

SOUTH AFRICA / JUDGMENT

Tlake v A Re Somang Projects (Pty) Ltd and Others (18894/2020) [2021] ZAGPJHC 466 (30 July 2021) [2021] ZAGPJHC 466

COURT

South Gauteng High Court, Johannesburg

BEFORE

Windell

CASE / FILE NUMBER

18894/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 18894/2020

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

30/7/2021

In

the matter between:

SELLO

TLAKE

Plaintiff

and

A

RE SOMANG PROJECTS (PTY) LTD

First Defendant

JACK

MASEKWAMENG

Second Defendant

A

RE SHOMENG HOLDINGS (PTY) LTD

Third Defendant

COMMISSIONER
OF THE COMPANIES AND
INTELLECTUAL
PROPERTY COMMISSION
Fourth Defendant

JUDGMENT

WINDELL, J:

INTRODUCTION

- [1] During July 2020, the plaintiff instituted action proceedings against the defendants. The plaintiff's claim is based on an alleged oral agreement concluded between the plaintiff and the second defendant during 2010, in terms whereof he would render certain geological services in respect of a coal mining project, in exchange for which he would be allocated a 12% ownership interest in the first defendant, A Re Somang Projects CC ("the CC") before it was converted to a private company.
- [2] This is an application to join a number of Government officials ("the officials") as the fifth to seventh defendant. The application is opposed.

THE PLEADINGS

- [3] The plaintiff's claim is straightforward and simple. As stated, it is based on an oral agreement concluded between the plaintiff and the second defendant, Mr Masekwameng. In the particulars of claim the plaintiff alleges that the material express, implied and/or tacit terms of the oral agreement were the following:

"7.1. the Plaintiff would work on a coal mining development project ("Coal Mining Project") which had been initiated by the Second Defendant;

7.2. the Plaintiff would render geological and related services ("Geological Services") in respect of the Coal Mining Project to ensure that a mining right application is completed and lodged with the Department of Mineral Resources (DMR) and

7.3. the Plaintiff would, in exchange for the Geological Services rendered, be allocated 12% (twelve percent) ownership interest in A Re Somang Projects Close Corporation, the entity which is now the First Defendant ("A Re Somang Projects CC") (sic)."

- [3] The plaintiff further alleges that despite the fact that he performed in terms of the oral agreement and rendered the geological services during 2011, and despite the fact that the CC was granted the mining right by the Department of Mineral Resources and Energy ("the DMR") on 22 February 2017, the second defendant neglected and/or failed to issue shares to the plaintiff upon the conversion of the CC to a private company in October 2018. The plaintiff contends that he is entitled to become a shareholder in the first defendant, and that

the first defendant is, through the second defendant and/or the third defendant, undertaking mining operations in the mining area and selling the coal to the exclusion of the plaintiff, without any justifiable reason. The plaintiff therefore seeks the following relief:

1. Declaring the plaintiff as the owner of 12% (twelve percent) of the entire issued share capital in the first defendant.
 2. Directing the second defendant to provide the plaintiff with the original share certificate in the name of the plaintiff reflecting the plaintiff as the owner of 12% (twelve percent) of the entire issued shares in the first defendant.
 3. Directing the first, second and third defendants (“the defendants”) to provide the following information to the plaintiff:
 - i. the first defendant’s securities register;
 - ii. the details and dates of all dividends declared by the first defendant;
 - iii. the first defendant’s (and any subsidiaries of the first defendant) audited financial statements for the financial years 2017, 2018, and 2019;
 - iv. all material agreements concluded by the first defendant in respect of the mining area and/or the mining right including, without limitation, loan agreements, mining outsource agreements and coal sale agreements; and
 - v. correspondence between the first defendant and its subsidiaries (if any) and any of the mining sector regulators in respect of the mining right and/or the mining area.
 4. Directing the first, second and/or third defendants to pay the plaintiff 12% of all dividends paid by the first defendant to the third defendant and/or its shareholders.
 5. Directing the first and second defendants to invite the plaintiff to all future shareholders’ meetings of the first defendant.
- [4] In the particulars of claim the plaintiff also relies on a shareholders’ agreement titled “Shareholders Agreement A Re Resomeng Project” that was concluded between the plaintiff and, inter alia, the second defendant who acted on behalf of Mogwasha Development Investment Proprietary Limited and the Mogwasha Trust. The Shareholders Agreement stated that the shareholders of the CC were: Mogwasha Trust – 44% (forty-four percent); Mogwasha Development Investment – 29% (twenty-nine percent); Simon Mohale – 3% (three percent); Molobe Paulina Mogale – 5% (five percent); Kedibone Martha Molefe – 5 % (five percent); Dennis Mashile – 2% (two percent); and the plaintiff, Sello Tlake – 12% (twelve percent) (emphasis added).

- [5] On 9 October 2020 the defendants filed their plea, incorporating two special pleas, one being of prescription and the other lack of authority. As far as the lack of authority plea is concerned, the defendants pleaded that to the extent that the first defendant was a party to the oral agreement on which the plaintiff relies (the plaintiff does not allege that it was), the second defendant disputes that he was authorised by the first defendant to bind it to that agreement or to allocate a 12% interest in the first defendant to the plaintiff.
- [6] In their plea on the merits the defendants admit that the plaintiff and the second defendant concluded an oral agreement in terms whereof the plaintiff “would perform certain geological work in support of an application that would be made by the first defendant for the granting to it of a mining right.” Although it is admitted that the plaintiff rendered geological services during 2011, the remainder of the allegations in the particulars of claim are denied.

THE JOINDER APPLICATION

- [7] In terms of the Rule 10(3) of the Uniform Rules of Court, a plaintiff may join a further defendant or defendants where the question arising between them depends on the determination of substantially the same question of law or fact. It is, however, trite that an applicant may also join another party or parties where that party or those parties has or have a “direct and substantial interest” in the subject matter of the application (and or action).[1] That interest has been held to be “a legal interest” in the subject matter of the application which may be affected prejudicially by the judgment of the court.
- [6] It is clear from the plaintiff’s founding affidavit that the basis of the joinder application and reason why the plaintiff wants to join the namely Minister of Mineral Resources and Energy (“the Minister”) as the fifth defendant; the Director-General: Mineral Regulation of the DMR (“the Director-General”) as the sixth defendant; and the Regional Manager of the DMR, Mpumalanga Province (“the Regional Manager”) as the seventh defendant, is because it is alleged that these officials have a “direct and substantial interest” in the outcome of the action for the following reasons:
1. The Minister, who is cited in his official capacity, is in terms of the Mineral and Petroleum Resources Development Act[2] (“the Act”) charged with the authority of making decisions in relation to mining rights and that it is he who has the right to delegate such authority.
 2. The Minister has, in terms of section 103(1) and (2) of the Act delegated and assigned powers to the Director-General and he was the official who took the decision to grant the first defendant a mining right in terms of section 23(1) of the Act, therefore the Director-General has an interest in the outcome of the litigation.

3. The Regional Manager, Mpumalanga has a direct interest in the outcome of the litigation because he or she would have had to perform various functions prior to the approval of a mining right, such as the approval of the environmental management plan and the mine in respect of which the mining right was granted is situated in the province of Mpumalanga.

[7] From the heads of argument it became clear that the joinder application is based on essentially four legs: Firstly, by converting

the CC into a private company there was a cession, transferral or alienation of the mining right and/ or the controlling interest in the CC, without the written permission of the Minister as contemplated in section 11 of the Act, which has the result that it

is of no force or effect and is invalid. Secondly, there is a dispute about the mining area where the mining is currently taken place. The mining right is very clear about the mining area in respect of which it was granted, therefore if the first defendant is not mining in terms of the mining right, that should be of interest to officials. Thirdly, there may be documents in the possession of the officials, relevant to the plaintiff's cause of action, that would assist the court in resolving this dispute pertaining to the nature of the geological services. Fourthly, there would be no prejudice to the officials if they are joined.

THE MINING RIGHT

Cession/ transferral of the mining right/ controlling interest.

- [8] The plaintiff contends that it is not disputed that the mining right was granted to the CC, yet the first defendant, A Re Somang (Pty) Ltd admits to mining in terms of the mining right. Given that the shareholders of the two entities differ, the mining right has been transferred, ceded or alienated. If such transfer, alienation or cession was without the written consent of the Minister, it is contended that the defendants either breached a material term of the mining right or submitted inaccurate, incorrect or misleading

information to the DMR. If that is indeed the case, so it is argued, the mining right could very well be cancelled or suspended. In the circumstances, it cannot be argued that the Minister, Director-General and the Regional Manager, do not have a direct and

substantial interest in the outcome of the litigation.

- [10] It is common cause that the CC was converted to a private company, namely A Re Somang Projects (Pty) Ltd. In terms of paragraph 2 of Schedule 2 to the Companies Act, 71 of 2008 read with section 2(2) of the Close Corporations Act, 1984, A Re Somang Projects CC and A Re Somang Projects (Pty) Ltd is one and the same corporate entity. The conversion thereof from a close corporation to an incorporated private company thus makes no difference to its legal corporate status. In addition, section 11(1) of the Act is only triggered when a "controlling interest has been ceded or transferred, without the written consent of the Minister. In *Mogale Alloys (Pty) Ltd V Nuco Chrome Bophuthatswana (Pty) Ltd and Others* [3], Coppin J, held that first has to be determined whether the interest was a controlling

interest. At paragraph 38 he states as follows:

“If the majority shareholder with the controlling interest intends to dispose only of a portion of his interest and the disposal will not result in a change of control, ie the shareholder will retain the controlling interest, then the disposal would in my view not require the Minister's consent. If, however, the effect of the disposal would be that the holder of the controlling interest would lose such control, then the disposal would require the Minister's consent, even if no one else acquires that controlling interest.”

- [11] The argument of the plaintiff has no factual or legal basis. Firstly, it is based on pure speculation and on the assumption that the mining right may have been ceded, transferred, alienated or encumbered by the CC to the first defendant and/or that it was the controlling interest in the CC that was transferred and/or ceded. Secondly, as alluded to above, the conversion of the CC to an incorporated private company made no difference to its legal corporate status. Thirdly, and most importantly, it is not an issue that features in the pleadings at all.

The mining area

- [12] In paragraph 10, 14 and 15.5 of the particulars of claim the plaintiff averred that:

“10. The First Defendant provided information to the Plaintiff for the area in respect of which A Re Sornang Projects CC was to apply for the mining right, being Portion 35, Portion 60 and the remaining extent of Farm Kromkrans 208 IS, Portions 1, 2 and 3 and the remaining extent of Farm Witbank 209 IS; and Portions 1, 2, 3 of the Farm Krogshoop 213 IS (“the Mining Area”).

14. On 22 February 2017, A Re Somang Projects CC was granted the Department of Mineral Resources in respect of the Mining Area (“the Mining Right”).

15.5. the Mining Right was granted in respect of the Mining Area;”

- [13] In the plea the defendants deny that the mining right that was granted in favour of the first defendant related to the mining area alleged by the plaintiff (i.e. the geographic area to which the mining right applied).
- [14] The plaintiff attempts to latch onto this, and contends that as a result of the defendants’ denial of the mining area, it is now directly relevant to the cause of action and the officials it seeks to join have a material interest in the outcome of this aspect.
- [15] The defence was pleaded in response to the allegation in paragraph 15.5 of the particulars of claim. It is, however, entirely irrelevant to the plaintiff’s cause of action, or to the defendants’ defences thereto. The plaintiff is free to prompt any of the said officials to cancel or suspend the said mining right. It is however difficult to understand how this would assist the plaintiff in his cause of action, as it might be destructive of the ultimate relief that the plaintiff seeks to obtain in the action. But, assuming for a moment that it is at all relevant to the plaintiff’s cause of action, or any of the defendants’ defences, the precise area can simply be determined from the notarially executed mining right. In any event, the consequence is

that leg of the plaintiff's argument is not sustainable. It only reinforces that the officials have no interest in the outcome of this action.

Documents

- [16] the plaintiff submits that considering that the geological services rendered by the plaintiff are in dispute, there are factual disputes which the officials sought to be joined would be in a position to assist the court in resolving. The plaintiff states that he prepared certain documents that were submitted to the DMR and the defendants are aware of this. In fact, in a letter dated 3 December 2019 the defendants requested that the plaintiff furnish them with all correspondence between the plaintiff and the DMR.
- [17] The fact that the officials might have documents in their possession that are relevant to the cause of action, is not a valid basis on which parties should be joined. Regardless of the plaintiff's entitlement to production by the defendant of the documents sought by him in his particulars of claim, he is free to seek discovery from the defendant of all documents relevant to issues in the action and to make use of the mechanism provide in Rule 38 of the Uniform Rules of Court. He has, despite the lapse of nearly 9 months after the closure of pleadings in the action, not taken any steps in that regard, let alone any other pre-trial steps.

Prejudice

- [18] In his replying affidavit, the plaintiff states that the joinder of the said officials will not cause any prejudice to the defendants. This is incorrect. Not only will there be an entire wastage of time and costs in the action by the joinder of irrelevant and disinterested parties, but the entire pre-trial process, which has not commenced, has been, held in abeyance as a result of this application.

CONCLUSION

- [19] The cause of action, as set out in the particulars of claim is straightforward. The issues that will fall for determination by the trial court are purely contractual in nature and will be determined by the facts. The plaintiff relies on an oral agreement and the defendants deny the terms of the oral agreement. All the other issues now raised by the plaintiff are collateral facts. The fact that one or more of the officials took the decisions relating to the issue of the said mining right is, firstly not in dispute in the action, and thus entirely irrelevant, but none of such decisions requires the joinder of any of the said officials.
- [20] The plaintiff has, moreover, not advanced any reason as to why it would be convenient to join any of the said officials as defendants to the action, nor is there any such reason. The joinder of the officials will cause an ongoing wasteful and unnecessary delay in the further prosecution of the action.
- [21] The plaintiff has not made out a case for the relief sought. In the result the following order is made:

1. The application is dismissed with costs, including the costs of senior counsel.

L. WINDELL

JUDGE OF THE HIGH COURT

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 July 2021.

APPEARANCES

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Date of hearing:

28 July 2021

Date of judgment:

30 July 2021

[1] Amalgamated Engineering Union v Minister of Labour, 1949

(3) Sa 637 (A) at 657; Transvaal Agricultural Union v Minister of Agriculture and Land Affairs, 2005

(4) SA 212 (SCA) at 226F-227F.

[2] Act 28 of 2002.

[3] 2011

(6) SA 96 (GSJ).

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Prepared on 11 October 2026 · Esheria