the considerations made above, the manner in which this application was couched or prepared, the nature of issues raised, I fully agree with Counsel for the respondents and the Amicus Curiae that a fresh application needs to be prepared by the applicants if they still want to pursue the issues they raised seriously. The respondents and other interested parties have to know in advance what case they are to meet to properly respond thereto. This Court cannot condone the manner in which this application was launched / brought, chopping and changing when and as the applicants feel some heat from the respondents' side.

[40] As contended by Counsel representing the first respondent, the applicants did not even come to this Court with clean hands.

They demonstrated an attitude of flagrant disregard of the legal principles or the Law, including the Rules of Court. They

unilaterally decided not to comply with the EAO's of the Magistrate Court. I have also taken into consideration the fact that during the submissions in Court, Counsel representing the applicants also indicated that they are prepared to abandon the prayers that dealt with the first respondents

(Steyn Attorneys) paying back the money. This is another demonstration of how the applicant willy nilly changes their application and that the opposing parties no longer understand what case they are facing. It should be noted that they did this as another attempt to salvage their application before this Court. On this note, a question that immediately comes to mind is: will the first respondent be joined again, because whether or not the prayers dealing with the paying back of the money is withdrawn or not, the matter still affects them materially as the applicants unilaterally stopped complying with the Orders they were successfully given by a competent Court?

- [41] In my view, a postponement for two weeks and/or the striking /removal of the matter from the roll was not an appropriate order in the circumstances of this matter. The same applies to the request that the order of the Court should be suspended pending the joinder of the interested parties. The applicants do not even attempt to tender wasted costs.
- [42] Similar orders were previously granted by our Courts. In the case of Absa Bank Ltd v Naude NO and Others 2016 (6) SA 540 (SCA) the Supreme Court of Appeal confirmed the dismissal of the application by a High Court for Non-Joinder where the other creditors in that application were not joined.

Costs

- [43] As far as costs are concerned, I do not see any reason why the costs should not follow the results. I am also of the view that the costs order should be on a punitive scale. With the risk of repetition, I want to emphasize the fact that the manner in which the matter was dealt with by the applicants leaves much to be desired. The several concessions made by the applicants at the last hours during the submissions in Court simply demonstrates how the prayers they sought could be equated to a fruit salad from the onset, as one of the Counsel submitted. The applicants were clearly clutching at straws. Of significance, is that these preliminary issues were raised by the respondents from the inception of the application since last year. The applicants ignored the chances that were given to them to rectify the situation and simply did some showy work to try and shut the mouth of the respondents. The issue of non-joinder of the parties is a simple legal argument which the applicants and their legal representatives ought to have foreseen even before the inception of the application and at the most, when it was raised. In addition, I do not see any reason why this issue, which was so pertinent, had to be argued in Court, causing the opposing parties so much costs to adjudicate this matter, only to be conceded to after they had made their submissions. Unnecessary costs, resources and a waste of time could have been saved.
- [44] Without overlooking the fact that the applicants are dominus litis and have the right to present their matter, I am of the view that this is a typical example of a matter where unnecessary costs, the wasting of the Court's resources and time could have been avoided. This issue was also raised by the Amicus Curiae who joined the matter at a much later stage. If the applicants could not hear the ringing bells before when it was raised by the respondents who opposed the application, this was a perfect time when the applicants could

have realized that the issue attracts some serious attention.

[45] The applicants' Counsel requested that they should not be ordered to pay the costs of the postponement of the matter on the 5th, a day prior to the hearing of the Preliminary issues, because the matter was postponed to the 6th (next day) by agreement between the parties and because the Court was not immediately available to hear the matter. The applicants

lost sight of the fact that notwithstanding that the Court had to first deal with other matters on the roll on that day, that they also requested an indulgence for them to verify whether the heads of all the parties were in the Court's file and indeed, as an example, the supplementary heads of the 17th respondent were found not to be in the Court's file and were only filed on that day. The second Amicus Curiae's heads or arguments were also filed with the Registrar on that day (the 5th) and were not in the Court's file as well. In addition, the matter was enrolled for the whole week, and the parties agreed in the morning that for convenience sake it was better to start with the matter the following morning. I therefore do not see any reasons why the costs occasioned by this postponement should be excluded from the other cost reserved previously.

[46] The above are the reasons for the Order I granted on the 6th March 2018.

A M KGOELE

JUDGE OF THE HIGH COURT.

ATTORNEYS

FOR THE APPLICANTS: Smit Stanton Inc. Attorneys

29 Warren Street

MAHIKENG

FOR THE RESPONDENTS:-

1ST Respondents: Arnoud Van Den Bout Inc

C/O Van Rooyen Tlhapi Wessels Inc

9 Proctor Avenue, Cnr Shippard Str

2ND to 11th Respondents: Lewies Attorneys

C/O Nienaber & Wissing Attorneys

10 Tillard Street

12th Respondent: Tuba Finance CC

Cnr Voortrekker & Plein Street

KLERKSDORP

13th to 14th Respondents: State Attorney

Cnr Sekame Road & Dr James Moroka Drive, 1st Floor, East Gallery

Mega City,

MMABATHO

15th Respondent: The National Credit Regulator

127 15th Road

Randjespark

Midrand,

JOHANNESBURG

16th Respondent: Association for Debt Recovery Agents

Suite 202

L A K House, 4 Fir Drive

NORTHCLIFF

17th Respondent: Root & Wessels Inc

C/O Minchin & Kelly

9 Proctor Avenue

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2018/10.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/lonmin-ltd-and-others-v-cg-unknown-topic-anwhc-2018>

Prepared on 13 October 2026 · Esheria