IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG

Case No . 574/2014
Reportable: **NO**
Circulate to Judges: **NO**
Circulate to Magistrates: **NO**
Circulate to Regional Magistrates: **NO**

In the matter between:

VALAMBYA ENERGY SERVICES AND PROJECTS (PTY) LTD	**Applicant**

and

SHELL SOUTH AFRICA (PTY) LTD (Now known as SHELL DOWNSTREAMSOUTH AFRICA (PTY)LTD	**1st Respondent**
NORTH WEST PROVINCIAL GOVERNMENT	**2nd Respondent**
ME-UNISI JOHANNES NGOBENI	**3rd Respondent**
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**4th Respondent**
NORTH WEST HOUSING CORPORATION	**5th Respondent**

In re:

SHELL SOUTH AFRICA (PTY) LTD (Now known as SHELL DOWNSTREAMSOUTH AFRICA (PTY)LTD	**Plaintiff**

and

NORTH WEST PROVINCIAL GOVERNMENT	**1st Defendant**
MFUNISI JOHANNES NGOBENI	**2nd Defendant**
VALAMBYA ENERGY SERVICES AND PROJECTS (PTY) LTD	**3rd Defendant**
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**4th Defendant**
NORTH WEST HOUSING CORPORATION	**5th Defendant**

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **22 February 2022**.

ORDER

In the result, the following order is made:

The application is dismissed with costs, which costs shall include the costs occasioned by the employment of two counsel.

JUDGEMENT

MFENYANA AJ

Introduction

[1] On **5 May 2014**, the first respondent (Shell) issued a summons for cancellation of the sale of four properties sold by the second respondent (North West Provincial Government) to the applicant (Valambya) and the fourth respondent (Ngobeni). Ngobeni was the sole director of the applicant and has since become deceased.

[2] As part of the relief, Shell sought a further order that the North West Provincial Government should sell the said four properties to Shell on the same terms and conditions as the applicant and fourth respondent acquired the properties. In the alternative, and in the event it is found that the properties are owned by the fourth respondent (City of Tshwane / COT), Shell seeks that the fourth respondent should be forced to sell the properties to it.

[3] On **16 October 2018** in a separate matter, the City of Tshwane issued a summons out of the Gauteng High Court, Pretoria, against Valambya, the North West Provincial Government, and the fifth respondent (North West Housing Corporation) for the transfer of the same properties to the applicant and the fifth respondent to be declared unlawful and set aside, and for the said properties to be transferred to the COT. Two of the properties have already been transferred to the applicant. In essence all four of the properties are the subject matter of the litigation in both this Court and the Pretoria High Court. The City of Tshwane is in essence challenging the title of both Valambya and the North West Housing Corporation to the properties.

[4] The applicant now approaches this court seeking an order that the matter be transferred from this Court to the Pretoria High Court in terms of section 27(1) of the Superior Courts Act[1] for purposes of consolidating it with the matter already enrolled in that court.

[5] The basis of the application is *inter alia* that all the parties cited in this matter are also cited in the matter before the Pretoria High Court. The applicant asserts that there is no difference between the two cases as to the core issues that need to be decided. Consequently, the applicant contends that the matter **"would be more conveniently or more appropriately heard or determined by another Division**. "[2]

[6] The application is opposed by Shell on the basis that it is inconvenient to the court and the parties to transfer the matter to the Gauteng Division, Pretoria and that such transfer would militate against the disposal of litigation.

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[1] Act 10 of 2013
[2] Section 27(1)(b)(ii)

[7] While the COT has filed a notice of intention to oppose, it did not oppose the matter and no further steps were taken in this regard.

Facts

[8] The applicant contends that all five of the defendants cited in the action before the North West High Court are also cited in the Pretoria matter. It further contends that the Registrar of Deeds in Pretoria ought to have been cited in the action, as the involvement of the five defendants in the Mahikeng matter is by reason of intergovernmental grants and transfers of land, some of which are still registered to the erstwhile Republic of Bophuthatswana.

[9] Notably, the applicant contends that all the four properties fall within the territorial jurisdiction of the Pretoria High Court as well as the Deeds office in Pretoria and that any issue relating to possession, registration, or cancellation of ownership over the properties is exclusively within the territory of the Pretoria High Court and Deeds office. Of the four properties, two have been transferred to the applicant who is also domiciled in the territory of the Pretoria High Court.

[10] Two of the defendants cited in the Pretoria High Court matter have not been cited in the Mahikeng matter. It is the applicant's contention that both these parties ought to have been joined to the main action before this Court. On the other hand, so contends the applicant, all the parties which would have been necessary in the Mahikeng matter are before the court in Pretoria.

[11] In respect of the stage of litigation before the Pretoria High Court, the applicant submits that pleadings in both matters are closed and that both matters are ready to proceed to trial subject to any amendments that may be sought.

[12] The fundamental difference in the claims before the two courts is that the issue of Shell's right of pre-emption has not been raised in the Pretoria matter. As such, the applicant contends that if it is successful in the matter after any appeals that may ensue, it would still have to return to Mahikeng to oppose Shell's pre-emption claims. This, and the whole scenario, the applicant argues, is prejudicial to it. The applicant

adds that it bought the properties in good faith and paid for them in full, which consideration has not been offered to it by any of the warring parties.

[13] On these bases, the applicant contends that the factual evidence and legal arguments to be dealt with in both matters are identical and that it would be in the interests of justice and any of the parties, for the matters to be heard together and disposed of in one trial, in Pretoria *'where the overwhelming bulk of convenience lies'* and which would lead to costs saving.

[14] In opposing the application, the first respondent avers that the action in the Pretoria High Court would be dispositive of the issues in the Mahikeng matter as the parties have not prosecuted their claims any further and focused on the Pretoria matter. The first respondent denies that the pleadings in the Mahikeng matter have closed as the **CoT** has not yet filed a plea and the North West Housing Corporation has not entered an appearance to defend. The respondent avers that the litigation in the Mahikeng matter has been stayed for approximately four years precisely for the reason that the parties understood that the Pretoria matter would in one way or another, be dispositive of the Mahikeng matter.

[15] The first respondent admits that all the interested parties are before the court in the Pretoria matter, that pleadings have closed, and that the matter is now ready to proceed to trial. As regards the issues for determination before the two courts, the first respondent contends that these differ materially and that it would be inconvenient to the parties and the court to transfer the Mahikeng matter to the Pretoria High Court. Shell avers that in the Mahikeng matter, the primary issue for determination is the validity of the lease agreements concluded between Shell and North West Provincial Government and consequently whether the rights conferred to Shell in terms of the lease agreements are extant. Shell thus seeks to enforce the rights arguably conferred to it in terms of the lease agreements.

[16] As far as the matter before the Pretoria High Court is concerned, Shell contends that the primary question is the ownership of the properties and the lawfulness of their transfer from the COT to the North West Housing Corporation and Valambya. Thus, the first respondent avers that the introduction of the issue before the

Mahikeng High Court in the Pretoria matter would muddy the waters of a crisp issue and conflate the issue. This, the first respondent argues, would translate to an inconvenience for the parties and the court, which inconvenience would be exacerbated by the applicant's assertions to appeal any decision made against it. Needless to say, this construction is challenged by the applicant who asserts that the core issues to be determined are the same.

[17] The respondent further avers that a transfer militates against the disposal of litigation and that this transfer would cause substantial delay in the determination of issues as pleadings in the Mafikeng matter have not closed.

Applicable legal principles

[18] Section 27(1) states,

27 Removal of proceedings from one Division to another or from one seat to another in same Division

(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings —

(a) should have been instituted in another Division or at another seat of that Division; or

(b) would be more conveniently or more appropriately heard or determined at another seat of that Division; or by another Division,

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that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

[19] It is trite that a court will not lightly transfer a matter which it is competent to decide[3] and in determining whether or not to transfer a matter, the court will have regard to the convenience of the parties, the convenience of the court, and the general disposal of the litigation. In this regard, Mr Pillay argued that the consideration is not that the transfer should just be convenient for the applicant. This is indeed so. I did not get the understanding that the parties disagree on this point. The applicant's contention is that the transfer would be convenient to all parties involved.

The whole point of contention is what each party considers convenient or inconvenient. This is directly linked to the issues to be determined by both courts.

[20] Mr Pillay further argued on behalf of the first respondent that the issue before the Pretoria High Court is a crisp issue which would be conflated if the matter was to be transferred and would not simplify the issues. I agree. The issue of whether or not Shell has a valid lease as well as the terms thereof have little or no bearing on the relief sought by the COT in the Pretoria matter and whether the COT is entitled to have the sale of the properties set aside. While the relief sought by the first respondent in the Mahikeng matter is the cancellation of the sale of the properties to the applicant, this is premised on the first respondent's right of first refusal. In my view the determination of the issue in the Pretoria matter is not dependent on the determination of the rights conferred to the first respondent in terms of the lease agreements. This is in spite of whether the validity of the said lease agreements is question or not.

[21] Conversely, the determination of the first respondent's pre-emptive claims and the lease agreements is dependent on the determination of the issue of ownership before the Pretoria High Court. It has a direct bearing on the outcome and the conduct of the Mahikeng matter and may potentially bring it to its conclusion. In this regard, the present stance adopted by the parties, in staying the Mahikeng matter appears to be sound.

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[3] *See: Mulder v Beacon Island Shareblock Ltd 1999*(2) SA 274 (C)

[22] The applicant says that this contention by the first respondent that the primary issue in the Mahikeng matter is the validity of the lease agreements is flawed, as inter alia, ownership is not a prerequisite for a valid lease. In the same breath, the applicant concedes that it is essential for the determination of the validity of the first respondent's right of pre-emption. In my view the applicant is correct. However, as the applicant itself has submitted, the determination of the first respondent's pre-emptive claims depends on ownership of the properties.

[23] In the even that it is determined that the COT is the rightful owner of the properties, it would bring an end to the dispute between the parties in respect of the pre-emptive claims, and by implication, the lease agreements. If it is ruled that the COT is not the rightful owner of the properties, the Mahikeng matter would be brought back to life. Mr Savvas argued that this would be prejudicial to the applicant. On the other hand, Mr Pillay argued on behalf of the first respondent that at this stage, there would be a record of the proceedings before the Pretoria High Court and the issues would be narrowed down. He further submitted that the applicant had to demonstrate that the transfer was not only convenient to the applicant.

[24] Both parties agree that amendments would be required and possibly joinder applications would have to be made before the matter is ready to be heard in the Pretoria High Court. The applicant also submitted that it would seek to have the two matters consolidated. This, as the first respondent contended, would delay the matter in the Pretoria High Court. The question that arises, in the face of all the arguments and counter arguments is whether in what has been submitted by both parties, it can be said that the matter(s) could be more conveniently and appropriately determined in that way. In my view they would not. There are clearly two distinct causes of action to be determined by the two courts, both of which require different considerations and raise different questions of law. Further, pleadings in the Mahikeng matter have not been closed. In **Nongovu NO v Road Accident Fund**[4] the court held that it is not desirable to transfer a matter before close of pleadings as it would be premature to do so. The first respondent aligned itself with this position arguing that the transfer is premature.

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[4] 2007(1) SA 59 (T) at para 16; see also Radloff v Union SWA Insurance Co Ltd 1972 (4) SA 634 (C)

[25] The real consideration for purposes of the present application is whether the transfer would be convenient and appropriate as contemplated in section 27(1)(b)(ii). In my view it would not. The inconvenience to the parties themselves, the court, and the general disposal of litigation, occasioned by the re-opening of pleadings, further amendments, joinder of parties and consolidation of the matters, far outweigh the continuation of the matter in Mahikeng should it be so determined.

[26] By the applicant's own admission, the issue of the lease agreements and Shell's pre-emption claims do not form part of the case before the Pretoria High Court. The result of it is that after the determination of the ownership issue in the Pretoria High Court, the issue of the lease agreements may still require determination in the Mahikeng High Court. I cannot see why it would be inconvenient to all the parties and the court for this to happen, if transferring the matter at this stage would cause the inconvenience described by both parties. As further argued on behalf of the first respondent, it would then take several years for all the processes to be finalised and the matter heard.

[27] It appears to me that considerations of the location of the parties as well as the situation of the properties, speak to the issue of jurisdiction. They are not in themselves a sole consideration in determining the issue of convenience for purposes of an application in terms of the provisions of section 27(1)(b)(ii). The same goes for the financial setback, which in my view is inevitable regardless of the transfer. The basis for the application is not in respect of jurisdiction, but convenience. I did not understand the applicant to be saying that the transfer is occasioned by this court's lack of jurisdiction. I am not able to agree with the applicant that the situation of the properties and the Deeds office could have any bearing in the matter being more conveniently and appropriately dealt with in Pretoria.

[28] Having considered all the above facts, I am of the view that the application should fail.

Costs

[29] On the issue of costs applicant argued that there was no justification for the employment of two counsel and that the court should bear that in mind. The first respondent however submitted that the nature of both matters justified the employment of two counsel. This being an interlocutory application it was justifiable for the first respondent to retain both its counsel. Mr Pillay further submitted that costs are within the discretion of the court and if successful in the application, the first respondent would ask for costs of two counsel.

[30] It is my view that the matter is complex enough to justify the employment of two counsel. Both counsel were employed in the main action. It was therefore reasonable for the first respondent to retain both counsel.

Order

[31] **In the result, the following order is made:**

The application is dismissed with costs, which costs shall include the costs occasioned by the employment of two counsel.

S MFENYANA
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING	**: 25 NOVEMBER 2022**
JUDGEMENT RESERVED	**: 25 NOVEMBER 2022**
DATE OF JUDGMENT	**: 22 FEBRUARY 2023**
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