

SOUTH AFRICA / JUDGMENT

Khanyisela Mineral Traders (Pty) Ltd v EJ Resources (Pty) Ltd (2024/069252) [2024] ZAGPJHC 754 (12 August 2024) [2024] ZAGPJHC 754

COURT

South Gauteng High Court, Johannesburg

BEFORE

Bester

CASE / FILE NUMBER

2024/069252

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2024-069252

1.

REPORTABLE:

NO

2.

OF INTEREST

TO OTHER JUDGES: NO

3.

REVISED:

YES

In the matter between:

KHANYISELA

MINERAL TRADERS (PTY) LTD

Applicant

and

EJ

RESOURCES (PTY) LTD

Respondent

Delivered

12

August 2024 – This judgment was handed down electronically

by circulation to the parties' representatives via email,

by being

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JUDGMENT

Bester AJ:

- [1] The applicant urgently applies for an interdict restraining the respondent from disposing coal mined on portion 5, Farm Mooifontein 35 IT, Registration Division IS, Mpumalanga (the mine) to any party other than the applicant, pending the final determination of a dispute between the parties in respect thereof. The applicant proposes to institute an action within 30 days.
- [2] On 22 March 2024 the applicant and the respondent entered into a written agreement. In terms thereof, the applicant agreed to assist the respondent to establish the mine by making advance payments for RB1, RB2 and RB3 grade coal from the mine (the coal), to be delivered once the mine has been established. In return, the respondent granted the applicant the exclusive right of first refusal to purchase all coal.
- [3] The applicant made advance payments and the respondent established the mine. A dispute arose between the parties as to whether the respondent validly terminated the agreement on 5 June 2024. The applicant seeks to secure the continued availability of the coal whilst the dispute is being resolved at trial. At the hearing I ruled that the matter is sufficiently urgent to be heard forthwith.

Factual Matrix

- [4] In terms of the contract, the applicant agreed to assist the respondent by making early payments, stipulated as an aggregate total amount of R10 million or any portion thereof, for the establishment of the mine. In return, the respondent irrevocably granted the applicant the right of first refusal to purchase the coal on the terms set out in the agreement, which would terminate once the applicant has purchased “any and all ... coal produced from the Mine”.

- [5] The parties agreed on a purchase price, per ton, for each of the three grades of coal stipulated in the agreement. Clause 4.3 provides that the applicant shall pay invoices submitted by the respondent or third-party contractors for goods and services required by the respondent to establish the mine. In terms of clause 4.4, the parties agreed that once the mine has been established, the purchase price of coal supplied shall be offset against the early payments.
- [6] In terms of clause 4.6, the applicant had the “sole and unaffected discretion”, but not the obligation, to exercise its right of first refusal. It was however obliged to purchase a minimum of 15 000 tons of coal per month; whilst the respondent was obliged to produce a minimum of 20 000 tons of coal per month.
- [7] In terms of clause 5.2, the respondent had to establish the mine within four weeks of the commencement date. The applicant had the “sole and unfettered discretion” to cease making early payments, “should it anticipate that the mine shall not be established within the period referred to ... and/or there has been wasteful expenditure in the establishment of the Mine”.
- [8] It is common cause that the applicant made early payments in terms of the agreement totalling R6 688 581,50. It is not clear from the papers when the mine was established, and the exact date is in dispute between the parties. However, they agree that by early June 2024 the mine was operational.
- [9] On 5 June 2024 the respondent’s attorneys addressed a letter to the applicant, in which it was claimed that the applicant was in breach of the agreement in that it had failed to pay:
- a) invoices in respect of fuel over the period 15 April 2024 to 21 May 2024;
 - b) the costs of an excavator of R56 000,00, in respect of which an invoice was forwarded to it on 3 May 2024; and
 - c) several other items, despite invoices having been forwarded to it.
- [10] The letter alleged that the applicant’s breach was an event of default as described in clause 7.1 of the agreement, and, consequently, the respondent elected to cancel the agreement with immediate effect, in terms of clause 8.1.
- [11] The letter also tendered payment of the full amount of the early payments by the delivery of coal to that value, as calculated at the purchase price described in clause 4.1 of the agreement, to the applicant.
- [12] On 10 June 2024, the applicant placed an order for 8 823.9862 tons of RB2 coal, which, at the pricing in the agreement, came to R6 688 581,54, with no reference to the 5 June letter.

- [13] On 11 June 2024, the applicant's attorneys responded that it was in the process of obtaining instructions in respect of the letter of 5 June. They recorded that the mine is operational and that the applicant has furnished the respondent with a purchase order for coal at a price as envisaged in the agreement, which order was being fulfilled at the time of writing the letter.
- [14] The order was fulfilled, and the coal was collected on 12 June 2024.
- [15] On 19 June 2024 the applicant's attorneys addressed a further letter to the respondent's attorneys, responding in more detail to the letter of 5 June. The respondent's cancellation of the contract was rejected. The letter recorded that the agreement does not obligate the applicant to make payment of all invoices submitted to it and entitled it to cease making payment should the mine not be established within the envisaged period, or if there has been wasted expenditure. The letter does not, however, tie these rights to any specific invoice referred to by the respondent.
- [16] The letter further claimed that the respondent had failed to place the applicant in mora, and thus it could not cancel the agreement. The applicant considered the attempt to cancel as a repudiation of the agreement, which it rejected, and it demanded specific performance. As a result, written confirmation was sought that the respondent would continue to supply coal in terms of the agreement.
- [17] On the same day (19 June 2024), the applicant delivered a purchase order for 6,000 tons of RB2 coal. The following day an email response was received from Mr Hill, the respondent's Chief Executive Officer. He confirmed that the order would be filled as requested (thus at the contracted price) but stated that further orders would not be filled. He advanced two reasons. He claimed that the respondent's weighbridges were inaccurate and lamented that the applicant failed to inform the respondent that it had previously delivered an extra two tons. He also claimed that the pricing (as stipulated in the contract) could not be honoured and stipulated substantially higher prices for future orders. The email does not make any reference to the contract, or the 5 June letter.

The challenge to jurisdiction

- [18] At the hearing, the respondent objected to this Court's jurisdiction to hear the matter. The answering papers did not raise the issue of jurisdiction at all. Ms Butler, appearing for the respondent, explained that the challenge to jurisdiction flows from the applicant's replying affidavit. The argument goes as follows. From the founding papers, the respondent understood the applicant to seek specific performance. Because the contract was concluded within this Court's jurisdiction, the respondent did not object to this Court's jurisdiction. However, in reply, the applicant expressly stated that it is seeking an interim interdict, and not specific performance. This caused the challenge to jurisdiction, because the subject matter of the interdict, the coal, is situated outside this Court's jurisdiction.

[19] At the time I ruled that the Court had jurisdiction to entertain the matter and argument proceeded. Generally, a court will not have jurisdiction to grant an interdict where the performance thereof will take place outside of the Court's jurisdiction and the respondent is a peregrinus to that court.[1] However, in this instance, the respondent, in my view, submitted to this Court's jurisdiction. It was clear from the notice of motion and the founding affidavit that the applicant sought an interdict restraining the respondent from dealing with the coal at the mine. In reply, it merely reiterated that position, in the light of the respondent's argument that the applicant seeks specific performance and therefore has to make out a case for final relief.

[20] The respondent did not challenge the Court's jurisdiction before *litis contestatio* and was deemed to have submitted to the Court's jurisdiction.[2] The Court's lack of jurisdiction was raised from the bar during argument. The change in stance does not have a factual basis. Ultimately, jurisdiction is a matter of effectiveness,[3] and I see no reason not to hold the respondent to its initial election.

Has a right been established *prima facie*?

[21] The applicant seeks an interim interdict pending the outcome of the proposed action. It is well settled that such an applicant must

establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) that the balance of convenience favours the granting of the interdict; and (d) that the applicant has no other legal remedy.[4]

[22] The applicant asserts a *prima facie* right to purchase all the coal from the mine in terms of the written agreement between the parties.

[23] To decide whether an applicant has established a *prima facie* right the Court considers whether, on the facts set out by the applicant together with the facts set out by the respondent which the applicant cannot dispute, the applicant could obtain final relief at the trial, having regard to the inherent probabilities. If serious doubt is thrown on the applicant's case, it cannot succeed with temporary relief.[5]

[24] The applicant would have a right to performance in terms of the agreement unless the respondent is correct when it asserts that the agreement was terminated.

[25] The respondent asserts that the applicant breached the agreement in that it did not timeously pay the items identified in the 5 June letter. The applicant does not dispute that it did not pay these invoices. Its Chief Operations Officer, Mr Argyle, baldly asserts in the founding affidavit that "the applicant has paid all invoices received by it from the respondent and / or third-party contractors as envisaged in clause 4.3", suggesting that some invoices may not have been received and that others fall outside of the ambit of the clause, without explaining why.

[26] In reply, the applicant expressly denied that all the invoices were received, without providing any details. It also attempted to explain why the invoices were not payable. It is well established that a party must make out its case in its founding papers.[6] The applicant had to show its prima facie right in its founding papers and it was not entitled to leave its explanations for not paying the invoices for reply. In any event,

these explanations provide little in detail. The applicant has not shown that a trial court will probably find in its favour on this point.

[27] The applicant's contention that the agreement was not properly cancelled, if it is assumed that the applicant was in breach, seems to be on stronger footing.

[28] The contract contains a cancellation clause that, on the face thereof, may be relied upon by the applicant, but not the respondent. Clause 7 of the agreement stipulates that an event of default will include a breach of 'any provision of this Agreement'. Clause 8 stipulates that, on the occurrence of an event of default, the applicant may cancel the agreement, amongst several options. However, the cancellation clause is silent as to cancellation by the respondent. It thus seems that the respondent's reliance on clauses 7 and 8 will probably not withstand scrutiny at trial.

[29] In the absence of a cancellation clause the test of whether the innocent party is entitled to cancel the contract because of malperformance by the other, entails a value judgment by the court.[7] It requires balancing the competing interests of the parties with the ultimate criterion of treating both parties fairly in the

circumstances. The court will bear in mind that cancellation is the more radical remedy, compared with specific performance or a damages claim. Simply put, the question must be answered whether the breach is so serious that it is fair to allow the innocent party to cancel the contract.

[30] Clause 4.3 requires the applicant to make payment of invoices submitted to it, but the contract does not expressly stipulate when that performance is due. Mr Shepstone, appearing for the applicant, submitted that where the contract does not fix a time for the performance, and where there is no legal prescript as to the due date, a demand is necessary to place the debtor in mora. I agree. As Wessels JA explained in Breytenbach[8]:

"[n]ot having placed appellant in mora the respondent was not entitled to sue for cancellation of the contract merely because in his opinion transfer was not effected within a reasonable time".

[31] Where immediate performance is contemplated, no demand is necessary.[9] The trial court will thus have to determine whether performance was due forthwith upon the presentation of the invoices, negating the need for a demand. The respondent contends that the invoices were due 'on a weekly basis', but the contract does not contain such a provision, and it is not necessarily clear what is meant by the phrase.

- [32] Prima facie, it seems that payment was not to be immediately made and an unmet demand should have preceded notice of cancellation. It thus seems probable that the issue would be decided in the applicant's favour at trial.
- [33] The respondent, in the alternative, contends that the applicant tacitly accepted the separation terms offered by the respondent in the 5 June letter, by placing an order for a volume of coal with a purchase price equal to the early payments made by the applicant. The applicant denies this, pointing out that the purchase order itself stipulates that the purchase price is to be set off against the early payments in accordance with the agreement, thus contradicting the alleged tacit agreement that the order constitutes acceptance of the separation terms. I agree that the order on the face of it seeks enforcement of the contract and not its agreed termination. The order was followed by a letter on 11 June 2024 insisting on specific performance of the agreement, further speaking against the suggested novation.
- [34] The agreement contains a term stipulating that any variation, novation or cancellation of the agreement must be in writing and signed by the parties. The respondent seeks to avoid the obvious consequences of the non-variation clause, often referred to as a Shifren clause[10], by reasoning that such a clause does not exclude the existence of tacit terms of the agreement, and by extension thus does not apply to the tacit novation thereof. Unsurprisingly, Ms Butler was unable to refer me to any authority in support of such an extension of the principle. The respondent's proposed approach would have the result that a non-variation clause can be avoided tacitly but not orally, an outcome that in my view is unlikely to find favour with the trial court.
- [35] I therefore conclude that the applicant has established a prima facie right to insist on performance in terms of the agreement and that no serious doubt has been cast thereon.

Is there a reasonable apprehension of irreparable harm?

- [36] The applicant advances four reasons why it reasonably anticipates suffering irreparable harm if the order is not granted. It argues that it will be deprived of its contractual right to exclusively purchase the coal. Although the proposition is sound, it does not consider the whole picture. The same agreement also creates other contractual rights, including to claim damages. The harm is therefor in my view not irreparable.
- [37] The applicant further alleges that its business model and financial projections are based on the exclusive right to purchase the coal. However, the applicant does not explain how this statement translates into an actual apprehension of irreparable harm.
- [38] The applicant also explains that it needs to fulfil existing client orders, for which it requires the coal. It argues that, if the respondent does not supply it with the coal, the applicant will either lose the orders (and possibly future orders) or have to buy in the coal from other sources. The respondent counters that there is ample alternative supply available to fill the orders, which assertion is not challenged by the applicant.

- [39] The respondent asserts that the contract prices were substantially below the market prices – it calls the prices “predatory” in its answering affidavit. In reply, the applicant denies the market prices stated by the respondent, and asserts that coal prices have decreased since the signing of the agreement. Unhelpfully, neither party offered any proof for their contentions. Because no evidence was presented as to the current coal prices, it is not clear to me that the price to be paid to third-party suppliers will be higher than the prices agreed between the parties.
- [40] Lastly, the applicant contends that quantification of damages would be “extremely difficult, if not impossible, to calculate accurately”. Why this is so, remains unexplained. The respondent argues that the price difference between the contract price and the price asked by third parties would be the obvious measure of damages, and easily calculable. I agree, with the rider that there may be additional costs involved that may form part of the loss. I do not see why these items would raise insurmountable hurdles. Thus, any price and cost differential can be claimed as damages.
- [41] The relief sought by the applicant is in the form of prohibiting the respondent from disposing of the coal, unless it is to the applicant. This formulation of the relief contradicts the applicant’s concern regarding its irreparable harm that it will lose the clients. An interdict in this form will not deal with that problem. There is a disjunct between the irreparable harm contended for and the relief sought.
- [42] I thus conclude that the applicant has failed to show that it has a reasonable apprehension of irreparable harm.

Does the balance of convenience favour the applicant?

- [43] The balance of convenience, which would be more aptly referred to as the balance of prejudice, essentially requires the court to weigh up the position of the applicant if the interim relief is not granted but it succeeds in asserting its right at trial, compared to the position of the respondent if the interim relief is granted but the applicant ultimately fails to assert its right at trial.[11]
- [44] The applicant asserts that its stands to suffer significant financial loss to its business if the interdict is not granted. It does not provide any detail of the anticipated loss, which seems easily ascertainable. There is nothing on the papers showing that the applicant may not be able to recover any loss from the respondent.
- [45] The applicant contends that the respondent will not suffer any undue hardship because it will “merely be required to comply with its existing contractual obligations”. This, of course, is the wrong analysis. It considers the question from the perspective of the applicant being successful in the trial, instead of its failure.

[46] In my view, if the interdict is not granted, the applicant could still buy coal from other suppliers to fill orders placed upon it. On the other hand, if the interdict is granted, the respondent's business, on all accounts, will come to an immediate stand still, as it will be obliged to hoard all coal mined until the trial has been determined. It will be faced with the dilemma of operating a mine without any income to fund its activities.

[47] The proposed proviso to the order, that the respondent may still sell the coal to the applicant, does not solve the respondent's

dilemma. Ms Butler argued that the proviso prejudices the respondent, as it does not stipulate a price. In the result, she pointed out, the applicant can refuse to offer the contract price and force the respondent to accept lower prices just to survive, to its prejudice.

[48] This led Mr Shepstone to propose an amendment to include the proviso that any sale must be in terms of the agreement. He did not present a written amendment at the time, but subsequently, after the hearing, his attorney sent an amended notice of motion. The respondent's attorney wrote to claim that there was no agreement to amend, and that the amendment was opposed. This came as somewhat of a surprise, given that Ms Butler in argument conceded that the proposed rider would resolve the complaint she raised as to the formulation of the relief, and raised no further objection thereto. Be that as it may, I considered it unnecessary to hear further argument, as proposed by the parties. This is because in my view the different wording will not affect the outcome of the matter.

[49] In the circumstances of the case, if the interdict is granted, the respondent will be placed on the horns of a dilemma: if it is to stay in business, it would be forced to sell to the applicant, or find an alternative source of funding to stay afloat. Thus, to decide the balance of convenience in favour of the applicant on the basis that the respondent can still sell the coal to the applicant to avoid hardship, will allow the applicant to effectively obtain final relief in the guise of interim relief. If the respondent sells to the applicant under the proposed terms of the interdict, it will have procured the coal at the contract price, and the respondent, who elected to sell, will have no recourse for damages if the applicant fails at trial, as it would have acted under a court order. In this fashion the applicant would likely procure all the coal under the interim order, as the litigation will probably take longer than the lifespan of the mine. On the applicant's case, the mine has a lifespan of around 12 months.

[50] The arguments raised by the respondent, that the applicant seeks final relief, is in my view better approached in this fashion. The respondent contended that, as formulated, the interdict is in effect final, because it will practically force the respondent to sell the coal to the applicant in terms of the contract before the conclusion of the trial. The proposed relief does not oblige the respondent to sell the coal to the applicant at the contract price but requires it to hoard the coal until the final determination of the dispute. The relief sought is thus interim in nature. However, when considering the balance of convenience, the practical factors, which will effectively force the respondent to make decisions that will pre-empt the final determination of the dispute, tip the scales in the respondent's favour.

[51] In these circumstances the prejudice to the respondent outweighs the prejudice to the applicant. The applicant has thus also failed to establish that the balance of convenience favours the granting of the interim relief.

Is there an alternative legal remedy?

[52] Generally speaking, a court will not grant an interdict where the applicant can obtain adequate redress by an award of damages.[12] There do not seem to be any factors against applying the general principle. Damages are relatively easy to quantify in this instance, and the applicant has not shown that a damages claim cannot be met.

[53] It therefore follows that, in my view, the applicant has not shown that it cannot obtain redress in the form of a damages claim.

The order

[54] I conclude that the applicant has not made a case for interim interdictory relief.

[55] In the result, I make an order in the following terms:

- a) The application is dismissed.
- b) The applicant shall pay the respondent's costs of the applicant, including the costs of counsel at scale B.

A Bester

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Heard on: 2 July 2024

Judgment

Date: 12 August 2024 Counsel for the Applicant: Ross Shepstone Instructed by: Richmond Attorneys Counsel for the Respondent: Jeanne-Mari Butler Instructed by: Brandmuller Attorneys Inc.

[1] Leyland v Chetwynd (1901) 18 SC 122; Ex parte Goldstein 1916 CPD 483.

[2] Muller v Möller 1965

(1) SA 872 (C).

[3] Foize Africa (Pty) Ltd v Foize Beheer BV 2013 (3) SA 91 (SCA).

[4] National Treasury and Other v Opposition to Urban Tolling Alliance and Others 2012

(6) SA 23 (CC) in [41] to [45], approving of Setlogelo v Setlogelo 1914 AD 221 and Webster v Mitchell 1948

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- (1) SA 1186 (W).
- [5] Webster v Mitchell supra at 1189, as qualified in Gool v Minister of Justice and Another 1955
- (2) SA 682 (C) at 688 E – F.
- [6] It is well established that a party must make out its case in its founding papers. See for instance Betlane v Shelley Court CC 2011 (1) SA 388 (CC) in [29].
- [7] Singh v McCarthy Retail Limited t/a McIntosh Motors [2000] ZASCA 129; 2000
- (4) SA 795 (SCA) in [15].
- [8] Breytenbach v Van Wijk 1923 AD 541 at 549.
- [9] Nel v Cloete 1972 (2) SA 150 (A) at 169 G, approving of Mackay v Naylor 1917 TPD 533 at 537 – 538.
- [10] Referring to SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A).
- [11] Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Another 1973 (3) SA 685 (A) at 691E.
- [12] UDC Bank Limited v SeaCat Leasing & Finance Co (Pty) Ltd 1979
- (4) SA 682 (T) at 695.
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