

SOUTH AFRICA / JUDGMENT

Scholes and Another v Minister of Mineral Resources (50642/2015) [2017] ZAGPPHC 303 (30 June 2017)

[2017] ZAGPPHC 303

COURT

North Gauteng High Court, Pretoria

BEFORE

M B Mokoena

CASE / FILE NUMBER

50642/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 50642/2015

Not

reportable

Not

of interest to other judges

Revised.

In

the matter between:

JOHN

HULME

SCHOLES 1ST

APPLICANT

MALAN

SCHOLES

INCORPORATED 2ND

APPLICANT

And

MINISTER

OF MINERAL

RESOURCES RESPONDENT

JUDGMENT

MOKOENA A.J

INTRODUCTION

- 1) The Applicants in this matter are John Hulme Scholes who is a practicing attorney in mining law and his law firm known as Malan

Scholes Incorporated. I shall refer to both of them as Scholes.

- 2) Their application came before me for hearing on 07 and 08 February 2017, sitting in the Special 3rd Motion Court.
- 3) The Applicants are challenging certain powers of the Minister of Minerals and Energy, who is the Respondent in this matter, as lacking a legal foundation. They also challenge the Constitutionality of some provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"). They further seek in the alternative an Order to review and set aside the decision of the Minister, in terms of PAJA, to develop and publish both the Original Mining Charter and the Amended Mining Charter ("the Charters") .
- 4) The relief they seek is set out in their Notice of Motion as follows:-
 1. That, upon a proper interpretation of the provisions of the Mineral Petroleum Resources Development Act, 2002 (Act 28 of 2002) ("MPRDA "), -

1.1 section 100(2)(a) and (b) of the MPRDA does not empower the Minister to develop a broad-based socio-economic empowerment Charter ("BBSEE Charter") which contains-

1.1.1. peremptory requirements that holders of rights or permits issued in terms of the MPRDA or holders of rights into which old order rights are converted as contemplated in Schedule II of the M PRDA ("MPRDA Rights") must comply with at all times:

1.1.2. peremptory requirements that applicants for MPRDA Rights must comply with before the right applied for may be granted to such applicants,

1.2 sections 23(1) (h) and 84(1) (i) of the M PRDA-

1.2.1. do not provide that a MPRDA Right may only be granted if the grant thereof will further the objects referred to in section 2(d) and (f) of the MPRDA in accordance with the BBSEE Charter;

1.2.2. empower the Minister to grant a MPRDA Right to an applicant for such a right if the objects referred to in section 2(d) and (f) of the M PRDA will be furthered in the manner set out in the BBSEE Charter or otherwise and in terms of the prescribed social and labour plan;

2. Alternatively to paragraph 1 hereof, that in terms of section 172(/)(a) of the Constitution of the Republic of South Africa, 1996 ("Constitution") the following provisions of the MPRDA are inconsistent with the Constitution and declared to be invalid, namely-

2.1 section 100(2) (a) of the MPROA, in so far as it purports to empower the Minister to develop the BBSEE Charter which contains-

2.1.1. peremptory requirements which holders of MPRDA Rights are required to comply with at all times;

2.1.2. peremptory requirements that must be met by applicants for MPRDA Rights before those right may be granted to applicants,

2.2 sections 23(1) (h) and 84(1)

(i) of the MPROA, in so far as they purport to require that a MPRDA Right may only be granted if the grant thereof will further the objects referred to in sections 2(d) and (f) of the MPRDA in accordance with the BBSEE Charter;

3. In the event that an order is made in terms of paragraph 2 hereof-

3.1 the order of invalidity is suspended for a period of 18 months to allow Parliament to correct the defect;

3.2 until Parliament corrects the defect in terms of paragraph 3. 1 hereof or if Parliament does not correct the defect within the period of 18 months referred to in paragraph 3. 1 hereof, sections 23(1) (h) and 84(1) (i) of the MPRDA shall be deemed to empower the Minister to grant a MPRDA Right to an applicant for such a right if the objects referred to in sections 2(d) and (f) of the MPRDA will be furthered in the manner set out in the BBSEE Charter or otherwise and in terms of the prescribed social and labour plan;

3.3 the grants of all MPRDA Rights before the date Parliament corrects the defect in terms of paragraph 3. 1 hereof, are deemed to have furthered the objects referred to in sections 2(d) and (f) of the MPRDA in accordance with the provisions of sections 23(1)(h) or 84(1) (i) of the MPRDA, as the case may be;

4. That it be declared, in terms of section 172(1)(a) of the Constitution, that the following conduct of the Minister is inconsistent with the Constitution and is hereby set aside, namely-

4.1 the development and publication by the Minister of the BBSEE Charter published in Government Notice 1639 on 13 August 2004 ("Original Charter" J; and

4.2 the development and publication by the Minister of the Amendment of the BBSEE Charter for the South African Mining and Minerals Industry published in Government Notice 838 on 20 September 20 10 ("the Amended Charter");

5. Alternatively to the relief sought in paragraph 4 hereof and if it is found that the conduct of the Minister referred to in paragraph 4 hereof constitutes administrative Justice Act, 2002 (Act 3 of 2000) ("PAJA" J, it is ordered that:-
 - 5.1. in so far as it is necessary to do so, the time period of 180 days contemplated in section 7 of PAJA is, in terms of section 9 of PAJA, extended until the date on which this application is issued; and
 - 5.2. the administrative action of the Minister to develop and publish the Original Charter and the Amended Charter, be reviewed and set aside;
6. In the event that this Honourable Court makes an order in terms of paragraphs 4 or 5 hereof, it is ordered that:-
 - 6.1 for purposes of the lawful development of the BBSEE Charter by the Minister, the six months period contemplated in section 100(2)
 - (a) of the MPRDA is deemed to commence on the date of this order:
 - 6.2 the grants of all MPRDA Rights before the date on which the Minister publishes the BBS EE Charter developed during the six months period to in paragraph 6. 1 hereof, are deemed to have furthered the objects referred to in sections 2(d) and (f) of the MPRDA in accordance with the provisions of sections 23 (1)(h) or 84 (1) (i) of the MPRDA as the case may be;
7. That it be declared that, upon a proper interpretation of the MPRDA and the BBS EE Charter-
 - 7.1 the failure by a holder of a MPRDA Right to comply with the provisions of the BBS EE Charter does not constitute a contravention or breach contemplated in sections 47(1)(a) , 98 and 99 of the MPRDA;
 - 7.2 a holder of a MPRDA right who-
 - 7.2.1. furthered the objects referred to in sections 2(d) and (f) of the MPRDA in the manner set out in the BBSEE Charter or otherwise and in terms of the prescribed social and labour plan: and / or
 - 7.2.2. sold 26% of its mining assets to a Historically Disadvantaged Person ("HDP"? as defined in the MPRDA, is deemed to have furthered the objects referred to in sections 2(d) and (f) of the MPRDA, notwithstanding that the HOP to whom the mining assets were sold, alienated the mining assets to a person who is not a HOP, as a result of which 26% of the mining assets of the holder are no longer owned by a HOP.
8. That the respondent be ordered to pay the costs of this application.
9. That further and I or alternative relief be granted to the applicant.

FACTUAL

BACKGROUND

- 5) The brief background of this application is that during October 2002, the legislature passed MPRDA which came to operation on 01 May
2004. Subsequent to the passing of that piece of legislation and before the expiry of a six months period from the coming into operation of MPRDA, the Minister developed what is called a broad- based Socio-Economic Employment Charter ("Original Charter") which, according to Section 100 of MPRDA, "set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources".
- 6) The publication of the Original Charter was made in the Government Notice 1639 of 13 August 2004. In 2010, the Minister amended the Original Charter and that Amended Charter was also publicised in the Government Notice 838 on 20 September 2010.
- 7) Eleven years later after the coming into operation of the MPR DA and the Original Charter and, four years and three months later after the amendment of the Original Charter Scholes launched this

application. To be precise it was launched on 30 June 2015.

- 8) Scholes application was opposed by the Minister who met their claim by contending in limine (at the onset) that:- (a) their application suffer a defect of non-joinder of Parties who have direct and substantial interest in the outcome of the issues raised in their application; (b) they lack a legal standing to launch this application and (c) they have not complied with Rule 16A of the Uniform Rules of Court. The latter point has since been abandoned after Scholes filed a Rule 16A Notice.
- 9) In addition to the preliminary points raised, the Minister also set forth the substantive grounds upon which he based his opposition to Scholes application.
- 10) Scholes filed their Replying Affidavit and did not address those two points in limine. They deal with them in their Heads of Arguments. During his address to the Court, Mr Bekker made a submission that as far as he is aware there are no factual disputes with regard to the allegations made as to why Scholes has locus standi. Regarding non-joinder, he argued that again there are no factual disputes. According to his submission, those preliminary points remain legal arguments.
- 11) I then directed the parties to address me on those preliminary points first. I exercised my discretion to hear the parties in order to determine whether or not the points in /imine raised are or would be dispositive of the matter as a whole or a substantial part thereof.

(See: Brian Kahn Inc v Samsudin 2012 (3) SA 310 (GSJ) at p313 A-B).

- 12) I now turn to deal with the points in limine raised by the parties, starting with non-joinder.

NON-JOINDER

- 13) Before I consider this legal point of non-joinder and the submissions made by Mr Semenya on behalf of the Minister, it is necessary that I should recount the facts upon which Mr Semenya based his submissions and the response of Scholes as they appear in their papers and the oral submissions made by their Counsel Mr. Bekker.
- 14) The Minister contends that the development and adoption of the Charters as legal documents regulating the mining industry are a product of several stakeholders in mining industry who participated in their development and adoption. Based on that, a large portion of would-be litigants whose rights and interest may adversely be affected by the outcome of this application and who would have the right to be parties to the determination of the issues raised by Scholes in their application have not been cited. Some of the stakeholders who participated in the development and adoption of those Charters are named by the Minister in his opposing papers.
- 15) The Minister contends also that there is a pending application by the Chamber of Mines of South Africa ("Chamber of Mines") under Case No. 4106/15 issued in this division. The Chamber of Mines is one of the stakeholders whom the Minister consulted during the development and adoption of the Charters. This Chamber of Mines represents a substantial number of MPRDA right holders, and that .Pending application is substantially similar to this application.
- 16) Mr Bekker agreed during oral argument that the Chamber of Mines is one of the most important role players in this application. In his address he brought to the attention of this Court that many issues that were raised in this application were the same issues raised in the Chamber of Mines application. He argued. that because of the similarities of those two applications, Scholes brought an application to consolidate this application with the Chamber of Mines application, and their application was dismissed.
- 17) Mr Bekker's submission seems to suggest that an application to consolidate the two applications was a procedure to join the Chamber of Mines to this application. The provisions of Rule 1 1 of the Uniform Rules of Court is quite clear on this issue of consolidation of separate actions.

It provides:-

"Where separate actions have been instituted and it appears to the Court convenient (own emphasis) to do so, it may upon the application of any party thereto and after notice to all interested parties, make an Order consolidating such actions, whereupon –

- (a) the said actions shall proceed as one action;
- (b) ...
- (c) ...

- 18) From the reading of this rule, convenience is a requirement that must be met before a Court can grant an order for consolidation of the separate actions. The provisions of this rule is also applicable to applications by virtue of the provisions of rule 6(14). (See also: Erasmus Superior Court Practice at pD11-133).
- 19) The requirements for joinder of parties are however, different to that of consolidations of separate actions. Joinder of a party to the proceedings is necessary where the party sought to be joined has a direct and substantial interest in the subject matter which interest may be affected prejudicially by the judgment of the Court. The test to determine whether the party has a direct and substantial interest in the matter is stated in *Gordon v Department of Health, Kwa Zulu-Natal* 2008(6) SA 522 SCA at 529C as follows:-

"The test is whether a party that is alleged to be a necessary party has a legal interest in the subject matter, which may be affected prejudicially by the Judgment of the Court in the proceedings concerned [See also *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 2 1]".

- 20) Based on the authorities and the provisions of Rule 1 1 of the Uniform rules of Court, I am of the view that the approach adopted by Scholes to join the Chamber of Mines application and theirs by invoking the provisions of Rule 1 1 to join the Chamber of mines in this application, was an incorrect approach. I agree with Mr Semenya that consolidation enquiry is totally different to a joinder enquiry.
- 21) I took note of some of the passages in the Judgment of Robie J in the dismissed consolidation application by Scholes. These passages are relevant to the issue of non-joinder raised by the Minister.

They read as follows:-

"17. ...The Minister, in consultation with industry stakeholders, developed a charter during 2003. This charter contained the mutual undertakings to which all industry stakeholders agreed to.

23...The Chamber not only represents mining rights holders but it is itself a signatory to the Original Charter that is the subject of the disputed interpretation and regards itself as the government's partner in the "shared vision" for the mining industry that forms back drop to the Charter.

24. According to the Chamber, and this is evident from the relief claimed by it in the Chamber application, the scope and nature of the Chamber application is informed by the role of the parties to the application as negotiation parties committed in the very text of the Charter's ability to achieve its transformational aims, and to participating in the process of monitoring Charter implementation, developing new strategies, to promote interaction in respect of the Charter's

objectives and to exchange problems and creative solutions and to arrive at a joint decisions in this regard.

- 25) The Scholes application, on the other hand, has a totally different approach which is evident from the relief claimed in that application. There are certain areas of overlap with the Chamber application but in the main Scholes application is aimed at the destruction of the Original and Amended Charter".
- 22) The quoted passages say three things. Firstly, that the Charter is a legal document owned by both the Minister and the Stakeholders in the mining industry; and it contains the parties' mutual understandings. Secondly, it contains the parties rights and obligations, among others, to participate in the process of monitoring its implementation and joint decision making. Lastly, Scholes application's ultimate objective is to set aside the said Charter and or amend its provisions.
- 23) Based on those quoted passages, the relief sought by Scholes if granted will ordinarily adversely affect the rights of those

Stakeholders who are not parties to these proceedings. It is for this reason that I hold a view that those parties are entitled to be joined in this application.

- 24) In their heads of argument, Scholes admit the Minister's contention that:- "a larger portion of would-be litigants whose rights and interests may adversely be affected by the outcome of their application and who would have the right to be parties to the determination of the issues in this application have not been cited." They provided several reasons for not joining those parties.
- 25) They made a submission that, in this case, the rights of the parties who are holders of MPRDA Rights will not be affected in the manner contemplated in the judgments they have referred this Court. I do not understand how they reach that conclusion as they are no facts placed before this Court to support their submission.
- 26) However, in his address Mr Bekker conceded that a finding by this Court in this application with regard to whether the principle of "once empowered always empowered" which is one of the major issues that are dealt with in this application, and whether the Minister can prosecute and use Section 47 of MPRDA to take away somebody's rights are issues that are obviously going to affect 100's if not 1000's of people who holds MPRDA rights. This concession suggest that the submission made by Scholes in their heads of argument that holders of MPRDA rights will not be affected by the decision of this Court falls away as it is without basis. It cannot be reconciled with the concessions made during oral argument.
- 27) They further submit that the manner in which they seek to deal with possible invalidity of the provisions of MPRDA and I or the BBSEE Charters will ensure the continued validity of MPRDA Rights that were granted in terms of these invalid provisions. In that regard, the relief they seek in prayers 3 and 6 of the notice of motion will ensure that any MPRDA Rights granted during a period where the relevant provisions of the MPRDA and I or the BBSEE Charters are valid, be preserved.

- 28) Mr Semenya's response to that submission was that for this Court to make such an Order will be to breach the doctrine of separation of powers in that, the Court as part of the judiciary cannot direct another branches of the State to alter their calendars to suit the particular directive.
- 29) I refrain from pronouncing on this issue and I leave it for adjudication in due course. The reason thereof is that what has been pertinently placed before this Court is a question of non-joinder which should be considered before the adjudication of any other parts of the merits. (See: Brian Kahn *supra* at p313A-B).
- 30) It is my view that those parties who have a direct and substantial interest in this matter and whose rights may adversely be affected by the Order of this Court, are entitled to be notified of this proceedings and whereupon receipt of such notice elect either to participate or abstain.
- 31) Scholes also made a submission that if the orders sought are granted, it will ensure certainty of the law which is to the interest of the parties who are not before Court. Again no facts were placed before this Court to support that submission. It may well be that those parties have a totally different understanding and interpretation of the MPRDA and the Charters to that of Scholes and the Minister; and any Order to be made by this Court may create uncertainty on their part. I agree with Mr Semenya that those parties will not be bound by the Order of this Court and it will be within their rights to approach another Court to obtain an Order irreconcilable with the

Order made by this Court.

- 32) A further submission by Scholes is that where such as in this case, a party challenges the validity of legislation and I or the proper interpretation of legislation it is clear that anyone to whom that legislation is applicable would have an interest in the outcome of the litigation; and to argue that, in such a case; an applicant challenging the validity of legislation or the interpretation thereof has to cite everyone who may have an interest in the outcome of the litigation is ludicrous.
- 33) It seems Scholes misunderstood the Minister's contention in so far as non-joinder complaint is concern. The Minister's contention is not that "the parties who have an "interest" in the outcome of this application" must be joined. The Minister's complaint is that parties whose rights and interest may adversely be affected by the outcome of this application and who would have the right to be parties to the determination of the issues raised by Scholes are not joined in these proceedings.
- 34) Mr Bekker having conceded that a finding by this Court in the major issues of the "once empowered always empowered principle" and on the powers of the Minister to take away the rights of these MPRDA right holders is obviously going to affect their rights, he argued that Scholes were facing a difficulty of joining 100's if not 1000's of those MPR DA right holders in this proceedings and that Scholes were uncertain whether those parties exist or

not, and under these circumstances , they resorted to the procedures set out in Rule 16A of the Uniform Rules.

- 35) A response by Mr Semenya was that if a party has a difficulty in practice to join hundreds of people and the remedy sought by that party has a potential to impact on thousands or hundreds of those people, that should not be a justification for not joining the would-be affected people. That party can bring an application for a class action.
- 36) The Court's view is that, the rules of this Court permit the parties to bring forward an application seeking directive as to how to go about identifying parties that may be adversely affected by the findings of the Court in their absence. This Court may further direct on how to bring to their attention the intended proceedings. In addition, some of the parties, as Mr Semenya correctly pointed out, are already being identified in the Minister's answering affidavit. At the very least, this specifically mentioned being identified can without any difficulty be joined or cited in these proceedings.
- 37) I therefore do not agree with Mr Bekker's submission that the purpose of Rule 16A is meant to deal with the problem of identifying parties who ought to have been joined in the proceedings. I agree with Mr Semenya's submissions that the process in Rule 16A is an invitation by the Court, on application by a party wishing to make a contribution to the assistance of the Court. It does not serve the purpose of a non-joinder.
- 38) Having considered all those arguments from both parties, I am of the view that the point in limine on non-joinder of parties who have substantial and direct interest in this matter and whose rights as correctly pointed out may adversely be affected, should be upheld.
- 39) Consequently and in view of the Order I intend to make, it will serve no purpose for this Court to deal with the remaining issues raised including other point of Jimine in the absence of the parties not joined in this proceedings.
- 40) On the question of costs, the principle unless evidence points otherwise, is that the costs should follow the results.

I accordingly make the following Order:-

1. The point in limine for non-joinder is upheld.
2. The Applicants are ordered to join the parties having direct and substantial interest in this matter.
3. The other issues raised by the parties are postponed sine die pending the joinder of all other parties.
4. The Applicants are ordered to pay the costs of this application including the costs of two Counsels.

M. B. Mokoena

Acting Judge of the High Court

30 June 2017

Appearances:

For the Applicant : Adv LJ Bekker

Instructed by : Klagsbrun Edelstein Bosman De Vries Inc.

For Respondents : Adv I. Semanya, SC

Instructed by : The State Attorney

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