

SOUTH AFRICA / JUDGMENT

## Randgold & Exploration Company Limited and Another v Fraser Alexander Limited and Others (21801/94) [1994] ZAGPHC 1 (17 August 1994)

[1994] ZAGPHC 1

COURT

High Courts - Gauteng

BEFORE

Myburgh

CASE / FILE NUMBER

21801/94

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IN

THE SUPREME COURT OF SOUTH AFRICA

(WITWATERSRAND

LOCAL DIVISION)

CASE

NO: 21801/94

DATE:

17 August 1994

In

the matter between :

RANDGOLD

&

EXPLORATION COMPANY LIMITED & ANOTHER Applicants

and

FRASER

ALEXANDER LIMITED

&

18 OTHERS Respondents

## JUDGMENT

MYBURGH J: This is an urgent application in which the applicants seek an order prohibiting the holding of a general meeting of the first applicant's shareholders tomorrow morning at 11 o'clock, which has been convened to consider a scheme, which I will refer to later, and alternatively, that I should order that no effect be given to the resolutions taken at that meeting.

In effect this is an interim order which is being sought pending litigation in due course declaring that the scheme proposed in the circular addressed to members of the first applicant and which scheme is to be given effect to by the adoption of the resolutions which will be tabled tomorrow, will constitute :

- (a) a contravention of the provisions of sec 38 of the Companies Act; 10
- (b) an affected transaction within the meaning of the Securities Regulation Code on Takeovers and Mergers and the rules of the Security Regulation Board;
- (c) a breach of fiduciary duties on the part of those directors who give effect thereto; and
- (d) vis-a-vis the second applicant unfairly prejudicial, unjust or inequitable conduct within the meaning of sec 252 of the Act.

The first requirement on which I have to be satisfied is that .this is an urgent application. It is obviously 20 urgent in this sense that the meeting is to take place tomorrow at 11 o'clock and it is desirable that an order, if an order is justified, should be given before then. It is, however, a principle of our law that an applicant is not entitled to create urgency by waiting until the death to move for relief. An applicant is required to move expeditiously in order to enable the respondents to have adequate time to place their case before the court.. The applicants failed to do so.

The relevant facts in this regard are that notice of the meeting, the date of the meeting and the resolutions which were to be tabled at the meeting, were furnished to the applicants on 28 July, approximately three weeks ago. The applicants at that stage seem to have adopted an attitude that they would co-operate with the respondents in regard to the holding of the meeting. No relief was sought at that time. I may say in this regard that if at that stage the applicants believed that there was to be a 10 contravention of sec 3 8 or that this was an affected transaction, then they could and should have moved at that time.

Reading between the lines, what I think happened was that the applicants decided first to have a look at the commercial rationale

of the transaction and, in particular, to ascertain the real value of the company, First West. It seems as if that information became available during the course of last week. By 11 August the applicants had decided that they should litigate. I am informed by Mr Levin, who appears for the applicants, that already on 20 Friday last week preparation had begun on these papers. I need merely state that to demonstrate the unfairness of the conduct of the applicants. They began

drafting their papers last Friday; they eventually completed them I assume some time last night or this morning and then served them during the course of the day (when all the parties were appearing before an appeal tribunal). Notice was given at 3 p.m. for an application which was to be moved at 7 p.m.

It would be absurd if I were to dismiss the application merely on the ground of urgency having listened to argument for nearly four hours. Accordingly, I will turn to the merits of the application for an interim interdict.

The first matter on which I have to be satisfied is that what will happen at the meeting tomorrow is in some way irreversible. If in due course the applicants or any other affected minority shareholders can seek redress from the court, for example, in terms of sec 38 of the Companies Act, or in terms of sec 252 of that Act, then it would be manifestly wrong for me to stop the meeting taking place to prevent the resolutions being passed. In regard to prayers 1(a), (c) and (d) I am satisfied that, even if the resolutions are passed in their present form tomorrow, in due course anyone who wishes to litigate in terms of those three causes of action will be free to do so. The meeting tomorrow does not conclude their rights in regard thereto.

Fundamentally what I have to consider, therefore, is whether the scheme amounts to an affected transaction within the meaning of the code. Some of the respondents sought a ruling from the requisite official as to whether what they contemplated was an affected transaction. The official determined that it was not. The present applicants then, as they were entitled to do, appealed to a body which has jurisdiction to hear such an appeal. That appeal was heard today. The appeal was unsuccessful. The applicants have a further right of appeal. The contention for the applicants is that they have a reasonable prospect of success in persuading the third internal tribunal that this is an affected transaction (which would have the effect of tainting - if I may use that word

- the first resolution which is to be tabled tomorrow).

That is a matter of law. I have to be satisfied, not merely prima facie, that, as a matter of law, that is a good argument. I am satisfied that it is not a good argument for a very simple reason. In terms of the 10 definition of an affected transaction, a transaction is affected if, taking into account any securities held before such transaction, it has or will have the effect of vesting control of any company in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction. "Control" is defined as the holding of 35% of the shares. It does not mean de facto control. But it is important to appreciate that what control means is that that collection of shares will be used in a particular way, and I quote from the definition 20 of control, "at meetings of that company". In other words, the present applicants have to satisfy me that there was some agreement, arrangement or understanding between various of the respondents that, beyond tomorrow's meeting they would exercise control at future meetings of the company. If they are unable to satisfy me in that regard it is not an affected transaction. I am informed by Mr Trengove, who appeared for certain of the respondents, that his clients have stated on oath on a number of occasions, and that the two boards in question have accepted that on each occasion, that there is no agreement, arrangement or understanding

between the offerors and the supporting shareholders beyond the two resolutions to be proposed at the general meeting. There is thus no agreement, arrangement or understanding "jointly to exercise control, whether between the offerors inter se or between them and the supporting shareholders. The fact that the respondents have formed an alliance in order to achieve a passing of the resolutions tomorrow which will give them management control and which will result in them holding 40% of the shares, is not enough. They have to go further, as I have explained. In my view, they have not gone as far as they should.

Accordingly I find that prima facie this is not an affected transaction and the first leg of what is necessary for an interim interdict is not satisfied. Even if I am wrong in that regard, I am not satisfied that the balance of convenience favours the applicants.

The application is dismissed with costs.

ON BEHALF OF APPLICANTS: ADV LEVIN

Instructed by:

ON BEHALF OF RESPONDENTS: ADV W H TRENGOVE SC

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