

SOUTH AFRICA / JUDGMENT

Mafa and Another v Lonplats Marikana Community Others (M659/2020) [2023] ZANWHC 78 (30 March 2023) [2023] ZANWHC 78

COURT

North West High Court, Mafikeng

BEFORE

S Mfenyana

CASE / FILE NUMBER

M659/2020

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Case No.: M659/2020

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

KGOMOTSO ROSINAH MAFA

First Applicant

LAZARUS NKHOMA

Second Applicant

and

LONPLATS MARIKANA COMMUNITY

First Respondent

PETER MCELLIGOT

Second Respondent

SIBANYE STILLWATER

Third Respondent

This judgement was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 30 March 2023.

REASONS

FOR JUDGEMENT

MFENYANA AJ

[1] This matter served before me on 9 February 2023 in the opposed Motion Court. The applicants sought certain relief as set out in their notice of motion dated 11 November 2020, and echoed in the heads of argument filed on behalf of the applicants on 17 January 2023[1].

[2] The matter was opposed by the respondents.

[3] Mr Xinishe appeared on behalf of the applicants and for the respondents, Mr Seape.

[4] Having listened to, and considered submissions from both counsel, I made the following Order:

"1 The points in limine are upheld;

2. The application is dismissed;

3. The applicant's legal representative is ordered to pay the costs of the application on a punitive scale of costs, de bonis propriis;

4. Should any party require written reasons for the order, they shall file a request with the Registrar of this Court within 14 days of this order."

[5] In opposing the application, the respondent raised five points of law. In summary, these points raised in limine relate to three main issues, being jurisdiction, arbitration and non-joinder. I deal with these briefly hereunder:

[6] On jurisdiction, the respondents argue that the Trust Deed was executed and registered in Johannesburg, outside of this Court's jurisdiction. They argue further that the first respondent's domicilium address, the second respondent's place of residence, as well as the third respondent's place of business, are all in Johannesburg. The respondents further argue that in terms of the Trust Deed, the parties submitted to the jurisdiction of the High Court, Gauteng (Local) Division in Johannesburg. They further contend that on each of these bases alone, this Court lacks the necessary jurisdiction and should refuse to entertain the application.

- [7] In respect of arbitration, it is the respondents' contention that in terms of clause 34 of the Trust Deed, any dispute arising therefrom shall be referred to arbitration in Johannesburg. They contend that the applicants have not referred the matter to arbitration, and on that basis the application should be stayed pending the final determination by an arbitrator.
- [8] In respect of non-joinder, the respondents raise three issues. The first is that the applicants seek relief against the Trust as the first respondent, which the respondents aver, cannot be done, as no relief can be granted against a Trust, but against the trustees thereof. As the applicants have failed to join all the trustees, the applicants' citation of the Trust amounts to non-joinder, so contend the respondents.
- [9] The second issue on non-joinder relates to the applicant's failure to join Eastern Platinum Limited (EPL) and Western Platinum Limited (WPL), who are the Trust founders of the first respondent and who are responsible for the appointment of trustees of the first respondent. This is borne out by the Trust Deed annexed to the founding affidavit. On hearing of further submissions, it became apparent that Mr Xinishe himself, is also a trustee of the first respondent.
- [10] Finally, the respondents assail the applicant's failure to join the Master of the High Court, Johannesburg (the Master), it being the case that the Trust Deed was concluded and registered in Johannesburg. Likewise, the letters of appointment of the trustees, were issued by the same Master's office. In August and October 2020 Mr Xinishe addressed letters to the Master, seeking his intervention on issues relating to remuneration and appointment of trustees as well as the reinstatement of the applicants as trustees. These very issues are what form the subject matter in the two applications brought by Mr Xinishe (as applicant) and the applicants in the current proceedings and in a previous application.
- [11] In opposing these points in limine, the applicants contend in their replying affidavit, that the respondents carry on business within the jurisdiction of this Court. They further contend that the community trustees as well as the applicants reside in Marikana, within the area of jurisdiction of this Court. I must mention with haste that the trustees have not been cited as parties in these proceedings. That, in my view, disposes of the issue in as far as the trustees are concerned.
- [12] During the hearing of the matter, Mr Xinishe further argued that the cause of action also arose within the jurisdiction of this Court. According to him, the cause of action is the removal of the applicants as trustees. This, Mr Xinishe contends, entitles the applicants to institute proceedings where the removal occurred, notwithstanding the fact that the Trust Deed was concluded in Johannesburg. There is no merit in this contention.

[13] There are various other factors which have an effect on the jurisdiction aspect of these proceedings. In terms of section 6(1) of the Arbitration Act[2], proceedings in any court may be stayed where a party commences such proceedings contrary to an agreement that a matter should be referred to arbitration. In *KZN Oils (Pty) Ltd v Nelta (Pty) Ltd t/a Keyway Motors*

[2021] 2 All SA 478 this position was confirmed, where the Court held that a party may apply for a stay of proceedings which have been instituted, pending the outcome of the arbitration. This has a bearing on both the jurisdiction of the Court as well as compliance with the parties' agreement to refer the matter to arbitration, if so agreed.

[14] It is also trite that "a person who voluntarily submits to the... jurisdiction of a court,may by so doing, confer jurisdiction on such court,

and cannot afterwards be heard to say that the court has no jurisdiction over him." [3] In this case the parties chose the jurisdiction of the High Court in Johannesburg. This is over and above all the other factors that clothe the Johannesburg High Court with jurisdiction in this matter, including the domicilium address of the respondents. This Court does not have the jurisdiction to entertain this application. I therefore upheld this point in limine.

[15] The applicant's failure to refer the matter to arbitration is common cause. However, they provide some or other justification for their failure to refer the matter. They contend that despite their attempts, they were just unable to refer the matter which they attribute to their inability to secure an arbitrator. The other issues raised by the applicants, are in my view, peripheral and in any event do not detract from the fact that the matter was not referred to arbitration, in the face of an agreement to do so, as recorded in the Trust Deed.

[16] The applicants further contend that in any event, in terms of clause 34.4 of the Trust Deed, they are not prevented from approaching this Court for urgent relief or judgment in relation to a liquidated claim. Mr Xinishe contended in this regard that part of the applicants' claim, as prayed for in the notice of motion, is for compensation which is a liquidated claim. In that submission, lies a concession that part of the claim is not. In my view, that part constitutes the main relief sought by the applicant, being their reinstatement as trustees. Their compensation, whether liquidated or not, is inextricable from the main relief and is dependent on it. Further, the applicants did not approach this Court on an urgent basis, nor was there a basis for urgent relief in the circumstances.

[17] I consider it necessary to restate the provisions of the Trust Deed. The relevant provisions state:

"34 DISPUTE RESOLUTION

34.1 In the event of there being any dispute or difference between the Parties arising out of this Deed, the said dispute or difference shall on written demand by any Party be submitted to arbitration in Johannesburg in accordance with the AFSA rules, which arbitration shall be administered by AFSA.

34.2. ...

34.3 ...

34.4 Nothing herein contained shall be deemed to prevent or prohibit a party to the arbitration from applying to the appropriate court for urgent relief or for judgement in relation to a liquidated claim.

[18] Simply put, clause 34 deals with arbitration. The provision expressly refers to “a party to the arbitration”. As the matter was not referred to arbitration, there cannot be any talk of ‘a party to arbitration’ in the present matter. Mr Xinishe misconstrued the entire purport of clause 34.4 and the context in which it is set. The purpose of the provision is to regulate the referral of the matter to arbitration. For these reasons, I upheld this point in limine.

[19] On the issue of the non- joinder of the trustees, the applicants assert that a trust can be sued in its own name. In their replying affidavit, the applicants state at page 121:

“The applicants are correct to sue the trust, as a trust have separate identity and existence from that of the trustees, so it can be sued on its own name. It’s our considered view that we don’t have anything against our fellow trustees, the people we have an issue with, is the founder and the trust as a separate entity. Our fellow black trustees are not the enemy. The enemy is the First respondent, Second respondent and Third respondent, who try by all means to divide us... .”

[20] This appears to be the sole basis for the applicants’ failure to join the trustees. They are unyielding in their belief, mistaken though it is, that they are well within their rights to proceed against the Trust, as a legal persona, in its own name, as they hold. The trite position though, is that a Trust does not possess any juristic personality. As such, legal proceedings by or against a Trust are brought or defended by the trustees nomine officii. It therefore follows that the trustees must be cited in their representative capacities as such.

[21] In Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd[4], Cameron J held that in legal proceedings by or against a trust, all the trustees must be joined in their representative capacity. This, the applicants, did not do. It would appear that the dichotomy that befell Mr Xinishe was to make an election whether to comply with the law as stipulated in Goolam. Had he done that, he would have had to institute proceedings against himself. His election was to leave out the trustees which resulted in a mis-joinder. Similarly, this point in limine was upheld.

[22] With regard to the non- joinder of the Trust founder, the applicants state that according to the information received from the second respondent, the third respondent is the new Trust founder. They consider any other suggestion as internal boardroom issues with which they

do not concern themselves. They, in any event never discussed these issues in their meetings, they add. As such, all they know is that Lonmin was replaced by the third respondent as the Trust founder, and on that basis, their claim should succeed. In my view, it was incumbent on the applicants to establish who the Trust founder is. It cannot avail them to merely state that they did not concern with it and in so doing risk the misjoinder of a party or the non-joinder of another. This is nonetheless the election they made, contrary to what is contained in the Trust Deed. For this reason, I upheld this point in limine.

[23] Finally, the applicants admit that they did not join the Master of the High Court to the proceedings as they still await a response from the Master on issues referred to him. The following extract from the applicant sums up the applicant's position on this issue:

..."we didn't want to cite the master as we still awaiting his response to our letters. But seeing that the office of the master

have challenges, in that they have not even acknowledged receipt of our letters, nor did they revert to us, we deem it fit, that as and when the office of the master is available to assist us, and then we will engage with them at that point. The master is not a court of Law, here we seek justice, and we couldn't on good conscience fail to protect our rights, simply because the office of the master is dysfunctional. We are not even sure, that the master received our letters or not justice delayed is justice denied, the court has jurisdiction to hear our matter, and then let us allow the court to adjudicate."

[24] Surely, the lack of response by the Office of the Master and the fact that there may be outstanding issues between the applicants and the Master, cannot justify the non-joinder of the Master where his joinder is warranted. Mr Xinishe admitted that the Master has an interest in the matter. Dare I add, that such interest is quite a substantial one. Consequently, the non-joinder of such a party has a negative impact on the determination of the matter.

[25] On the day of the hearing, the parties gave a detailed account of the history of the matter. Mr Xinishe explained that the applicants issued two applications which are related to each other. At the commencement of the litigation, the respondents sought to have the matters heard together by the same Judge, but this was turned down by the Court. The application under case number 658/2020 was finalised and a judgement granted, which is now the subject of an application for leave to appeal. Case number 659/2020 is the present application before this Court.

[26] The judgement in case number 658/2020 became a basis for Mr Seape's contention that despite the matters not having been heard at the same time, the points in limine raised in both cases are identical. It is common cause that these were upheld by the Court per Snyman J. Mr Seape further averred that having filed an application for leave to appeal, the best course for the applicants to take would have been to await the outcome of that process instead of going ahead with the present application.

- [27] Mr Xinishe expressed 'discomfort' with what he referred to as the discussion of the judgement of another Court, especially in circumstances where the applicants have brought an application for leave to appeal against that judgement. What this approach overlooks is that the two matters are interlinked. This is not disputed by any of the parties. The relevance is that this Court per Snyman J already pronounced on the points in limine, albeit under a different case number. On what basis the applicants insist on pressing ahead with the determination of the same points in limine is something that the applicants themselves could not explain. It bears mentioning that the merits of the two matters were not considered in these proceedings. The points in limine, however, suffer from the same defects and this is common cause.
- [28] The respondents sought a punitive cost order against the applicants' legal representative *de bonis propriis*. They bemoaned his conduct in the handling of the matter, which they state has prevailed from the inception of the matter to date. According to the respondents, this Court had questioned the capacity in which Mr Xinishe appeared and directed him to clarify this issue. Mr Seape submitted that Mr Xinishe had so far appeared in three different capacities, first as the applicant and a trustee of the first respondent in case number 658/2020, and as the applicant's legal representative, and a trustee of the first respondent in the present application. This, he submitted was one of the reasons the Court did not proceed with the matter when the matters first served before Leeuw JP (as she then was). Leeuw JP had, according to Mr Seape, requested the applicants to clarify the issue, which they 'have still failed to do.' He added that Snyman J was also compelled in the circumstances, to raise this issue in her judgement. On these bases, coupled with his insistence in proceeding with the matter even though he knew that the same points of law were upheld, the respondents submitted that the costs should be borne by the applicants' attorney in his representative capacity.
- [29] Resisting a punitive cost order, Mr Xinishe averred that in terms of the Trust Deed, he is entitled to fees and remuneration for the services he provides as he is mandated by the Trust. As a result, he cannot be 'slapped' with a punitive cost order. This contention is misplaced. Clause 22.1 which Mr Xinishe relied on has nothing to do with cost orders and simply states that only independent Trustees shall be entitled to trustees' fees. When this was pointed out to Mr Xinishe, he sought to rely on clause 13.2.4 to the effect that the Trustees have the power to pay out of the Trust Fund for attorneys' fees. Needless to say, this does not assist the applicants, as this provision, similarly deals with has no bearing on cost orders.
- [30] The other difficulty faced by Mr Xinishe and by implication, the applicants, is that the same Trust is cited as the first respondent in these proceedings. Mr Xinishe failed to clarify his role in this regard, save to state that he is a trustee.

- [31] What became clear from the submissions is that the issue of Mr Xinishe's capacity has been a sore issue since the inception of the matter, and was pointed out to Mr Xinishe on various occasions. It remains unresolved regardless. Despite being fully aware of the defects in the previous application, these have carried through to the present application, with no attempt to have them clarified. Mr Xinishe was aware that the points in limine were upheld, but still persisted with the present application. To the extent that these issues are points of law, I can see no reason why the applicants should be burdened with costs, on issues that are within the purview of the legal representative, as he himself submitted. The only change that has occurred in bringing the same issue before this Court is that Mr Xinishe, who was the applicant in those proceedings, is now the legal representative for the applicants. He hides behind the veil of being a trustee, which trustees he flatly refuses to join to the proceedings, presumably in the fear of suing himself. He shows no duty towards this Court or the applicants, but to himself. This is an abuse of the process of this Court. On these bases, I ordered a punitive costs order against the applicants' legal representative de bonis propriis.
- [32] Having upheld the points in limine, some of which are fatal to the applicant's case, I proceeded to dismiss the application with a punitive cost order.

S MFENYANA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING: 26 January 2023 DATE ORDER GRANTED: 26 January 2023 DATE REASONS REQUESTED : 21 February 2023 DATE OF JUDGEMENT: 29 March 2023 For the Applicants: Mr K.P.R Molefakgotla Instructed by: R.Xinishe Attorneys c/o: Molefakgotla Attorneys Email: molefakgotlatt@gmail.com For the Respondents: Ms Nicolene Neethling Instructed by: Cliffe Dekker Mofmeyer INC c/o: Smith Stanton Attorneys Email: nicolene@smitneethling.co.za

- [1] Para 4.1 of the Heads of Argument
- [2] Act 42 of 1965; See also: BDE Construction v Basfour 3581 (Pty) Ltd 2013
- (5) SA 160 (KZP)
- [3] Mediterranean Shipping Co v Speedwell Shipping Co Ltd 1986 (4) SA 329 (D)
- [4] 1989 (4) SA 985 (C) at 988 D-E

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