

SOUTH AFRICA / JUDGMENT

Huayou (Hong Kong) Co., Limited v C. Steinweg Bridge (Proprietary) Limited and Others (2017/17232) [2017] ZAGPJHC 348 (3 November 2017)

[2017] ZAGPJHC 348

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman

CASE / FILE NUMBER

2017/17232

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2017/17232

Not

reportable

Not

of interest to other judges

Revised.

3/11/2017

In

the matter between:

HUAYOU
(HONG KONG) CO., LIMITED
Applicant
and
C.
STEINWEG BRIDGE (PROPRIETARY) LIMITED
First
Respondent
TRANS-MED
SHIPPING CC
Second
Respondent
GERALD
INDUSTRIAL SARL
Third
Respondent
THE
NATIONAL NUCLEAR REGULATOR
Fourth
Respondent

JUDGMENT

OPPERMAN J

INTRODUCTION

- [1] These proceedings arise from a cobalt concentrate sales contract entered into between the applicant (a foreign company based in Hong Kong, China - Huayou) as buyer, and the third respondent (a foreign company based in Switzerland - Gerald), as seller. The contract provided for inter alia the sale and purchase of the material; the delivery of the material, and the minimum cobalt and copper content of the material. Gerald purported to cancel the contract on the basis of force majeure events, which were alleged to have affected its ability to supply the material from its stock in South Africa and from other sources. The force majeure events included the detention of the material which was held in the warehouses of the first and second respondents (local companies and independent contractors), in terms of certain directives issued by the fourth respondent (the National Nuclear Regulator – NNR).
- [2] The validity of Gerald's force majeure notice and subsequent cancellation of the contract are in dispute. Such dispute is the subject of arbitration proceedings in London (the arbitration), which proceedings were commenced by Huayou on 12 May

2017. On 18 May 2017, only five days later, Huayou sought and obtained, in this court in South Africa and on an urgent, ex parte basis, an interim interdict (the Order) preventing the first and second respondents from releasing the detained material pending the outcome of the arbitration. The Order took the form of a rule nisi but also operated as an interim interdict preventing the first and second respondents from releasing Gerald's cobalt and copper concentrate pending the finalisation of the arbitration in London.

[3] This dispute takes place against the backdrop of sharply increasing cobalt and copper prices. The value of the detained material

increased some 140% between its detention (26 June 2016) and the filing of the founding affidavit (18 May 2017), from approximately

USD 12 million [R 144 million] to approximately USD 30 million [R 400 million].

[4] The confirmation of the rule nisi, pending the final determination of the arbitration, is, so Huayou contends, necessary to protect Huayou's claim in the arbitration and aimed at preserving the integrity of the arbitration proceedings, by protecting the status quo ante.

Factual background

The contract

[5] The contract was entered into between Huayou and Gerald on 28 December 2015. It provided for the sale by Gerald, and purchase by Huayou, of 37,500 – 45,000 dry metric tons of high grade cobalt concentrate. The contract provided that the material was to be delivered monthly, from February 2016 to January 2017, and was to contain a specified minimum cobalt and copper content.

Force majeure, cancellation and Order of 18 May 2017

[6] On 23 June 2016 and pursuant to clause 15 of the contract, Gerald issued a force majeure notice relying on two force majeure events, namely the failure of its supplier in the Republic of Congo (CMD) to deliver shipments of material to Gerald and the detention of a certain quantity of material by the NNR. On 29 June 2016, Huayou requested proof of these assertions. On 20 July 2016, Huayou recorded that they had not received any proof nor a response to the previous request. On 19 August 2016 Gerald responded advising Huayou that Huayou's cargo was being detained in Gerald's warehouses by the authorities but that Gerald was attempting to solve the problem. The second respondent confirmed this to Huayou.

[7] On 25 January 2017 Gerald cancelled the contract on the basis of the two force majeure events recorded in its notice of 23 June 2016. Following the purported cancellation of the contract and on 12 April 2017, Huayou, through its attorneys in China, again called for further evidence in support of the alleged force majeure events. They called for Gerald to provide an undertaking that the detained material would not be sold or disposed of pending the outcome of the dispute. Gerald refused to give any such undertaking.

- [8] On 12 May 2017, Huayou commenced arbitration proceedings against Gerald in London and on 18 May it obtained the urgent ex parte Order in this court.

JURISDICTION

- [9] The respondents dispute that this Court has jurisdiction to hear this matter. Huayou admitted that this Court does not have jurisdiction over Gerald. It said the following in its replying affidavit :

“27.1 The respondents allege in paragraph 12 that this Honourable Court had no jurisdiction to grant the interdict as against the third respondent. This is correct, albeit that the applicant did not seek an interdict against the third respondent, nor did this Honourable Court grant the interdict against the third respondent. This is apparent from the applicant’s notice of motion and court order granted on 18 May 2017. The relief sought and granted is directed at the first and second respondents (who are the parties in possession of the detained material).”

27.2 As the respondents note, the contract provides that a dispute between the applicant and the third respondent arising out of or in connection with the contract is to be resolved by arbitration in London under the LME Regulations. However the proceedings before this Honourable Court are fundamentally between the applicant and the first and second respondents, who are not parties to the contract.” (emphasis provided)

- [10] Clause 17.3 of the contract provides:

“Any dispute, controversy or claim (“Dispute”) arising out of or in connection with this Contract, or the breach, termination or invalidity thereof shall be settled by arbitration in London, England, according to the rules and regulations of the LONDON METAL EXCHANGE. The language of the arbitration shall be the English Language.”

- [11] The present proceedings, Huayou argued, are not a “dispute, controversy or claim” arising out of the contract, but are aimed at preserving the status quo pending the resolution of such dispute. That argument fails immediately because this is clearly an opposed application and therefore clearly a dispute or controversy but also, and perhaps more significantly, because Huayou alleged in its founding affidavit that these proceedings do arise from the contract. This means that this court does not have jurisdiction in respect of the dispute because clause 17.3 reserves jurisdiction in such a dispute to London, and this point was emphasised by the respondents’ counsel in argument.

- [12] Clause 17.3 of the contract has the effect of ousting a South African court’s jurisdiction. There is nothing unjust in this. Parties, everywhere and often, agree to oust the jurisdiction of courts in favour of arbitration. This is even more common and understandable when, as here, they do so in favour of a specialised tribunal (in many countries, certain areas of the law are reserved for specialised tribunals - competition, labour, patents and tax). The parties’ contract ought to be respected and enforced, and the interdict discharged on this ground alone.

- [13] In *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL*, [1] the SCA held that if an arbitration agreement provides for arbitration as a one-stop method to determine any dispute arising out of the parties' contractual relationship, the appointed tribunal will have jurisdiction to decide any issue that may be raised before it, including jurisdiction, and our courts will not interfere unless it is clear that certain questions were intended to be excluded from the tribunal's jurisdiction. Willis J mentioned at [29] the following:

*“The majority judgment in the Constitutional Court, delivered by O'Regan ADCJ in *Lufuno Mphaphuli v Andrews*, makes it plain that our law of arbitration is not only consistent with but also in full harmony with prevailing international best practice in the field. Since 1976 our country has been a party to the New York Convention on the Recognition of Foreign Arbitral Awards 10 June 1958, widely known simply as the 'New York Convention'. The duty of our courts to support international arbitration and to give effect, where they can, to international arbitration agreements is bolstered by the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.”*

the majority held at [54] that:

“If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the arbitration clause by determining issues that are within the province of the arbitrator in terms of the arbitration agreement. A court is not entitled to do that unless an order has been granted in terms of s 3(2)(b) of the Act that those particular disputes shall not be referred to arbitration. No such order has been sought or granted.”

- [14] A new approach was adopted in oral reply. Clause 17.10 was now invoked, instead, as the basis for this court's jurisdiction. Clause 17.10 provides as follows:

“Nothing in this Clause shall limit or be construed so as to limit the right of either party to take proceedings against the other party in any court of competent jurisdiction to obtain security for its claim against the other party.”

- [15] That clause is limited to litigation between Huayou and Gerald, so now it was suggested that the relief was, in fact, also against Gerald. Developing this argument in replying oral argument, it was contended that the relief was really against Gerald because the first and second respondents are its mere agents and the Court was referred to authority that service on an agent is service on a principal. This argument fails because Huayou's allegations in its affidavits are in direct and stark contradiction of this submission. Huayou admits that this court has no jurisdiction over Gerald. The submission of agency can not be made in circumstances where Huayou has never alleged that the first and second respondents were Gerald's agents with the result that agency is not an issue in this matter. The respondents have never had the opportunity to deal with such an allegation because it was not raised in the papers. There also appears to be no basis for inferring agency.

- [16] Clause 17.10 applies only inter partes, as between Huayou and Gerald, so it can never authorise proceedings against the first and second respondents in Johannesburg. Clause 17.10 leaves open the question as to whether this Court is one of “competent jurisdiction”. It is in any case confined to security, whereas this application purports to seek to restore the status quo. Clause 17.10 has been disavowed by Huayou. In paragraph 27.2.1 of its heads of argument the following concession is made:

“Clause 17.10 of the contract is not applicable to the present dispute as the applicant sought relief against the first and second respondents. These respondents are not parties to the dispute.”

- [17] Huayou relies on the contract concluded between it and Gerald for the relief which it seeks before this Court. In this regard, Huayou alleges that it is seeking specific performance of the contract and has a prima facie right against Gerald for preservation of the material. In answer Gerald refers to clause 17.10 of the contract which states that “Nothing in this Clause [17] shall limit or be construed so as to limit the right of either party to take proceedings against the other party in any court of competent jurisdiction to obtain security for its claim against the other”. Gerald contends that this clause does not apply to the relief which Huayou seeks in this application. Huayou has rejected any reliance on clause 17.10 of the contract and states merely that it was required to show the court that it had a prima facie right, which it says it did which was “specific performance under the contract, and not a “security right” or “title to the Material” as incorrectly contended by the respondents.”
- [18] The only prima facie right which Huayou relies on is against Gerald. No facts or allegations are made in the founding affidavit as to Huayou having a prima facie right against the first and second respondents. It is thus clear that Huayou can only rely on the contract in its claim against Gerald which provides, in peremptory terms, that Huayou approach the LME to settle any dispute, controversy or claim between the parties. The applicant did not do so. Moreover, clause 17.6 of the Contract provides “For the avoidance of doubt, it is agreed that, unless and until the Seller makes an election in the previous paragraph, all and any disputes shall be submitted to arbitration in London, England which should be deemed as the only agreed arbitration place.” Clause 17.6 confirms that unless the previous clause (i.e. clause 17.5) is invoked (which it was not) all and any disputes between Huayou and Gerald shall be submitted to arbitration in London.
- [19] It is common cause that by the time Huayou launched this ex parte application, it had on the 12th May 2017 already commenced with the arbitration proceedings as it had given written notice of its claim and intention to arbitrate.
- [20] Huayou argued that these proceedings are aimed at preserving the status quo and therefore did not qualify as a ‘dispute, controversy or claim’. It relied on the dictum in National Gambling Board v Premier, Kwazulu-Natal, and others[2] where the Constitutional Court held as follows:

“[49] An interim interdict is by definition

'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.'

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim

interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements,

the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction

to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status

quo. It does not depend on whether it has the jurisdiction to decide the main dispute.” (footnotes omitted)

[19] The respondents had no quarrel with the principles formulated in such decision but countered that the authority does not deal with the situation where the parties have agreed to limit jurisdiction to a particular forum and so is not relevant. I agree. There is no justifiable reason why Huayou did not proceed against Gerald before the LME (alternatively the UK courts in terms of section 44 of the Arbitration Act, 1996), for the interim interdict it obtained from this Court. I must agree with this reasoning. The UK Arbitration Act, 1996, seems especially tailored to confer on the UK courts the rights to make any ancillary order (such as the one at issue in this application) to an arbitration in London. Section 44 provides –

“44 Court powers exercisable in support of arbitral proceedings

- (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
- (2) Those matters are -
 - (a) ...
 - (b) ...
 - (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
 - (i) for the inspection, photographing, preservation, custody or detention of the property, or
 - (ii) ...
 - (d) the sale of any goods the subject of the proceedings;

- (e) the granting of an interim injunction or the appointment of a receiver.
- (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
- (4) If the case is not one of urgency, the court shall act only on the application of a party or proposed party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
- (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- (6) ...
- (7) ...”(emphasis provided)

[20] It is immediately clear that this Act conferred jurisdiction on UK courts to restrain Gerald's dealing with the cobalt concentrate held in South Africa. Huayou suggests that an order against Gerald in London would have been ineffectual. This is incorrect as Huayou would have had contempt proceedings available to it and it could have applied to a South African court to make the London court order, an order of a South African court.

[21] Whatever the principle, in my view, Huayou are wrong : there is nothing to prevent Gerald from selling the material now. The interdict does not prevent such a sale. All Gerald has to do is to find a buyer that is willing to wait for the end of the arbitration proceedings and, perhaps, for the Regulator's position to become clear. That may require a discount on the sale price from the current market price, but such a sale will be perfectly lawful and, in itself, would preclude any order of specific performance in the London arbitration. This means that the doctrine of effectiveness is of no application because the Order that was made does not prevent the sale.

[22] I accordingly find that as against Gerald, this court does not have jurisdiction.

[23] Inevitably, the question arises as to why these proceedings, in South Africa, have come about? What is it that the Hong Kong company could achieve against the Swiss company in Johannesburg, regarding the arbitration in London, that it could not achieve in London? The answer may lie in the fact that the contract is governed by the English law of contract where specific performance

is only exceptionally available which brings me to the issue of non-disclosure of the complexities relating to specific performance

in the English law of contract, to Wepener J.

NON-DISCLOSURE OF FACTS IN EX PARTE APPLICATION

[24] In *Schlesinger v Schlesinger* [3], Le Roux J held:

“I respectfully associate myself with the learned Judge’s censure that a litigant who approaches a court ex parte is not entitled to omit any reference to a fact or attitude of his opponent which is relevant to the point in issue merely because he is not prepared to accept the correctness of it.”

[21] In *Powell NO and Others v Van der Merwe NO and Others*[4], Southwood AJA held the following:

“... These factors also illustrate the necessity for the rules relating to proper disclosure of material facts in ex parte applications to be strictly and rigorously applied.

[73] In *National Director of Public Prosecutions v Basson* 2001 (2) SACR 712 (SCA) (2002 (1) SA 419) in para [21] this Court expressly approved of the rules as they are set out in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B, concluding with the following three propositions.

‘(1) In ex parte applications all material facts must be disclosed which might influence a court in coming to a decision;

(2) The non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission;

(3) The Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.’

[74] In *Schlesinger* Le Roux J also considered when a court will exercise its discretion in favour of a party who has been remiss in its duty to disclose rather to set aside the order obtained by it on incomplete facts. He concluded (at 350B-C):

‘It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained in a subsequent application by the same applicant.’

[75] In my view, this approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or

inaccurately set out in the application for the order (cf *Hall and Another v Heyns and Others* 1991 (1) SA 381 see at 397B-C) or, as in this case, because they have been sufficiently investigated. And it should be rigorously applied where a right in the Bill of Rights has been violated. That is the only way the courts can ensure that the right to privacy is vindicated after the event.”

[22] In my view, Huayou failed to make disclosure of material facts to the Court at the hearing of the ex parte application. I do not find that such non-disclosure was wilful or mala fide but do find that it was material.

Extent of Gerald's interest

- [23] The citation and reference to Gerald in the founding affidavit as merely “an interested party” is misleading. The relief is, in essence and in substance, against Gerald and not against the first and second respondents.

No unequivocal tender of performance

- [25] The judge's attention ought to have been drawn to the fact that an unequivocal tender to pay the full contract price had not been made. In the absence of such a tender, neither specific performance nor the interdict were open to it. If Huayou wants specific performance it cannot do anything other than tender the full contract price.[5] This essential allegation is lacking.

Nature of order

- [24] The judges attention ought further to have been drawn to the fact that the order does not preserve the status quo, but rather creates an entirely new situation. It contended that the interdict preventing the first and second respondents from releasing the detained material simply preserves the status quo in terms of which the NNR's directive remains in place. It therefore argued that the first and second respondents would not incur any inconvenience in the grant of the order. Huayou also says that if the NNR's directive has been lifted, the only inconvenience would be to Gerald which would now not be in a position to profit from “the alleged force majeure events by selling the Detained Material ...” But the status quo has not been preserved by the order in this application: the order creates an entirely new situation in which the contractual relationship between Gerald and the warehouse respondents is eliminated by the order that simply imposes the burden on them to continue to warehouse the material regardless of other commercial commitments or interests. It is therefore not status quo relief, although clothed and characterised as such.

Legal position in SA v UK

- [25] In addition, in my view, Huayou ought to have disclosed to the judge who heard the ex parte application the differences between English law and South African law on specific performance. This is particularly so, as foreign law is presumed to be the same as South African law.
- [26] In South Africa the primary relief for breach of contract is specific performance and, in this regard, it is very different from English law.
- [27] Had Huayou proceeded in the UK, it would have had to deal with whether Huayou is entitled to specific performance in the LME arbitration, under English, which, it would appear, would have operated to deny it the relief sought.
- [28] To this end, both Huayou and the first three respondents engaged Queen's Counsel in London to provide opinions on this question. The issue was not addressed either in the founding papers or in argument before the judge who heard the ex parte application.

However, the respondents attached an expert opinion from Mr Schaff QC to their answering affidavit in which Mr Schaff set out his views, and concluded that Huayou was not entitled to specific performance. Huayou provided its own expert opinion from Mr Hancock QC in its reply.

[29] In Mr Schaff's opinion he summarises both the questions he was asked and opines:

"... Specifically, I have been asked to advise whether under English law, the remedy of specific performance is, in principle, available to and, if so, will be afforded to Huayou in its dispute with Gerald, both in general and with particular reference to the goods currently the subject of the interdict in the South African proceedings.

3. For the reasons which I set out in detail below, I consider that:

a. The remedy of specific performance is not one which is legally available to Huayou in this case, either at all or with particular

reference to the goods currently the subject of the interdict in the South African proceedings; and

b. Even if the remedy were legally available to Huayou, then as a matter of discretion there are no grounds justifying the granting of an order of specific performance in this case, either at all or with particular reference to the goods currently the subject of the interdict in the South African proceedings."

[30] The position in English law is governed by section 52 of the Sale of Goods Act, 1979 ("the 1979 Act") which provides for specific performance only if the goods in question are "specific or ascertained". He advises that "specific goods" are defined in the 1979 Act as "goods identified and agreed on at the time a contract of sale is made" and that the materials in this case were clearly not. However "ascertained goods" are not defined in the 1979 Act and Mr Schaff then turns to the case law before concluding that the material at issue in this matter was also not "ascertained".

[31] He then considers whether Huayou is entitled to specific performance in equity and concludes that, in spite of a largely academic debate to the contrary, it is not. He records that if his opinion, thus far, is correct then "no question of discretion will arise" but then proceeds to deal with the position as if specific performance was available and, after noting that an exclusion clause that restricts a party's right to damages "only opens the door to the exercise of the court's discretion", examines clause 18 of the contract. He concludes that clause 18.1 is inapplicable and that a claim for the additional cost of obtaining substitute goods is not contemplated in clause 18.2 of the contract. It therefore follows that damages are not excluded and that this is not therefore a factor militating in favour of specific performance. He then provides four further factors militating against the exercise of any discretion in Huayou's favour and records his resultant conclusions.

[32] Mr Hancock does not deal with the central question addressed by Mr Schaff, which is whether, under English law, specific performance is available to Huayou. He deals with the tribunal's jurisdiction to award specific performance, the principles that should guide it (namely whether or not section 52 of the 1979 Act is an exhaustive remedy and, if it is, when specific performance would be available) and whether damages are an adequate remedy. In discussing the principles that would govern the award of specific performance in English law, Mr Hancock canvasses the issue raised and dealt with by Mr Schaff, as to whether or not

section 52 of the 1979 Act is exhaustive, but expresses no opinion on this question, contenting himself with the observation that "it remains very arguable that there is jurisdiction to order specific performance of contracts for unascertained goods and that section 52 is not exhaustive", concluding that:

"I cannot of course say whether the arbitral tribunal would in the final analysis conclude that specific performance is not in fact available, and do not express any opinion on this."

[33] After noting that "the goods were clearly not specific" (thus agreeing with Mr Schaff on this), Mr Hancock turns to the question as to whether or not they had been ascertained. He expresses no firm view, but identifying two possibilities, the more likely of which (in his opinion) he says would not result in the ascertainment of the goods.

[34] Then Mr Hancock turns to the adequacy of damages. He identifies the question as to whether or not section 18 of the contract "might" result in the exclusion of damages. He does not express any opinion on what the Tribunal might decide, and discusses Mr Schaff's three points of argument with genial agreement.

[35] In its founding affidavit Huayou characterised the material as "identifiable", an allegation denied by the respondents. The allegations in the founding affidavit do not bring the detained material within Mr Hancock's first possibility of ascertainment, which is that they were "appropriated to this contract when they were sent from the DRC". As Mr Hancock notes, the questions of whether the goods are ascertained, or are not available in the market, are factual ones, to be determined by the arbitration tribunal. However, Gerald's reliance on an alleged force majeure event affecting the very same goods which are specified in Huayou's notice of motion and the Order of 18 May 2017, points strongly towards the conclusion that the goods were ascertained. This might well have been a very persuasive argument before Wepener J if the respondents were there to counter it when advanced.

[36] The foregoing arguments were those developed by the parties in their heads of argument relying on Mr Schaff's opinion attached to the answering affidavit and Mr Hancock's, which was attached to the replying affidavit in advancing their arguments as to whether or not Huayou has established a prima facie right as against Gerald. In my view, the legal position ought to have appeared from the founding affidavit of Huayou as it might well have influenced the judge who granted the ex parte order. It did not. From the papers which served before him he did not have an inkling that such a huge controversy lurked in the relief Huayou was seeking in the London arbitration and which affected the assessment of

its prima facie right as against Gerald.

ABSENCE OF EXCEPTIONAL CIRCUMSTANCES

[37] In my view, court orders should only be granted behind a litigant's back in exceptional circumstances. In *South African Airways SOC v BDFM Publishers (Pty) Ltd and others*, 2016

(2) SA 561 (GJ) at para [22] Sutherland J summarised this principle as follows:

“The principle of audi alteram partem is sacrosanct in the South Africa legal system. Although, like all other constitutional values, it is not absolute, and must be flexible enough to prevent inadvertent harm, the only times that a Court shall consider a matter behind a litigant's back are in exceptional circumstances. The phrase 'exceptional circumstances' has regrettably through overuse, and the habits of hyperbole, lost much of its impact. To do that phrase justice, it must mean very rarely, only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established.” (emphasis added)

[38] More fundamentally, section 34 of the Constitution guarantees a right to a fair hearing, which right has been formulated as follows by Yacoob J in the unanimous judgment of *De Beer NO v North- Central Local Council Etc*, [2001] ZACC 9; 2002 (1) SA 429 (CC) at para [11]:

“This section 34 fair-hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.”

[26] No exceptional circumstances existed which warranted the granting of the ex parte order. The sequence of events leading up to the granting of the order are:

- 26 June 2016 – Gerald issues force majeure notice.
- 29 June 2016 – Huayou requested proof of force majeure events.
- 20 July 2016 – Huayou sent a reminder.
- 19 August 2016 – Gerald recorded that goods were being detained by authorities but that the problem was being addressed.
- 19 August 2016 – Second respondent confirms detention of goods.
- 25 January 2017 – Gerald cancelled the contract.
- 12 April 2017 – Huayou sends first lawyers letter asking for an undertaking not to dispose of the goods failing which interim relief would be sought.

· 13 April 2017 – Gerald’s attorneys responded contending that the contract had validly been cancelled and refused to give an undertaking. Attention was specifically drawn to clause 17 of the contract dealing with jurisdiction and the governing law.

· 12 May 2017 – Notice to arbitrate was issued.

[39] The justification for launching the application ex parte is to be found in para 65 of the founding affidavit in which the deponent says: ‘If any of the respondents were to become aware of the intended interdict, the third respondent would likely begin efforts to have the detained material immediately released and moved’. But Huayou had expressly told Gerard on 12 April 2017 that it would, in the absence of an undertaking, be seeking interim relief. Gerard accordingly knew of Huayou’s intentions. In addition, 5 days prior to seeking the Order, Huayou had issued the notice to arbitrate and had sought delivery of the very same material forming the subject matter of the Order. There was thus a proceeding pending in which Huayou was claiming the material. Why notice of the proceedings in South Africa would trigger the release and movement of the material but notice laying claim to the very same material in London would not trigger the release and movement of the material, remains unexplained. In my view, notice of the proceedings ought to have been given.

[40] In my view, and by virtue of all the foregoing-discussed transgressions viewed individually or collectively, the rule falls to be discharged.

RELIEF SOUGHT AGAINST WRONG PARTIES AND FAILURE TO UNDERTAKE TO PAY DAMAGES

[27] The interdict ought not to have been granted against the first and second respondents because Huayou had no dispute with them. I find as a fact that there exists, as between Huayou and the first and second respondents, no right at all, let alone a prima facie right. Indeed, no rights against the first and second respondents were even alleged. Had the first and second respondents been

responsible for the wrong alleged by Huayou, the relief against them might have been competent[6]. No such wrong has been alleged. The first and second respondents have no interest in the material. The relief, so it is contended, is sought against the first and second respondents interdicting them from releasing the material pending finalisation of the arbitration between Huayou and Gerald, to which the first and second respondents are not parties. Huayou alleged rights against Gerald but took no order against it.

[28] The first and second respondents have done no harm to Huayou, and none is alleged. They are innocent, yet it is their businesses that are restrained, they who are inconvenienced by having to hold material and they who are potentially prejudiced because no provision was made for payment for the stored material. There is no good reason why the warehouse respondents should bear the burden imposed upon them of storing goods which they might not wish to store any more, and for which they have no guarantee of payment

(Huayou not having tendered payment).

[29] Huayou countered this criticism by referring (in its replying affidavit) to Gerards's "Points of Defence and Counterclaim" filed in the LME arbitration proceedings on 23 August 2017, where Gerard seeks inter alia the following award:

"An order that the Claimant (applicant in these proceedings) indemnify the Respondent (the third respondent in these proceedings) in respect of ... any losses which the Respondent has suffered by reason of the commencement of the South African proceedings."

[30] The question whether Huayou should be held liable for any damages allegedly suffered by Gerard as a result of the interim interdict, Huayou argues, is accordingly an issue raised in the LME Arbitration proceedings and falls to be decided by the arbitration

tribunal. This fails to have regard to the fact that the first and second respondents are not parties to the arbitration proceedings and only holds good for as long as Gerard honours its contractual obligations to the first and second respondents but as soon as Gerard contends that the first and second respondents are not detaining the goods at the instance of Gerard but rather by virtue of a court order, the first and second respondents' position would change detrimentally.

[31] Huayou's founding affidavit contains no undertaking that it would pay Gerald (or the first and second respondents) such damages as they may suffer as a result of the rule nisi being set aside and/or as a result of Huayou failing in the arbitration proceedings before the LME. This constitutes a ground for discharging the order because it tilts the balance of convenience against the Huayou.[7]

[32] In *The Law and Practice of Interdicts* by Prest (published in 1996), at p114 it is stated:

"Undertaking by plaintiff in damages and expenses:

The undertaking in damages is a normal prerequisite for interim relief which affects a defendant. It will normally be required from the plaintiff who obtains a Mareva injunction.

Where the injunction affects third parties, the plaintiff will normally be obliged to undertake as a term of the order to indemnify any third party against the costs and expenses reasonably incurred by the third party in seeking to comply with the order as well as all liabilities which may flow from such compliance." [8] (own emphasis)

[33] It has also become a practice in ex parte applications for attachments pendent lite that the applicant provide security for costs and damages which may be awarded to the respondents. [9]

[34] Here an undertaking ought to have been offered and made part of the order because -

34.1. Huayou has no (even alleged) claim against the first and second respondents;

34.2. Huayou is a foreigner with no assets within South Africa;

34.3. the dispute between Huayou and Gerald is subject to an arbitration in a foreign country before the LME, based in London.

[35] Although this court has jurisdiction to hear the matter against the first and second respondents, no cause of action is made out against them and the rule falls to be discharged on this basis too.

STRIKE OUT APPLICATION AND SUPPLEMENTARY AFFIDAVIT

[36] By virtue of my findings herein, it has become unnecessary to deal with either the strike out application or the supplementary affidavit.

[37] The respondents opposed the introduction of a supplementary affidavit to which they had filed an opposing affidavit but no replying affidavit to that had been filed. Huayou argued that the supplementary affidavit should be received as the content is relevant to the status of the NNR directives. By virtue of the approach I have taken to the matter, I hold the view that the status of the directives is not relevant to these proceedings and thus do not deem it necessary to consider this issue any further.

[38] The strike out application relates largely to new matter, the respondents contend, is contained in the replying affidavit. This new matter includes the opinion of Mr Hancock. I have only had regard to his opinion to demonstrate how complex the issue of specific performance in the law of contract in the UK is. Respondents further contended that Huayou disavowed reliance on its replying affidavit in its opening address at the hearing of this matter. Whether or not this in fact occurred, and if so, to what extent, need not be decided as, in reaching my conclusion, I had regard, in the main in respect of Huayou's case, to that which was contained in Huayou's founding affidavit only.

ORDER

[39] I accordingly grant the following order:

The rule granted on 18 May 2017 is discharged and the application is dismissed with costs including the costs consequent upon the

appointment of two counsel and the costs of qualifying (preparation) of respondents' expert, Mr Schaff QC.

I OPPERMAN

Judge of the High Court

Gauteng Division, Johannesburg

Heard: 17 October 2017

Judgment

delivered: October 2017

Appearances:

For Applicant: Adv C. Badenhorst SC

Adv M. Williams

Instructed by: Attorneys: Werksmans Attorneys

For First to Third Respondent: Adv J. Campbell SC

Adv B. Maselle

Instructed by: Bowman Gilfillan

For Fourth Respondent: No Appearance

[1] 2015 (1) SA 345 (SCA)

[2]

[2001] ZACC 8; 2002

(2) SA 715 (CC) at 730H – 731B.

[3] 1979 (4) SA 342 (W) , at 352C-D

[4] 2005 (5) SA 62 (SCA) at 89A-G

[5] SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle 1955 (3) SA 541 (N) at pp 542H – 543B RM Van de Ghinste and Co (Pty) Ltd v Van de Ghinste 1980 (1) SA 250 (C) at p 256 E-G Sandown Travel (Pty) Ltd v Cricket SA 2013 (2) SA 502 (GSJ) at para 62

[6] Hoffman (supra)

[7] Hix Networking Technologies v System Publishers (Pty) Ltd

[1996] ZASCA 107; 1997 (1) SA 391 (AD) at p 403 D-F

[8] Z Limited v A and Others [1982] 1 All ER 556 (CA) at 565J-566B and 572J-573A; Allen and Others v Jambo Holdings and Others

[1980] 2 All ER 502 (CA) at 505D-F.

[8] Z Limited v A and Others [1982] 1 All ER 556 (CA) at 565J-566B and 572J-573A;

Allen and Others v Jambo Holdings and Others

[1980] 2 All ER 502 (CA) at 505D-F.

[9] Roamer Watch Co. SA v African Textile Distributors 1980 (2) 254 (W), at 260H-261A.

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