REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG

CASE NO: 54197 /2022

DATE: 6 February 2024

DELETE WHICHEVER IS NOT APPLICABLE

1. Reportable: Yes / No

2. Of Interest to Other Judges: Yes / No

3. Revised

DATE: SIGNATURE:

In the matter between:

National Union of Mineworkers **Applicant**

and

Anglo-American Platinum Ltd: **First Respondent**

Rustenburg Platinum Mines Ltd	**Second Respondent**
The Minister of Mineral Resources and Energy	**Third Respondent**
The Chief Inspector of Mines	**Fourth Respondent**
The Principal Inspector of Mines: (North West, Rustenburg Region) Department of Mineral Resources and Energy	**Fifth Respondent**
The Minister of Labour	**Sixth Respondent**
The Chief Inspector-OHS Department of Employment and Labour	**Seventh Respondent**
Association of Mineworkers and Construction Union	**Eighth Respondent**
United Association of South Africa	**Ninth Respondent**

JUDGMENT

Johann Gautschi AJ

1. This is an application for interdictory and declaratory relief, with the applicant seeking to interdict the first and second respondents from applying the Occupational Health and Safety Act 85 of 1993 (OHSA), as opposed to the Mine Health and Safety Act 29 of 1996 (MHSA), to smelting and refining operations (the "retained operations") which were retained following the sale of mining rights during 2016 to 2018. The retained operations are: (1) The Waterval Smelter; (2) Anglo Converter Plant; (3) Precious Metals Refinery; (4) Rustenburg Base Metals Refinery; (5) The Mortimer Smelter.
2. The sixth, seventh and eighth respondents did not enter an appearance to defend.

3. No practice note was filed on behalf of the third, fourth and fifth respondents, but counsel briefed by the State Attorney appeared at the hearing on a watching brief.

4. A practice note was filed on behalf of the ninth respondent advising that its legal representatives would not make an appearance on the hearing day and pointing out that it had made no further submissions in this matter after filing a short answering affidavit. It submits that no costs order should be made against the ninth respondent in these proceedings and expressed the view of the ninth respondent that in terms of section 82 of the MHSA the Labour Court has jurisdiction to determine the dispute among the parties. This practice note also advised that the ninth respondent had instituted proceedings against the first and second respondent in the Labour Court for a declaration that the MHSA applies to the business operations of the first and second respondents relevant to this application and that the first and second respondents and filed a notice to oppose the application.

5. Consequently, as the case was argued only by the first and second respondents, I shall, for ease of reference, hereinafter refer to them as the respondents.

6. The respondents raised three issues. In summary they are:

   6.1. the first issue, as a point in limine, whether the High Court has jurisdiction to determine the application in the context of section 82 (1) of the MHSA which provides that the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of the MHSA;

   6.2. the second issue, also as a point in limine, whether interdictory relief is competent in relation to conduct that has already taken place;

   6.3. the third issue, on the merits (conditionally upon the merits being entertained despite the two points in limine) whether the MHSA is applicable to the processing operations.

7. Given that I have concluded that the first point *in limine* should be upheld, it is unnecessary for me to deal with the second and third issues.

8. Section 82 (1) of the MHSA, headed "*Jurisdiction of the Court*", reads:

> *"The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of this Act except where this Act provides otherwise."*

9. This should be read together with section 157 (1) of the LRA, headed "*Jurisdiction of the Labour Court*", which reads:

> *"Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."*

10. In Baloyi v Public Protector & others (2021) 42 ILJ 961 (CC) at paragraph 44, the Constitutional Court held that "*[t]he exclusive jurisdiction of the Labour Court is engaged where legislation mandates it*". Section 82(1) is an example of such a legislative mandate.

11. The focus of the applicant's heads of argument on its first point *in limine* was its so-called "multi-legislation" point (as it was termed in the first and second respondents' heads of argument), namely, that the High Court "*is not called upon in this Application to only adjudicate on the applicability of MHSA, but also other pieces of legislation*".

12. In support the following was stated in footnote 3 of the applicant's heads of argument: *"See Bon Accord Environment Forum v The Department of Mineral Resources: Chief Inspector of Mines (Gauteng Region) and another (2021] JOL 49770 (LC), para 17 and 36: '...However, as it shall be demonstrated later in this judgment, section 82 of the MHSA only applies to issues of interpretation and application of the MHSA and nothing more...'. '...The exclusive jurisdiction referred to in the section is specified as that which involves a dispute about the interpretation and application of the provisions of the MHSA and not any other*

legislation…'. See also Baloyi v Public Protector and others (2020] JOL 49101 (CC), para 38 – 40."

13. The multi-legislation argument continues as follows:

> *"The other pieces of legislation that the Court will have to be taken into account is* (sic) *the OHS Act 85 of 1993, the Minerals Act 50 of 1991 ("MA"), and the MPRD Act 28 of 2002 (as amended). These are the Acts that will also be applicable in determining which Act is applicable to the operations of the First and Second Respondents , as set out above. For instance, the OHS Act 85 of 1993 provides in Section 1(3) thereof as follows:*
>
> > *"This Act shall not apply in respect of (a mine, a mining area or any works as defined in the Minerals Act, 1991 (Act 50 of 1991), except in so far as that Act provides otherwise"*
>
> *In order to interpret this provision, the Court will have to take into account what is stipulated in the Minerals Act of 1991. The Court will then proceed and interpret the provision of OHS Act as was done in* ***Industrial Health Resources Group and G and another v Minister of Labour and others 2015 (5) SA 566 (GP)."***

14. The applicant further relied on the following three judgments where the High Court dealt with aspects of the MHSA: Terra Bricks and another v Regional Manager, Limpopo Region Department of Minerals and Energy and others [2013] JOL 30635 (GNP); Bert's Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others (15347/2011) [2012] ZAGPPHC 11 (9 February 2012); Misty Falls 45 (Pty) Ltd and Another v Access World (Pty) Ltd and Others (2935/17) [2019] ZANCHC 45 (28 June 2019).

15. The respondents submit that this argument is misconceived. I agree.

16. First of all, as submitted by the respondents with reference to the following dictum of the Constitutional Court in Gcaba v Minister for Safety & Security[1] quoting from Chirwa v Transnet Ltd,[2] jurisdiction is determined on the basis of the pleadings:

> *"Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. … I n the eve nt of t he court 's jurisdiction being challenged at the outset (in limine), th e app lica nt's p lea din gs are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of t he app lican t's cla im is , it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA [or the MHSA], one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. … ."*

17. It is clear from the applicant's notice of motion and founding affidavit that the legal basis of its claims is the MHSA.

18. Prayer 1 of the notice of motion seeks to interdict the implementation of a safety system under the OHSA "*instead of the* [MHSA] *as is the current position*".

19. Prayer 2 seeks a declarator that the MHSA is applicable and prayer 3 seeks a declarator that the OHSA is not applicable.

20. As pointed out in the respondents' heads of argument, because "*prayer 3 flows axiomatically from prayer 2 – – prayer 3 does not require any separate judicial determination*". This is because where the MHSA applies, the OHSA does not apply. Section 103 of the MHSA specifically states: "*The [OHSA] is not applicable to*

[1] 2010 (1) SA 238 (CC) at paragraph 75
[2] 2008 (4) SA 367 (cc)

any matter in respect of which any provision of this Act is applicable.". Section 1 (3) of the OHSA in turn provides that the OHSA "*shall not apply in respect of – (a) a mine, a mining area or any works as defined in the Minerals Act, 1991 (Act 50 of 1991), except insofar as that Act provides otherwise*".[3]

21. The respondents further highlighted the following aspects of the applicant's founding affidavit (quoted without footnotes) which they submit, correctly in my view, bear out that the legal basis of its claim is the MHSA:

> *"12.1 NUM complains about an (alleged) unlawful migration from the MHSA to the OHSA, which it contends is legally impossible, and asserts that the respondents ought instead to have followed the exemption process provided for in section 79 of the MHSA.*[16]
>
> *12.2 In contending that whether the MHSA or the OHSA applies is a matter of law, NUM quotes the definition of a "mine" (in part) and the definition of "processing" in section 102 of the MHSA, and goes on to assert that the work performed by Retained Operations (processing plants) "falls squarely within the definition of mining which makes the*

---

[3] in footnote 15 of the first and second respondent's heads of argument it was pointed out that this reference to the Minerals Act must be read a substituted with the MHSA. This was explained in footnote 29 by reference to the following extract from le Roux and Colyn, Occupational Health and Safety Law at 3-48 [issue 1], paragraph 3.2.59.2-3.2.59.3: '"The Minerals Act … dealt with regulatory matters concerning prospecting and mining and certain health and safety issues. The health and safety provisions applicable to mines and works were removed from the Minerals Act and were transferred to and amplified in the new MHSA. The MHSA repealed Chapter V of the Minerals Act which governed health and safety (see item 8, Schedule 3 to the MHSA). The MHSA came into operation on 15 January 1997. Subsequent thereto, the [MPRDA] was enacted. The MPRDA repealed the whole of the Minerals Act, save for a few provisions which are not relevant to the topic under consideration … .

Taking into account the provisions of section 12 of the Interpretation Act 33 of 1957, the reference to the 'Minerals Act, 1991 (Act No 50 of 1991)' must be substituted with the words 'Mine Health and Safety Act, 1996 (Act No 29 of 1996)'."

MHSA applicable in the circumstances".[17] *(It warrants mention that the founding affidavit references only sections in the MHSA.)*

12.3 NUM goes on to articulate its clear right to interdictory (and declaratory) relief in these terms:[18]

> *"In these circumstances, it is clear that as a matter of law, the applicant has a clear right in respect of the enforcement of the [MHSA], on behalf of its members who are employees of the second respondent and whose health and safety is to be protected." (Own emphasis.)*

The position could not be any clearer: NUM contends that it has a clear right to the enforcement of the MHSA.

12.4 This is echoed in NUM's articulation of the requirement of irreparable harm:[19]

> *"Should the 'migration' not be interdicted … the members of the applicant will suffer irreparable harm as they will not enjoy the protection of the provisions of the [MHSA]." (Own emphasis.)*

12.5 Even when it comes to costs, NUM contends that the respondents "ought to have been aware of the legal position but chose to close their eyes to the provisions of the MHSA" (own emphasis)"

22. In oral argument in reply it was submitted on behalf of the applicant that constitutional and unlawfulness disputes were raised in paragraph 16 of the founding affidavit. That paragraph reads as follows:

> *"As the NUM, we have expressed our concern that the monitoring of workplaces by the Department of Labour in terms of the OHS Act is not comparable with the enforcement of the MHSA by the Department of Mineral Resources and Energy. It was further also pointed out that the benefits of having available to inspectors the powers in Section 54 of*

the MHS a are not available to inspectors from the Department of Labour in terms of the OHS Act.

Secondly, in terms of section 22 and 23 of the MHSA, employees have a right to refuse to work all draw from working areas they deem to be unsafe and such right is not provided in the OHS Act."

23. However, it is clear from the above quoted paragraph that constitutional and unlawfulness issues are not raised and consequently this submission is without merit.

24. The respondents' heads of argument, correctly in my view, articulate as follows (quoted without footnotes) why the applicant's multi-legislation argument is misconceived:

18.1 As stated above, jurisdiction is determined on the basis of the pleadings. The analysis of the notice of motion and founding affidavit undertaken earlier establishes that the legal basis of NUM's case is the MHSA, and that the matter involves a dispute about the interpretation or application of the MHSA. In short, this is a MHSA dispute (as pleaded), over which the Labour Court has exclusive jurisdiction.

18.2 It is accepted (subject to what is submitted below) that: the determination of the MHSA dispute involves the interpretation of statutes in addition to the MHSA (ancillary and collateral issues); the Labour Court does not have exclusive jurisdiction in relation to these other statutes; and this court also has jurisdiction in relation to them. But this does not serve to somehow (1) deprive the Labour Court of its exclusive jurisdiction to determine the MHSA dispute (involving in part an interpretation of other statutes); or (2) clothe this court with jurisdiction over the MHSA dispute (when it only has jurisdiction over the other statutes). NUM's argument really amounts to the tail wagging the jurisdictional dog.

18.3 To the same effect, it is important to recognise the distinction between the dispute (being about the interpretation / application of the MHSA) and an issue in the dispute that may need to be resolved in order to determine the dispute (say, the operation of statutory provisions outside of the MHSA).[38] *The Labour Court has jurisdiction over both. At best, this court has jurisdiction over the latter; but it has no jurisdiction over the dispute.*

18.4 It does not assist NUM to contend, in the abstract, that this court has the jurisdiction to determine whether the OHSA applies. Jurisdiction is determined on the basis of the pleadings, and the analysis undertaken above shows that this is a MHSA dispute. Furthermore, if it is found that the MHSA applies, it follows axiomatically that the OHSA does not apply (without the need for any separate determination).”

25. The applicant’s reliance on the fact that the judgments in Terra Bricks, Bert’s Bricks and Misty Falls 45 dealt with aspects of the MHSA and considered multiple statutes is of no consequence. Section 82 of MHSA was not addressed or considered in any of those judgments.

26. In the result I am of the view that the respondents’ jurisdictional point in limine should be upheld and the application dismissed for want of jurisdiction.

27. Accordingly, I make the following order:

ORDER:

1. The first and second respondents’ jurisdictional point *in limine* is upheld and the applicant’s application is dismissed for want of jurisdiction.
2. The applicant is ordered to pay the first and second respondents’ costs of this application, including the costs of two counsel.

_____

Johann Gautschi AJ

6 February 2024

Date of judgment: 6 February 2024

Date of hearing: 25 October 2023

Counsel for Applicant: Adv Gys Rautenbach SC

Attorneys for Applicant: Cheadle Thompson and Haysom Inc

Counsel for 1st & 2nd Respondents: Adv Anton Myburgh SC and Adv Riaz Itzkin

Attorneys for 1st & 2nd Respondents: Webber Wenzel Inc

Counsel for 3rd, 4th & 5th Respondents: Adv Lwanda Qwabe

Attorneys for 3rd, 4th & 5th Respondents: The State Attorney

Counsel for 9th Respondent: Adv Paul Carstensen SC

Attorneys for 9th Respondent: Bester and Roodie Attorneys