

SOUTH AFRICA / JUDGMENT

Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Another (191905/20) [2020] ZAGPJHC 347 (21 August 2020) [2020] ZAGPJHC 347

COURT

South Gauteng High Court, Johannesburg

BEFORE

U. Bhoola

CASE / FILE NUMBER

191905/20

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

(1)

REPORTABLE: NO/YES

(2)

OF INTEREST TO OTHER JUDGES: NO/YES

(3)

REVISED

DATE:

21 August 2020

Case

number: 191905/20

IN

THE MATTER BETWEEN: BASSANI
 MINING (PTY) LTD
 Applicant
 and
 SEBOSAT
 (PTY) LTD
 First Respondent
 MASHALA
 RESOURCES (PTY) LTD
 Second Respondent
 HERMAN,
 KURT
 Third Respondent
 ANDERSON,
 ANDREA AVRIL
 Fourth Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] The applicant ("Bassani") seeks urgent interim relief pendente lite against the respondents in the form of an anti-dissipation order restraining the respondents from alienating, encumbering or removing

directly or indirectly coal mined to the value of R 25 million from the Wesselton mine ("the mine"), pending an action for damages against respondents to be brought by Bassani. In this application Bassani also sought the return of its mining equipment

but the respondents made a "with prejudice" offer in relation to the return of the equipment which has been accepted. The Respondents oppose the application on urgency and its merits.

Urgency

[2] The essential facts giving rise to this application are not disputed on the papers. They are that:

2.1 Bassani and the second respondent, ("Sebosat"), entered into a written agreement ("the subcontracting agreement") on 19 February 2020. In terms of the agreement Bassani would conduct coal-mining operations on behalf of Sebosat at an agreed fee at the Wesselton mine. The subcontracting agreement commenced on 20 February 2020 and Bassani moved its equipment onto the mine and commenced mining operations.

2.2 Bassani conducted the mining operations at the mine for three months, for March, April and May 2020. It is common cause that a dispute arose between the parties, which led to Sebosat terminating the subcontracting agreement on 1 June 2020. Bassani has a claim against Sebosat for unpaid invoices. Sebosat does not dispute that Bassani has a claim against it but is disputing the amount of that claim. It relies on the failure to meet production targets in terms of the subcontracting agreement. The subcontracting agreement provides for mediation and arbitration as dispute mechanisms. Bassani, however, intends, within 30 days of this application, to institute proceedings in which it seeks damages in the sum of approximately R 17 million

against the respondents, on the basis that fraud was committed against it by the third respondent ("Herman") and that he misused the juristic personalities of Sebosat and Mashala.

- [3] The deponent to the founding affidavit states that having regard to the fraudulent misrepresentations, the summary lockout of Bassani from the mine, and the mala fide conduct of the respondents, Bassani had to act urgently as there is a real risk that the respondents will take every step in the intervening period to dissipate and/or diminish their assets in order to avoid the efficacy of a court order and to leave it with a hollow judgment should it succeed in its damages claim. This, it is submitted, justifies enrolment of this application on an urgent basis in terms of Rule 6(12)(b) of the Uniform Rules of Court.
- [4] It is common cause that after the termination of the subcontracting agreement Bassani attempted to settle the dispute with Herman and Sebosat. Bassani's founding affidavit states that there was in principle agreement as at 5 July 2020 for the termination of the subcontracting agreement and the exit of Bassani. However, thereafter Bassani's attorney's attempts to obtain a response to the draft settlement agreement sent on 29 June 2020 to Herman and his attorney met with no responses. Respondents allege however that a meeting was held at the mine on 2 July 2020 and it is incorrect to allege that respondents walked away from settlement negotiations. Bassani alleges it then received information from its attorneys on 29 July 2020 in relation to the allegedly fraudulent conduct of Herman, and acted without delay to bring this application on 4 August 2020. There is no indication on the facts that Bassani was dilatory in its institution of these proceedings. However, the respondents oppose urgency and submit that urgency is self-created by Bassani. They allege that Bassani relies on commercial urgency without setting out the appropriate allegations of fact and instead relies on mere assertions as why it would not be able to obtain substantial redress in due course.
- [5] For the purposes of deciding the urgency of this matter I assumed that Bassani's has a prima facie cause of action against the respondents which is good and that the allegations of fraud were correct, in accordance with the approach

taken by Goldstone J in *Twentieth Century Fox Film Corporation and another v Antony Black Films (Pty) Ltd*[1], to which I was referred by counsel for Bassani, Mr Eyles SC. Hence I exercised my discretion to permit the matter to be enrolled on the basis of urgency.

The requirements for an anti-dissipation interdict

[6] There are various threshold requirements an applicant for an anti-dissipation interdict has to meet. The first of which, given the nature of the order sought, are the standard requirements for an interim interdict. These are trite and include: [a] a prima facie right albeit open to some doubt, [b] a well-grounded fear of irreparable harm to the applicant if the interim relief is refused and the ultimate relief is granted eventually, [c] the absence of a satisfactory alternative remedy, and [d] the balance of convenience

favours the grant of interim relief: *Myflor Investments (Pty) Ltd v Everett NO and Others*.^[2] Counsel for the respondents, Mr Cassim SC, referred me to the authority of *Knox D'Arcy Ltd v Jamieson and Others*,^[3] which states that the requirement of absence of a satisfactory alternative remedy (in an application for interim relief) does not apply in the case of an anti-dissipation order.

[7] The second threshold requirement to be met in order to obtain an anti-dissipation order, where the applicant does not have any special claim to the respondent's property, is for the applicant to convince the court that: the respondents are wasting or secreting assets, or there exists a reasonable apprehension that the respondents are about to embark on such conduct; and save in exceptional circumstances, it is demonstrated that there is an intention on the part of the respondents to defeat the applicant's claim : *Knox D'Arcy Ltd and Others v Jamieson and Others*.^[4]

[8] In determining whether the requirements for an anti-dissipation interdict have been met the following important passage by Grosskopf JA in *Knox D'Arcy Ltd v Jamieson and Others*, is of particular importance:

"As to the nature of the interdict, this was dealt with by Stegmann J in 1994

(3) SA at 706B707B and in 1995 (2) SA at 591A600F. The latter passage was largely devoted to showing that it is not necessary for an applicant to show that the respondent has no bona fide defence to the action. This conclusion was not attacked before us and I agree with it. What then must an applicant show in this regard? In the passages mentioned above, Stegmann J quoted the relevant cases in our law and I do not propose dealing with all of them. For the most part they were decided on their own facts without providing any theoretical justification for the interdict. However, in *Mcitiki and Another v Maweni* 1913 CPD 684 at 687 Hopley J stated the effect of earlier cases as follows:

'... (T)hey all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so.' See also *Bricktec (Pty) Ltd v Pantland* 1977 (2) SA 489 (T) at 493EG.

The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, i.e that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency. In the judgment a quo Stegmann J dealt with this topic as a part of the enquiry whether the petitioners' claims for damages 'will not be a satisfactory remedy in the absence of the interlocutory interdict in securitatem debiti' (1995 (2) SA at 637E638C).

In my view this is not a correct way of looking at the matter. It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer?"

[9] The test for an anti-dissipation interdict as has been set out by Van der Linde J in *Carsten v Kullmann* 2018 JDR 0018 (GJ) at

[33] requires consideration of the following issues : [h]ave the applicants shown that the respondents are dissipating or secreting their personal assets so as to render the applicants' claim hollow? Or have they at least shown that the respondents have embarked on conduct that is calculated to produce that result? My learned brother referred in regard to the test for an anti-dissipation order to *HERBSTEIN & VAN WINSEN*, *The Civil Practice of the High Courts of South Africa*, 5th ed, p1488 (footnotes omitted) as follows : "A special type of interdict may be granted where a respondent is believed to be deliberately arranging his affairs in such a way as to ensure that by the time the applicant is in a position to execute judgment he will be without assets or sufficient assets on a which the applicant expects to execute. It is not a claim to substitute the applicant's claim for the loss suffered, but to enforce it in the event of success in the pending action so that he will not be left with a hollow judgment."

[10] The proper approach in an application for interim relief such as the present one is to take the fact sets out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should (not could) on those facts obtain final relief at the trial. Furthermore, although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once the prima

facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed: see *Webster v Mitchell* 1948(1) SA 1186 (W) at 1189; *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688.

The merits

- [11] The primary justification for the relief sought is that Bassani was a victim of fraud committed by Herman and Sebosat. Bassani submits that until 29 July 2020, Herman misrepresented to it, and it believed, that it had on 20 February 2020 entered into a legitimate subcontracting agreement with Sebosat (represented by Herman) and that Sebosat had a legitimate main agreement with Mashala. The main agreement was not produced by Herman at the time. Mashala, it is common cause, had in fact been under business rescue from 20 November 2014 until 30 June 2020 and did not have a main agreement with Sebosat at the time. It is common cause that it was only ratified after the business rescue was finalised, by Herman and Anderson as shareholders and directors of Masala. In these circumstances, Bassani avers, only the business rescue practitioners ("BRPs") could have authorised the mining operations at Wesselton mine.
- [12] In this regard Bassani's counsel, Mr Eyles SC, referred to section 140(1)(a) of the Companies Act, 71 of 2008, which provides that during a company's business rescue proceedings, the BRPs have full management and control of the company in substitution for its board and pre-existing management: see *Murgatroyd v Van den Heever NO and Others*.^[5] In addition, the Companies Act also provides that the board of directors operates under the supervision of the BRPs, and section 137 (4)^[6] expressly provides that any action undertaken by a board, which the BRPs did not authorise, is void.^[7] Thus, Mr Eyles submitted, for Mashala to have commenced legal mining activity at Wesselton it was necessary for the BRPs to have

authorised the mining activity. It also appears from the replying affidavit that the BRPs had warned Herman about the mining activities

being illegal. Mr Eyles submitted that for Mashala to have appointed Sebosat as a contractor, the BRPs must either have appointed Sebosat themselves or they must have approved the appointment of Sebosat. It is common cause that this was not done.

- [13] Bassani avers that Herman had therefore fraudulently concluded the subcontracting agreement with it on behalf of Sebosat, in the absence of a main agreement with Mashala. As a result of the subcontracting agreement (which Bassani believed to be valid), it had mined coal to the value of R 94 million, and when it queried payment of its outstanding invoices the subcontracting agreement was terminated and it was summarily locked out of the mine. Herman had furthermore grossly abused the provisions of the Companies Act and of the separate juristic personalities of Sebosat and Mashala. He represented to Bassani that

he was entitled to represent Mashala.

However, since it is common cause that Mashala is the holder of the mining right over the mineral area at the Wesselton mine, Mr Eyles submitted, the only person that could (a) mine at Wesselton or (b) appoint a contractor or subcontractor to mine at Wesselton was Mashala. This is clear from the section 11 consent granted by the Director General of Mineral Resources[8] on 18 February 2020 under the Mineral and Petroleum Resources management Act ("MPRDA") Act No, 28 of 2002. It transferred the shareholding but did not authorise any person other than Mashala to mine at Wesselton or to appoint a third party contractor or subcontractor to mine. Hence, neither Herman nor Steel Eye (which is the holding company of Mashala, having purchased 100% of the shares in Mashala from Continental Trading) or anyone else could authorise the mining at Wesselton mine.

[14] It is further submitted that Herman had not only misrepresented the true facts relating to Sebosat and Mashala to Bassani, which induced it to enter into the subcontracting agreement, but has also fraudulently interposed Sebosat as a beneficiary in the contractual relationship in an unconscionable abuse of the juristic personality to avoid Mashala being held liable for the mining operations being conducted By Bassani. Thus, Mashala has had the benefit of coal worth about R94 million mined by Bassani during March, April and May 2020. Bassani submits that, in the circumstances, it has a prima facie right to proceed with an action for damages against Herman, Sebosat and Mashala.

[15] In addition to relying on its prima facie right, Bassani also submits that the balance of convenience favours the granting of the interim interdict and that the prospects of success favour it in the damages claim. It submits further that it has a reasonable apprehension of harm in that given the fraudulent and mala fide conduct of Herman, he is now in control of Mashala as well as Sebosat, and it is unlikely that it would be able to recover anything

at the conclusion of its damages action. There is, it submits, a real prospect that that by the time it is to execute the judgment there will be no coal left and it will be left with a hollow judgment. It submits that if interim relief is not granted Mashala will continue to dispose of the coal to shelf companies and they will on-sell the coal and diminish the assets available for execution in due course. Herman, Sebosat and Mashala, it is alleged, have structured their affairs in such a way that there will be layers of shelf companies which will lay claim to the coal which they are disposing off at the rate of about 8000 tonnes per week. Mr Eyles submits that the ongoing sale of the coal diminishes the value of assets against which Bassani can execute, should it be successful in its damages claim. This will leave it with a hollow judgment.

[16] Counsel for the respondents, Mr Cassim SC, submitted that there is no merit to the fraud allegations whatsoever. Bassani was at liberty to investigate the integrity and standing of Sebosat at the stage before it concluded the subcontracting agreement. Any averment moreover relating to Mashala is irrelevant to the agreement between Bassani and Sebosat, which stands on its own. Insofar as Bassani relies on the misrepresentation from Herman that induced it to enter into the subcontracting agreement, Mr Cassim submitted that a

party relying on misrepresentation must prove that the misrepresentation induced it so to act. In this case, the representation relied upon by Bassani is not material and is unrelated to its obligations to Sebosat. In any event, Herman was a director of Steel Eye, which had acquired the shareholding of Mashala on 28 February 2020 and on 8 November 2018 Continental Coal, the shareholder in Mashala sold its shares and loan account to Steel Eye subject to suspensive conditions being met. Hence, he did not misrepresent his authority to represent Mashala. Respondents thus submit that no fraud has been committed and in any event on Bassani's version, it would have no recourse against Mashala. Mr Cassim submitted that what Bassani is seeking is in fact,

security which would be in terrorem to Mashala and Steel Eye (the latter not even being a party to the application), and is unfair in circumstances where its claim for services rendered is disputed and where in any event it could under the subcontracting agreement resort to expedited arbitration to enforce its rights.

[17] Mr Cassim submitted that the subcontracting agreement imposes no obligation whatsoever upon Mashala in favour of Bassani, and hence there is no basis for an interim interdict against Mashala. In any event there is no evidence in relation to [a] the disposal of assets with the intention to thwart Bassani's claim, and [b] the mala fides of Mashala. There is no evidence whatsoever that Mashala is disposing of the coal in any other manner other than in the ordinary

course of business, or that it is being done without a fair value in return to Mashala or that the proceeds from the sale of the coal are being hidden or diverted. Quite to the contrary, Mashala is disposing of the coal in the ordinary course of business. In these circumstances Mr Cassim submitted that the requisite intention required to prove dissipation is absent.

[18] In any event, Mr Cassim submitted, Mashala has been misjoined to these proceedings. It was not responsible for the appointment of the Bassani as a subcontractor, and by implication not responsible for any of the alleged misrepresentations made by Herman. There are in fact no averments to the effect that that Mashala was a party to the alleged fraud.

[19] In relation to the averments that Herman had misused the corporate personalities of Mashala and Sebosat, Mr Cassim submitted that Bassani at the very least is required to demonstrate some misuse or abuse of the distinction between the corporate entity and those who control it, which misuse or abuse results in an unfair advantage to the latter: see *HülseReutter v Gödde* [9] and *Nel v Metequity Ltd.* [10] There is no evidence that demonstrates that the affairs of Mashala were conducted in a manner that maintained no distinguishable

corporate identity between Mashala and Sebosat. In fact, the subcontracting agreement between Bassani and Sebosat makes it clear

that Sebosat is the contractor, Bassani is the subcontractor and Mashala is the holder of the mining right. Mr Cassim submitted

further that the allegations of impropriety that have been made (and which are disputed by the Respondents) were made in relation to Sebosat and Herman, neither of which exercised ownership or control over Mashala at the time of the subcontracting agreement. Moreover, the fact that Herman and Anderson became directors of Mashala after the conclusion of the subcontracting agreement, and did not represent it before that date (19 February 2020), does not ipso facto result in an abuse of the corporate personality. In any event they confirmed that they ratified the agreement between Sebosat and

Mashala, again supporting the respondents' contentions that the companies are separate juristic entities. Ownership of Mashala

moreover, it is common cause, vests in Steel Eye Trading Ltd, which is not cited as a party to the application and no allegations of impropriety have been made against it.

Conclusion

[20] It seems to me that there is some substance, at least on a prima facie basis, to a damages claim against Herman and/ or Sebosat arising out of the alleged fraud, and that there are allegations of illegal mining against Mashala that fall to be proven. However, I am not required to determine these issues in this application. They will

undoubtedly be fully dealt with in the damages claim. For present purposes I am required to determine whether the test for an anti-dissipation interdict has been met. It is common cause, alternatively not seriously disputed that [a] the coal is being mined

by Sebosat and Mashala and disposed of in the ordinary course of business, and that [b] the coal mined by Bassani has already been

sold. In the founding affidavit reliance is placed on coal mined by Bassani that is being dissipated, but there is no reply to the allegation that there is no longer any coal on the premises mined by Bassani.

[21] In order to succeed in this application, Bassani has to show that the dispositions are being done with the intention of thwarting its pending damages claim. There is no evidence that Mashala and Sebosat are arranging their assets or disposing of coal with the intention of defeating its claim. It may or may not be that Bassani succeeds in proving the allegation that there is pattern of conduct by Herman to use shelf companies and interpose them between the subcontractor and Mashala to protect its assets. In other words, that there is a practice to "use" various subcontractors (i.e. Latozest, Tamosys and Sebosat), by contractors represented by Herman but when disputes arise (as occurred between Latozest with the contractor Close Up Mining (Pty) Ltd), the contractor has no assets and is allowed to be liquidated, thus protecting Mashala as owner of the coal. These allegations would need to be established by evidence in the damages claim.

[22] Bassani has therefore not proven, as it alleged, that there is a real risk that the respondents will take every step in the intervening period before the damages claim is heard, to dissipate and/or diminish their assets in order to avoid the efficacy of a court order and to leave it with a hollow judgment should it succeed. This means that it has not met the second threshold requirement for obtaining an anti-dissipation interdict as required by Knox D'Arcy Ltd (supra) and its application falls to be dismissed.

Order

[23] In the result, I make the following order:

23.1 The application is dismissed.

23.1 The applicant is to pay the costs of the respondents, including the costs of two counsel.

U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing: 11 August 2020. Heard by videoconference as per the Consolidated Directive of the Judge President of 11 May extended to 15 August 2020.

Date of judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by being uploaded onto the CaseLines digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 21 August 2020.

Appearance:

Counsel for the Applicant : AJ EYLES SC with R ISMAIL

Instructed by:

Hogan Lovells

Johannesburg

Counsel for the Respondents : N CASSIM SC with A VORSTER

Hulley & Associates

[1] 1982

(3) SA 582 (W).

[2] 2001

(2) SA 1083 (C) at 1088 E-F.

[3] (283/95) [1996] ZASCA 58; 1996 (4) SA 348 (SCA) at 373D.

[1996] ZASCA 58; [1996] 3 All SA 669 (A) (29 May 1996).

[4]

[1996] ZASCA 58; 1996

(4) SA 348 (A) at 372F-H. See also *Carmel Trading Co Ltd v Commissioner, South African Revenue Service and Others* 2008 (2) SA 433 (SCA).

[5] [2014] 4 All SA 89 (GJ) para 16.

[6] Section 137 (4): " If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner."

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[7] See the judgment of Mosopa J in *Tayob and Another v Shiva Uranium (Pty) Ltd* (In business rescue) and Others (86673/2018) [2018] ZAGPJHC (21 December 2018) para 34.

[8] "NOW THEREFORE I, Adv Thabo Mokoena in my capacity as a Director- General; of Mineral Resources, by virtue if the powers delegated to me, hereby grant consent for the transfer to transfer 100% shares held by Continental Coal (Pty) Ltd in Mashala Resources (Pty) Ltd to Steel Eye Trading (Pty) Ltd."

[8] "NOW THEREFORE I, Adv Thabo Mokoena in my capacity as a Director-

General; of Mineral Resources, by virtue if the powers delegated to me, hereby grant consent for the transfer to transfer 100% shares held by Continental Coal (Pty) Ltd in Mashala Resources (Pty) Ltd to Steel Eye Trading (Pty) Ltd."

[9] [2002] 2 All SA 211 (A), 2001 (4) SA 1336 (SCA).

[10] [2007] 2 All SA 602 (SCA), 2007 (3) SA 34 (SCA).

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