

## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED: YES/NO

13/5/24

DATE

SIGNATURE

In the application between:

CASE NO: 35266/2022

MAMBANE DOLLY NOMSA

Applicant

And

MINISTER OF MINERALS AND ENERGY

1<sup>ST</sup> Respondent

THEMBANI TECHNICAL/MINING SERVICES CC

2<sup>ND</sup> Respondent

KGAUGELO LESOLA JEREMIA

3<sup>RD</sup> Respondent

**MOLEFE ENOCK**

4<sup>TH</sup> Respondent

In re:

**MAMBANE DOLLY NOMSA**

Plaintiff

And

**MINISTER OF MINERALS AND ENERGY**

Defendant

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**JUDGMENT**

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**POTGIETER AJ:**

- [1] The Plaintiff is applying to join the Second, Third and Fourth Respondents as the Second, Third and Fourth Defendants in an action instituted by the Plaintiff against the First Respondent.
- [2] The Second, Third and Fourth Respondents are opposing the joinder on the following grounds:
- [2.1] An alleged lack of jurisdiction of this Court. This is based on the following:
- [2.1.1] A contention that there is no concurrent jurisdiction

between this Court and the Mpumalanga Division.

[2.1.2] A contention that the fact that the First Respondent has an address within the area of jurisdiction of this Court does not suffice to grant this Court jurisdiction over the Second to Fourth Respondents.

[2.1.3] A contention that there are no grounds of convenience, justice and good sense that require this Court, rather than the Mpumalanga Court, (which is where the property which the Plaintiff's minor son lost his life is situated), to entertain the action.

[2.2] Prescription.

[2.3] A contention that the Second to Fourth Respondents have no direct and/or substantial interest in the action.

[2.4] A contention that there is already a pending action against all of the Respondents in the Mpumalanga Division of the High Court.

[3] The Plaintiff is also applying for a declaratory order to the effect that the action in the Mpumalanga Division of the High Court is void. To this claim the Second to Fourth Respondents contend that this Court does not have jurisdiction to declare any proceedings in any other Court void. It is contended that the Court in which the proceedings sought to be impeached is pending should be approached.

- [4] I shall firstly deal with the claim for a declarator as mentioned directly above.
- [5] I am not prepared to grant the claim for a declarator for *inter alia* the following reasons:
- [5.1] There is a dispute, irresolvable on papers alone, about whether or not the Plaintiff instituted the action in the Mpumalanga Court.
- [5.2] The Plaintiff accuses her erstwhile attorney of acting off his own bat when it came to the issuing of the summons in the Mpumalanga Court. Her erstwhile attorney is necessarily affected, (beyond mere financial considerations), by the requested declaratory order but he is not before Court.
- [5.3] Although not contained in the Second to Fourth Respondents' heads of argument, *viva voce* argument was advanced by the Second to Fourth Respondents' Counsel who replaced the Counsel who drafted the Second to Fourth Respondents' heads, which *viva voce* argument pointed out that termination of the erstwhile attorney's mandate occurred only after the summons in the Middelburg Court, was issued. Axiomatically the fact that this point was taken for the first time in argument means that the Plaintiff did not deal with same in any of the Plaintiff's affidavits or heads of argument.
- [5.4] The obvious solution for the Middelburg action and the *sequelae*

thereof is the withdrawal of the action in the Middelburg Court. Given that the Plaintiff alleges that the action was not instituted by her I appreciate that the Plaintiff might be seen to be acting incongruously should she withdraw the action in Middelburg. But she can obviously request the erstwhile attorney to withdraw the action because according to her it was the erstwhile attorney who, without a mandate to do so, instituted the Middelburg action.

[5.5] The point taken by the Second to Fourth Respondents that the validity of the process in a given Court should be adjudicated by that Court *prima facie* has merit. Given that there are a multitude of reasons why this relief should not be granted I deem it unnecessary to embark upon an exposition of this question.

[6] In the premises the action for a declarator pertaining to the Middelburg action's invalidity is refused.

[7] I shall now deal, *ad seriatim*, with the other objections raised by the Second to Fourth Respondents.

[8] I find that there is no merit in the alleged lack of jurisdiction of this Court, for the following reasons:

[8.1] The question of the concurrent jurisdiction of this Court with the Mpumalanga Division, is not comprehended. No one is relying on this as a basis for anything and the Second to Fourth Respondents

have advanced no facts, (but merely argument), to this effect. The jurisdiction of this Court flows from the jurisdiction which this Court has by virtue of the action already instituted against the First Respondent.

[8.2] The contention that section 21 of the Superior Court's Act does not cloak this Court with jurisdiction is likewise not comprehended. The existing action in this Court, to which the Plaintiff applies to join the Second to Fourth Respondents, is a *fait accompli*, the First Respondent already having filed a Plea and thus accepting this Court's jurisdiction. Furthermore, the First Respondent was always within the jurisdiction of this Court because its business address, according to paragraph 1.2 of the existing Particulars of Claim, is in Pretoria.

[8.3] The contention that it is not convenient to the join the Second to Fourth Respondents to the proceedings already instituted in this Court against the First Respondent because the Plaintiff's claim against them should rather be dealt with in the Mpumalanga Court where action has already been instituted against the Second to Fourth Respondents presupposes the validity of the proceedings in the Mpumalanga Court. All of the remarks I have made above about why I declined to grant the Plaintiff the declaratory order are *mutatis mutandis* applicable here. It is at present foreshadowed by the Plaintiff that that action in the Mpumalanga Court will not

proceed for reasons advanced by the Plaintiff.

- [9] It has long been a time honoured practice in this Division not to decide the validity of a potential plea of prescription in circumstances such as the present. Reported cases are replete with examples of pleas of prescription failing once the matter is sent to trial where such pleas *prima facie* appear to be valid. Whilst the Plaintiff's substituted Counsel, in his *viva voce* argument, pointed out the dates of two e-mails which could serve to illustrate that the Plaintiff had knowledge of the liability of the Second to Fourth Respondents more than three years ago this question has not been dealt with by the Plaintiff and, in my finding, the possibility of a reply which provides a sufficient answer to this *prima facie* cogent proof, must be and is accommodated. It must furthermore be remembered that a party raising a prescription plea bears the onus thereof. The **Plascon-Evans** rule applicable to motion proceedings does not and cannot detract from this fact. In the premises the prescription objection is dismissed.
- [10] The objection that the Second to Fourth Respondents have no interest, (other than financial), in the Plaintiff's action is incomprehensible and consequently dismissed. It is inherent in every delictual claim, (which is what the claim by the Plaintiff against the Second to Fourth Respondents is), that a Plaintiff merely seeks money and this is merely a financial consideration for any wrongdoer who is a Defendant. But this has never been a hurdle to the joinder of joint wrongdoers, (which is what the Applicant seeks to achieve). In any event the interest of the Second to Fourth Respondents is not purely financial, in my opinion. It is the Plaintiff's contention that the Second to Fourth Respondents

failed to rehabilitate a mining site as a result of which the Plaintiff's minor son fell into a hole with water and drowned. A finding of wrongful and culpable conduct on the behalf of the Second to Fourth Respondents or anyone of them is hardly a purely financial matter. What is furthermore of interest is that the First Respondent, the Minister of Minerals and Energy, has pleaded that the Plaintiff is guilty of non-joinder by failing to join at least one of the Second to Fourth Respondents. Bearing in mind that the First Respondent is the nominal Defendant responsible for mining activities and the *sequelae* thereof it appears to be uncontestable that the Second to Fourth Respondents have more than financial exposure when it comes to the Plaintiff's claim against them. Statutory offences by at least one, (but perhaps more), of the Second to Fourth Respondents is a distinct possibility.

[11] What remains to be dealt with is the fact that if the Plaintiff's application for joinder of the Second to Fourth Respondents is granted there will be two cases pending between the same parties. Whilst this is true the remarks I made above about the action in the Middelburg Court when I dismissed the Plaintiff's application for a declarator must be borne in mind. One simply does not know what the future holds pertaining to the Mpumalanga action but one thing is clear viz the Plaintiff does not intend pursuing that action.

[12] In any event, as pointed out to both Counsel appearing for the parties, nothing prevents the Second to Fourth Respondents from raising a plea of *lis alibi pendens*. The same applies to the Second to Fourth Respondents raising a plea of prescription.



[13] I comprehend the Second to Fourth Respondents' fear that they will become embroiled in extensive litigation without any prospect of recovery of their costs from the Plaintiff should the Plaintiff be unsuccessful. But if the prescription plea is good, (and if a plea of *lis alibi pendens* is raised), no protracted litigation is at play. Both theses pleas can conveniently be dealt with and separated from all other issues in terms of Rule 33(4) and it is difficult to conceive why such pleas cannot be adjudicated in a single day. If the points taken by the Respondent as grounds of objection to the present joinder application are good they will succeed if pleaded and that will be the end of the matter. Furthermore, it is a daily occurrence that indigent Plaintiffs are not prohibited from pursuing what they believe to be legitimate claims merely because Defendants might not be able to recoup their costs should such Plaintiffs be unsuccessful. The interests of justice dictate that such pecuniary considerations cannot override a litigant's constitutional rights to a trial.

[14] For precisely the lastmentioned reasons I debated an appropriate costs order with Counsels and they indicated their agreement that the order that I proposed as far as costs are concerned would be an appropriate one if I grant the joinder. In any event, to the extent that I might have misunderstood the agreement of any of the Counsel, I nevertheless deem the cost order I am granting below to be appropriate in the circumstances.

[15] In the premises I make the following orders:

[15.1] The application for the declarator pertaining to the Middelburg

action purportedly instituted by the Plaintiff is dismissed.

[15.2] The Applicant's application for joinder of the Second, Third and Fourth Respondents as Second, Third and Fourth Defendants, is granted.

[15.3] Costs of this application will follow the outcome of the special pleas which might be raised by the Second to Fourth Respondents *viz* prescription and *lis alibi pendens* and those costs will be on Scale B. Should no special pleas as aforementioned be raised by the Respondents the costs of this application will be borne by the Second to Fourth Respondents and such costs shall be taxable on Scale B.



TALL POTGIETER  
ACTING JUDGE OF THE HIGH COURT, PRETORIA

**APPEARANCES:**

**FOR APPLICANT:**

ADV NKOSI  
MWIM & ASSOCIATES INC  
TEL: 012 323 1004  
E-MAIL: [osmwim@gmail.com](mailto:osmwim@gmail.com)  
[infor@mwimlaw.co.za](mailto:infor@mwimlaw.co.za)

FOR THE SECOND TO

FOURTH RESPONDENTS:

ADV FJ NEL

VAN RENSBURG KRUGER RAKWENA

TEL: 013 656 9600

E-MAIL: [jrakwena@vrkr.co.za](mailto:jrakwena@vrkr.co.za)

This judgment has been delivered by uploading it to the Court Online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and for the delivery is the 13<sup>TH</sup> day of MAY 2024.