HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. Yes .

3/5/2016 CJRabie

DATE SIGNATURE

3/5/2016.

Case no. 50642/2015

In the matter between:

JH Scholes	First Applicant
Malan Scholes Incorporated	Second Applicant
and	
Minister of Mineral Resources	Respondent

JUDGMENT

RABIE J

1. This is an application in terms of Rule 11 of the Rules of this court for the consolidation of the application of The Chamber of Mines of South Africa v The Minister of Mineral Resources and another, case number 50642/15 (the Chamber application) and the application of JH Scholes and another v Minister of Mineral Resources, case number 41661/15 (the Scholes application).

2. The Chamber application was referred to me, sitting in the Special 3rd Motion Court, by the Deputy Judge President for hearing on 15 and 16 March 2016. The parties to this application was informed of the enrolment during November 2015. Subsequently the Scholes application as well as the application for consolidation were also referred to me by the Deputy Judge President. The parties to these applications were informed of this fact on 1 March 2016.

3. In both the Chamber application and the Scholes application an *amicus curiae* applied for permission to be heard in the applications. These applications were granted.

4. The application for consolidation was opposed by the Chamber of Mines as well as the Minister of Mineral Resources. It should also be mentioned that due to the time consumed by the hearing of the consolidation application, the parties eventually agreed that, whatever the outcome of the consolidation application, there would not be sufficient time for the Chamber application to be heard. The consequence was that the chamber application, which was set down for hearing, had to be postponed *sine die*.

5. The background to the aforesaid applications is briefly the following: On 26 March 2015 the Chamber of Mines (the Chamber) proposed to the Minister of Mineral Resources (the Minister) that the disputes between them be referred to Court in order to obtain clarity thereon. On 31 March 2015 the Chamber and the Minister agreed to approach the Court for a declaratory order in respect of, *inter alia*, the interpretation of a number of provisions of the Minerals and Petroleum Resources Development Act, Act 28 of 2002 (the Act), and other documents published in terms of the Act.

6. The Chamber launched the application during the beginning of June 2015. Two months later, on 6 August 2015 the Minister filed his answering affidavit. Approximately one month later on 11 September 2015, the Chamber filed its replying affidavit. Two months later on 11 November 2015 the parties met with the Deputy Judge President for the allocation of a court date for the hearing of the application. The dates of 15 and 16 March 2016 were specifically chosen to allow the party sufficient time to file full written argument.

7. The Scholes application was launched at the end of June 2015. On 1 October 2015 the Minister filed his answering affidavit. It would seem that the replying affidavit of the applicant was filed during November 2015.

8. Rule 11 of the Rules of Court provides that "where separate actions have been instituted and it appears to the court convenient 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...". The provisions of this rule are applicable to applications by virtue of the provisions of Rule 6 (14). In Erasmus, Superior Court Practice, it is stated by the learned authers that the purpose of a consolidation of actions is to have issues which are substantially similar tried at a single hearing so as to avoid the disadvantages attendant upon a multiplicity of trials. The paramount test in regard to consolidation is convenience. This not only relates to expedience or ease, but also appropriateness. Consolidation will in general be ordered in order to avoid multiplicity of actions and attendant costs and also in order to avoid two courts having to decide on the same facts and/or the same legal questions. Consolidation would not generally be ordered where there is substantial prejudice to one of the parties.

9. On behalf of the Chamber it was, *inter alia*, submitted that a consolidation would cause a delay which would be unjustified and that if the applicants in the Scholes application had acted expeditiously, they could have avoided delaying the Chamber's application. It was further submitted that those applicants failed to bring the consolidation application timeously and failed to explain why they did so. For these reasons, it was submitted, that it would not be convenient or in the interests of justice to consolidate the two applications.

10. It was further submitted on behalf of the Chamber that the applicant in the Scholes application had failed to show that there is a sufficient overlap of issues to warrant consolidation. It was submitted that the applicants in the Chamber and Scholes applications have fundamentally different objectives which informed how they approached their applications and the relief they seek. It was submitted that these differences are significant and any attempt to resolve them in a single consolidated hearing would be cumbersome, result in unjustifiable delays and would cause all the parties to incur additional unnecessary costs.

11. It was further submitted that the fact that different judges may pronounce differently in the two applications in respect of the same issues, would not be unusual and that differences can be resolved by either the Supreme Court of Appeal or the Constitutional Court.

12. The Minister also opposed the application for consolidation. Firstly, it was submitted that a consolidation holds a real risk that the Chamber's application would be postponed and that would cause prejudice to the parties and the mining industry. It was also submitted that the scope and ambit of the Scholes application is much wider than that of the Chamber application. It was submitted

that the parties in the Chamber application have narrowed their dispute to one that can be resolved expeditiously.

13. It was also submitted *in limine* by the Minister that the applicants in the Scholes application do not have *locus standi* to bring the application, that they have failed to join the Chamber to the application, that the applicant's are merely seeking an opinion from the court and, lastly, that Rule 16A had not been complied with.

14. It is appropriate to briefly refer to the Act which forms the backdrop to both applications. The objects of the Act are diverse but include the object of promoting equitable access to the nation's mineral and petroleum resources to all the people of South Africa; to substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources; to promote employment and advance the social and economic welfare of all South Africans; and to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

15. Section 100 of the Act under the heading "Transformation of minerals industry", provides in subsection (2) (a) and (b) as follows:

"To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will 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.

(b) The Charter must set out, amongst others, how the objects referred to in section 2 (c), (d), (e), (f) and (i) can be achieved."

16. In respect of the granting of a mining right the Act, in section 23, provides that the Minister must grant a mining right if, *inter alia*, "(h) the granting of such right will further the objects referred to in section 2 (d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan."

17. It appears that in the main the mining industry cooperated towards achieving the constitutional commitment to equality as contemplated in the Act. 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. The undertakings were aimed at creating an enabling environment for the empowerment of historically disadvantaged South Africans (HDSA). The stakeholders undertook, among other things, to reach a target of 26% HDSA ownership of mining industry assets over a period of 10 years.

18. In 2010 the Minister published a new charter. This charter contained new rules of BEE ownership, and gave the Minister new enforcement powers to compel compliance with the new rules. According to the Minister he is entitled to act in terms of section 47 of the Act which included the right to cancel or suspend any mining right, or other right if an entity is conducting any mining operation in contravention of the Act. One of the main issues of dispute between the parties resulted from a situation where a company complied with the 26% requirement but had then, through no fault of its own, fallen below the 26% mark due to, for example, a sale of shares by an HDSA owner to a non-HDSA purchaser.

19. The contents of the 2010 charter and the views of the Minister resulted in a number of disputes between the government and mining companies about, *inter alia*, the interpretation of the ownership rules in the charter and about government's powers to enforce those rules.

20. The main disputes which have to be determined according to the Chamber application are the following: whether a mining company as a perpetual and recurring obligation, has to meet a 26% ownership target after the grant of a mining right or the conversion of an old order mining right; Whether the Minister can use the enforcement powers in the Act to compel compliance with the 26% target; How compliance with the 26% HDSA target is to be calculated; And whether the contested provisions of the 2010 charter are *ultra vires* and void.

21. It goes without saying that in order to adjudicate the aforesaid disputes, a number of issues, including issues of interpretation of numerous sections of the Act, have to be decided in the process.

22. The Scholes application arose against the same backdrop of facs and disputes mentioned in the Chamber application and referred to above. However, the approaches of the parties in the Chamber application and the applicants in the Scholes application in addressing the disputes, are vastly different. This is clear from a mere reading of the relief sought in the respective applications.

23. In the main, the parties in the Charter application seek clarity on certain issues that plague the effective implementation of the Charter and the achievement of the transformational goals of the Act. In order to achieve this goal the applicant and the respondent in the Chamber application have gone to great lengths in

order to reach agreement, prior to approaching the court, on narrowing the issues between them. According to these parties this not only resulted from a common wish to avoid wasteful litigation but also from the particular relationship between them as the main industry stakeholders. The Chamber not only represents mining rights holders but is in 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 the backdrop to the Charter. For this reason the parties to the Chamber application agreed to approach the court for the effective and narrow relief that would resolve the disputes between them.

24. According to the Chamber, and this is also 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 Original Charter to reviewing the Charter's ability to achieve its transformational aims, and to participating in processes 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 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 the Scholes application is aimed at the destruction of the Original and Amended Charter. According to the relief claimed the applicants in the Scholes application challenge the constitutionality of both the Charters, the conduct of the Minister, the exercise of

ministerial powers, the conduct of departmental officials and the lawfulness of acts of Parliament. Furthermore, and in addition to the declaratory relief regarding the proper interpretation of the Act the application seeks orders declaring unconstitutional parts of the legislation; suspended orders of invalidity; orders for Parliament to rectify those defects; orders deeming ministerial powers to be put in place pending those corrections; orders setting aside both Charters under the Constitution; orders reviewing ministerial decisions under PAJA and extending time periods under PAJA; orders that preserve the validity of mining rights granted under the unconstitutional provisions of the Act and the Charters; and declaratory orders deeming mining rights holders to have been compliant with those Charters.

26. It is clear from the aforesaid that the scope and ambit of the Scholes application is much wider than the Chamber application and that to adjudicate these issues in one application with the issues raised in the Chamber application, would not only be cumbersome but would result in especially the Chamber having to incur additional costs and for the parties in the Chamber application to suffer a much longer delay than would otherwise have been the case. This is primarily so because the Chamber, who wishes to uphold the Charters, would find itself in a position of a respondent in the Scholes application, at least in respect of the relief which seeks the destruction of the Charters. The material allegations made in the Scholes application go beyond the scope of the Chamber application and, *inter alia*, bring to the fore constitutional challenges that do not form part of the Chamber application. In effect, the material part of the Scholes application comprise a very different case to that brought by the parties in the Chamber application. The Chamber would consequently have to file opposing papers to a

significant portion of the Scholes application. This would not only result in additional costs for the Chamber but would be inconvenient to both the parties in the Chamber application. The Chamber and the Minister would be dragged into an expansive and more complex dispute, not of their making and which they took every care to avoid. To approach the court as part of such an application, which would inevitably result in a protected hearing, would be contrary to the basis of the agreement to approach the court on certain limited issues. Apart from the approach to the matter and the differences in the relief claimed, the issues relating to the *locus standi* of the applicants in the Scholes application would exacerbate the situation.

27. Furthermore, the time which it would take for such a consolidated application to be finally heard would be vastly different than the time within which the Chamber application, which is ripe for hearing, can be heard. This issue is of particular importance having regard to what both parties in the Chamber application have put forward as the reasons why the adjudication of their application should not be further delayed. This aspect is not only in the interest of the parties to the Chamber application but to the industry as a whole.

28. I have considered the submissions on behalf of the applicants in the Scholes application which moved the application for consolidation, but in my view they do not trump the substantial prejudice and inconvenience that would be suffered by the parties to the Chamber application. It may be so that if the Scholes application were to be heard separately, that court would in all probability have to adjudicate certain issues which the court would have adjudicated in the Chamber application. However, such issues do not seem to be the material issues of either

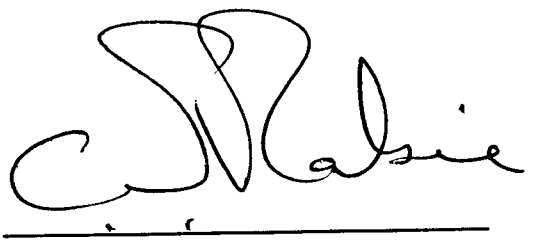
application but rather subsidiary issues which are incidental to the relief ultimately sought, which is substantially different. Even if some of them could be said to be material, the applicants in the Scholes application would suffer very little prejudice, if any, by having another court having to rule on such issues again. It might even curtail the proceedings in the Scholes application.

29. Consequently, apart from the issues of prejudice and inconvenience, I am of the view that the two applications pursue different objectives and that the questions of fact and law implicated in both applications are not substantially the same for purposes of consolidation.

30. As far as costs are concerned there is no reason why costs should not follow the event. In my view such costs should also include the costs of two counsel.

31. In the result the following order is made:

    1. The application for consolidation is dismissed with costs which costs shall include the costs of two counsel.



C.P. RABIE

JUDGE OF THE HIGH COURT