

SOUTH AFRICA / JUDGMENT

Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others (83344/2018) [2019] ZAGPPHC 574 (25 October 2019)

[2019] ZAGPPHC 574

COURT

North Gauteng High Court, Pretoria

BEFORE

S. Potterill

CASE / FILE NUMBER

83344/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: YES / NO.

(2)

OF INTEREST TO OTHER JUDGES: YES / NO.

(3)

REVISED.

Case

Number: 83344/2018

25/10/2019

In

the matter between:

OAKBAY
INVESTMENTS (PTY) LTD
Applicant
and
TEGETA EXPLORATION AND
RESOURCES
(PTY)
LTD
First
Respondent
JOHAN LOUIS KLOPPER
N.O.
Second
Respondent
KURT ROBERT KNOOP
N.O.
Third
Respondent
THE COMPANIES AND
INTELLECTUAL
PROPERTY COMMISSION
("CIPC")
Fourth
Respondent

JUDGMENT

POTTERILL J

- [1] Upon consideration of the application for leave to appeal I wish to comment on only certain paragraphs. The balance of the paragraphs are fully ventilated in my judgment.

Ad paragraph 1

- [2] This ground of appeal is astonishing. Adv. Hellens SC used "the Gupta vilifying train" and the "dislike of the Guptas" expressly as the whole basis of his argument as to why there is a lack of independence of the BRP's. It is to be noted that in the founding affidavit no factual basis for the lack of independence was specifically set out. The typed record of the argument reflects Adv. Hellens SC equating the "not liking the Guptas" as a true reflection of the BRP's lack of independence. In fact the tenure of this oral argument was raised over and over in oral argument. More is expected of senior counsel.

Ad paragraph 2

- [3] This ground of appeal is unfounded, offensive and in fact untruthful. In oral argument Adv. Hellens SC had told this Court that I am not entitled to upon watching television conclude that the Guptas had fled the country and then utilise this in my judgment as a finding. He furthermore submitted that there was no such averment in the papers. The fact that the

Guptas had fled the country was a common cause fact on the papers (paragraph 6, p397 of the answering affidavit of the respondents with no reply to paragraph 6 in the reply of the applicant).

Ad paragraph 3

- [4] Personal bias is only one of the indicators of a conflict of interest. In the business rescue proceedings bias cannot be in the air, but must manifest itself in the process.

Ad paragraph 4

- [5] Oakbay is under control of the BRP's just as the other companies are, yet Oakbay brought this application, there was nothing barring the other companies from supporting Oakbay in bringing the application for the removal of the BRP's.

Ad paragraph 7

- [6] This ground of appeal is unfounded. Nowhere in the judgment is a finding made that the application for security of costs had no merit; there was no such application before me and no finding was made pertaining to the security application.[1]

Ad paragraphs 9-12, 16

- [7] The subordination agreement speaks for itself.

“Tegeta hereby agrees, subject to the terms and conditions in this Agreement, that:

2.1.1 it subordinates for the benefit of the other creditors of OCM, both present and future, so much of the Tegeta Claim as would enable the claims of such other creditors to be paid in full as and when such claims fall due;

2.1.2 the claims of the other creditors of OCM, both present and future, will rank preferentially to the Tegeta Claim; and

2.1.3 in liquidation of, or during the existing or any future business rescue of, or compromise by OCM, it will not prove or tender to prove a claim in respect of the Tegeta Claim, which proof would reduce or diminish any liquidation dividend payable to other creditors, whether present or future, and accordingly, Tegeta hereby abandons the Tegeta Claim to the extent that it would reduce or diminish the dividend payable to those other creditors. In addition, and without derogating from the foregoing, Tegeta hereby withdraws any claim made in respect of the Tegeta Claim during the existing business rescue proceedings of OCM to the extent to which such claim has been accepted or proved.

2.2 ...

2.3 Tegeta hereby agrees that, whilst this Agreement remains in effect, it shall not be entitled to demand or sue for or accept repayment of the whole or any part of the Tegeta Claim and set-off shall not operate in relation to the Tegeta Claim in respect of any debts owing by it now or in the future; provided that if the auditor of OCM shall certify in writing that he/she has been furnished

with evidence that reasonably satisfies him/her that the amount of the Tegeta Claim exceeds the amount by which the liabilities of OCM exceed its assets, such excess portion of the Tegeta Claim as is specified in the said certificate shall, subject of the provisions of clause 3.1, be released from the operation of this Agreement.”

This vital information was inventively left out in the founding affidavit.

Ad paragraph 22

[8] This finding was based on the applicant’s own written heads of argument.

[9] I am thus in terms of section 17(1)(a) of the Superior Courts Act 10 of 2013 of the opinion that the appeal has no reasonable prospects of success and the application is dismissed with costs.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 83344/18

HEARD ON: 10 October 2019

FOR THE APPLICANT: ADV. M.R. HELLENS SC

ADV. L. VAN GASS

INSTRUCTED BY: Van der Merwe and Van der Merwe Attorneys

FOR THE RESPONDENTS: ADV. P. STAIS SC

INSTRUCTED BY: Smit Sewgoolam Attorneys

DATE OF JUDGMENT: 25 October 2019

[1] Paragraph [45] of the judgment

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