

SOUTH AFRICA / JUDGMENT

Zipro Mineral Processing (Pty) Ltd v Coal Giant (Pty) Limited (436/2017) [2017] ZAGPPHC 818 (20 December 2017) [2017] ZAGPPHC 818

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi

CASE / FILE NUMBER

436/2017

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IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MIDDLEBURG]

CASE NUMBER 436/2017

ZIPRO MINERAL PROCESSING (PTY) LTD

APPLICANT

And

COAL GIANT (PTY) LIMITED

RESPONDENT

JUDGMENT

LEGODI J,

[1] Payment of an amount of R130 000.00 in total made to one Mr Mnisi, a director of the respondent, Coal Giant (Pty) Ltd on 21 December 2016, 23 December 2016 and 31 December 2016 resulted in the respondent having to cancel an agreement of sale of coal to the Zipro Mineral Processing (Pty) Limited (the applicant). Subsequent to the cancellation aforesaid, the applicant on 10 March 2017 launched the present application in terms of which it sought relief framed as follows:

"1. Pending the outcome of an action to be instituted by the applicant against the respondent within 30 days from date of an order in terms hereof, that the respondent be directed:

1.1 To grant access to the applicant and/or the applicant's representative to the mine and its adjacent facilities.

1.2 To allow the applicant and/or the applicant's representative to view general operations, witness sampling and analysis procedures, view stockpiles, and monitor daily procedures and operations at the mine.

1.3 To henceforth sell and deliver coal to the applicant and/or the applicant's representative against pre-payment therefore in terms of Schedule 3A to the applicable agreement.

2. Directing the respondent to pay the costs of this application."

[2] The applicant is effectively asking for the implementation of the agreement which is due to expire on 31 December 2018 pending

institution of action proceedings contemplated in paragraph 1 of the notice of motion referred to above.

[3] The respondent sees payment of money to Mr Mnisi, a director of the respondent as a serious breach of fiduciary relationship that makes impossible to continue with a relationship in terms of which the respondent is compelled to sell coal to the applicant at a discounted amount.

[4] The background to the payment is articulated by the respondent and is summed up as follows: That the applicant's deponent dishonestly and corruptly paid a director of the respondent. That the deponent was attempting to convince the director, Mr Mnisi to support an attempt to buy out the respondent at a nominal value. The respondent is said to have tried to explain its conduct by stating that Mr Mnisi needed the money in the sum of R130 000.00 to return from East London. You really do not need such an amount of money to return from East London, but I pass no final judgment in this regard.

[5] The respondent describes the conduct of the applicant as follows:

"1.11.3 The above conduct is clearly a material breach of good faith required between contacting parties. It is clear from the founding affidavit that the applicant's version is that "the whole idea between the relationship

between the respondent, the applicant and Mercuria was to ensure that the mine got established and be successful, as all parties would benefit". The conduct is clearly a repudiation, which the respondent accepted and lawfully cancelled the agreement."

[6] The applicant is asking for an interlocutory interdict. Therefore, this is an interlocutory application which seeks to restore the status quo. It is designed to provisionally protect the rights of the complaining party pending an action to be brought to establish the respective rights of the parties[1]. It does not involve a final determination of the rights of the parties and does not affect such

determination[2]. Its purpose is to freeze the position until the court decides where the right lies[3], at which point it ceases to exist. It is aimed at ensuring, as far as it is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief at a later stage.

- [7] The rights which the applicant seeks to protect is to challenge the cancellation of the agreement and demand performance in accordance with the terms and conditions of the agreement. In the course of oral argument counsel for the respondent elected to confine himself to the conduct of the applicant regarding payment of money to the director of the respondent which is seen by the respondent as articulated in paragraph [5] of this judgment.
- [8] Where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make a secret profit at the other's expense or place oneself in a position where his interest conflict his duty. The principle underlies an important field of legal relationship... It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own properly; if employed to sell, he cannot buy his own properly, nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transaction can be validated, and that is by the free consent of principal following a full disclosure by the agent. It is nowhere laid down that ... there can be no fiduciary relationship to set in the remedy without agency[4]. The defences open to a fiduciary who breaches his trust are very limited. Only the free consent of the principal with full disclosure

will suffice[5]. Because the fiduciary who acquires for himself is deemed to have acquired for the trust, once proof a breach of a fiduciary duty is adduced, it is of no relevance inter alia; (a) that the trust has suffered no costs or damages[6], (b) that there is no privacy between the principal and the party with whom the agent or servant is employed to contract business and that the money would not have gone into the principal's hands in the first instance[7]. (c) that it was not part of the fiduciary's duty to obtain the benefit for the trust[8], in the instant case for example, that it was not part of the fiduciary duty with the respondent for Mr Mnisi to obtain R130 000.00 from the applicant, (d) that the fiduciary (in this case, Mr Mnisi, the director) acted honestly and reasonably.

- [10] The point I am making is this: It is common cause that the applicant and respondent has contractual relationship with each other, that the said Mr Mnisi is a director of the respondent and that money was paid on more than two occasions to Mr Mnisi by the applicant without full disclosure by either Mr Mnisi or the applicant to the respondent. Prima facie, this constituted a conflict and breach of fiduciary relationship which not only Mr Mnisi owes it to the respondent, but also a duty of good faith which the applicant owes to the respondent seen also in the context of the motive behind the money paid to Mr Mnisi as alluded to by the respondent. As I said, this prima facie

evidence should be found to amount to a breach of duty of trust which entitles this court to refuse the granting of interlocutory interdict.

[11] I should be careful not to be understood as making a final determination. The point is that the applicant should be found to have failed in establishing prima facie the requirements for interlocutory interdict.

Case management of the contemplated action proceedings

[12] When this matter was argued on 27 November 2017 I indicated to the parties that the court intends to case manage the action proceedings aforesaid. For this purpose, it was proposed as follows:

- (i) The applicant to deliver its summons by Monday the 27th of November 2017.
- (ii) The respondent to file its plea and counterclaim (if any) by the 13th of December 2017.
- (iii) The applicant to serve and file its response (if any) within 10 court days thereafter.
- (iv) The parties are to complete discovery procedures in accordance with the applicable Rules by the 22nd of January 2018.
- (v) The parties are to hold a pre-trial conference before the 31st of January 2018.
- (vi) The parties are available for trial in the weeks of the 12th of March 2018 and the 19th of March 2018.

[13] Consequently an order is hereby made as follows:

13.1 The application is hereby dismissed with costs.

13.2 The contemplated action proceedings is hereby set down for hearing on 12 March 2018 and parties are hereby directed to comply with all time-frames set out in paragraph[11] above.

M F LEGODI

JUDGE OF THE HIGH COURT

DATE OF HEARING: 21 NOVEMBER 2017

DATE OF JUDGMENT: 20 DECEMBER 2017

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REF: S8336

- [1] Airoad Express (Pty) Ltd v Chairman Local Road Transportation Board Durban 1986 (2) SA663 (A) at 681 D-F
- [2] Pikoli v President of Republic of South Africa 2010 (1) SA 400 (GNA) at 403 H
- [3] Jordaan v Penmill Investments CC 1991(2) SA 430 (E) at 438F
- [4] Robinson v Randfontein Estates Gold Mining Co Ltd 1921AD 168 AT 177 180, Eric M Phillips v Fieldstone Africa (Pty) Ltd & another ZASCA (28 November 2003 at para 30
- [5] See Robinson supra, see also Eric M Phillips supra at para 31
- [6] Regal (Hastings) v Gulliver AT (1967)
- [7] Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 (HD 339 at 367
- [8] See Regal (Hastings) supra at 386A; 392D; see also Eric M Phillips supra at para 31

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