


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED YES
05/02/2020	
DATE	SIGNATURE

CASE NO: 79954/2018

In the matter between:

RONHOLD INVESTMENTS (PTY) LTD

APPLICANT

And

MIRANDA COAL (PTY) LTD

FIRST RESPONDENT

SIAFA RESOURCES (PTY) LTD

SECOND RESPONDENT

ALCHEMY VENTURES (PTY) LTD

THIRD RESPONDENT

ABHOU INVESTMENTS (PTY) LTD

FOURTH RESPONDENT

ABDUL SAMAD SHAIK EBRAHIM

FIFTH RESPONDENT

JUDGMENT

COLLIS J:

[1] In the present application the applicant seeks relief in its notice of motion in two parts. In Part A the relief sought is for an interim interdict prohibiting the respondents from *inter alia* alienating a right of first refusal, in respect of the coal reserves at the first respondent's mine.

[2] Following the institution of the application, the parties agreed to present a draft order to the court.¹ This draft order was made an order of court and it disposed of Part A of the application.

[3] Part B of the application is the part that this court is now seized with. In this part the applicant is requesting that the first and second respondents be ordered to issue 40 % shares in the first respondent to the applicant, alternatively an order is sought to place the first respondent under provisional liquidation in the hands of the Master.²

[4] At the hearing of the application the applicant requested that the court having regard to the nature of the respondents' disputes, should refer the matter for oral evidence in respect of the following:

4.1 that oral evidence be heard on the issue of the applicant's shareholding;
and

4.2 pending the hearing of oral evidence, that a suitably qualified independent third party be appointed (such as a chartered accountant or senior business

¹ Court order Khumalo J dated 20 November 2018 p 233

² Notice of Motion p 1-10

practitioner) be appointed as a director to Miranda Coal under section 163(2) (f) of the Companies Act, 2008 to ensure that there is no attempt to jeopardize the business or assets of Miranda Coal in the intervening period.

[5] The respondents oppose the request for referral for oral evidence principally on three grounds:

5.1 there is an interim order that was granted with without prejudice to the respondents' rights which is severely prejudicial to the commencement of the business by the first respondent.

5.2 the applicant knew that there was a material dispute of fact before having instituted the proceedings.

5.3 the applicant's should have applied for a referral *in limine* as soon as it received the answering affidavit instead of filing a comprehensive replying affidavit and heads of argument. It is on this basis that the respondents opposes the request for a referral to oral evidence and submitted that same should be refused.

[6] In the present instance it would be apposite to have a look at the provisions of Uniform Rule 6(5) (g), which provides as follows:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such an order as it deems fit with a view of ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[7] If material facts are in dispute and the applicant did not request that a matter be referred for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.

[8] Furthermore, the Supreme Court of Appeal has cautioned that a court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent only on delay or intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one.

[9] In resolving to refer a matter for oral evidence a court has a wide discretion,³ and the court will, to a large extent, be guided by the prospects of *viva voce* evidence tipping the balance in favour of the applicant.

[10] In every case the court must examine an alleged dispute of fact and determine whether in truth there is a real⁴ dispute of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.

[11] In the present matter the principles regarding referral for oral evidence as espoused in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co. (Pty) Ltd*⁵ per Colman J are relevant, namely:

“My conclusion rests upon my experience, and the experience of others before me, that shows that an assertion or a denial which seems very probable or

³ *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10A-D

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I

⁵ 1971 (2) SA 388 (WLD) at p 390F-H

improbable on a reading of a set of affidavits often takes on a different colour when the veracity of the person which has made it is tested by cross-examination. There is the rare case of course, in which a disputed statement made on affidavit is so manifestly untrue, or so grossly improbable and unconvincing that the court is justified in disregarding it without recourse to oral evidence. But I cannot say that Mr. Rowe's assertions on the point in dispute fall into one of those categories. They fall rather into the class of assertions which, although apparently improbable, might be accepted after an oral hearing."

[12] It is trite that the party seeking to refer a matter for oral evidence or trial because of the presence of a dispute of fact, must do so *in limine* having made his or her election earlier on.⁶ The reason is simple: litigants should not be mulcted in wasteful costs of further papers and heads of arguments and a hearing, only for another litigant to request a referral for oral evidence in the end.

[13] In *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and Another and Four Related Applications* 2014 (1) SA 141 (WCC) Louw J held as follows:

"A court will, however permit an applicant to apply in the alternative, in exceptional circumstances for the matter to be referred to oral evidence should the main argument on the merits fail, which is what I understand the request to be in this case."

[14] Now, at the heart of the matter is whether the applicant is entitled to a transfer of 40% shares in the first respondent. In this regard the applicant relies on a Memorandum of Understanding ("MOU") signed on 31 May 2017.⁷

⁶ *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 981; *Du Plessis and Another NNO v Rolfes Ltd* 1997 (2) SA 354 (A) at 366-367.

⁷ Founding Affidavit para 7.11 p21

[15] The material terms of the MOU relevant to the application are the following:

“15.1 the shares would have been bought for R8 million, which was to be paid by SIAFA.

15.2 Nel, in his personal capacity, or on behalf of a legal entity, would acquire Holdings Loan account in Miranda Coal in the amount of R 60 million.

15.3 the shareholding in Miranda Coal was recorded as follows, namely SIAFA would retain 51% of the shares, the applicant would be issued with 40% of the shares and Blue Chip (Alchemy) would retain 9% of the shares.”⁸

[16] The MOU was signed by Nel, Shaik and Gani on behalf of the applicant, SIAFA and Blue Chip respectively.

[17] The MOU had the following suspensive conditions:

“1. The sum of R 8 000 000.00 (Eight Million Rand) to be paid by SIAFA to Miranda Mineral Holdings Limited attorneys trust account.

2. The attorneys will hold the funds strictly for the account of SIAFA together with interest accrued.

3. That the due diligence is completed and accepted by the future shareholding of Miranda Coal Proprietary Limited.

4. The transfer of the shares into the respective parties names as detailed in clause 1 above.

5. By no later than 3 calendar months after the Signature Date, the Parties

⁸ Founding Affidavit para 7.12 p21

conclude the Principal Agreements (as defined in clause 4 below)."⁹

[18] The MOU expressly states that:

"The conclusion of the proposed transaction is subject to the fulfillment of the conditions precedent..."¹⁰

[19] Clause 4 of the MOU further provides that:

"Pursuant to Condition Precedent 5, the Parties shall in good faith cooperate and use their commercially reasonable endeavours to negotiate and execute the following binding definitive agreement:

A shareholder's agreement or a memorandum of understanding between shareholders to govern the parties relationship as shareholders in Miranda Coal Propriety Limited and the repayment of shareholder loans and other provisions usually incorporated in a shareholders' agreement for such joint venture company;

The above agreements together with any other agreements required to implement the Proposed Transaction shall collectively be referred to herein as the '**Principal Agreements**'."

[20] In answer to the allegations made by the applicant, the first, second and fourth respondents specifically admitted the allegations insofar as they accord with the tripartite agreement including the MOU.¹¹

⁹ MOU p 93

¹⁰ MOU p 93 clause 2

¹¹ Answering Affidavit para 53 p 325

[21] The applicant in paragraph 7.18 further alleges the following:

‘There were various addendums to the agreement, altering the effective date. The main reason for this was that Miranda Holdings was in the process of cleaning up its affairs and arranging for shareholders consent for the agreement of sale. This consent, at a general meeting of shareholders was obtained on 14 August 2018 and when the approval was obtained the sale became effective. All other conditions precedent of the sale were complied with and the purchase consideration for the shares was duly paid by SIAFA to the seller and applicant also paid for the assignment of the sale claim as referred to above.’¹²

[22] The above allegations made by the applicant were admitted by the respondent.¹³

[23] Only once SIAFA became the lawful owner of the shares in the first respondent, could SIAFA transfer 40% thereof to the applicant in accordance with the MOU.¹⁴

[24] In reply thereto, the respondents allege that the structure as mentioned above was deliberate, and forms the core contextual basis for the interpretation of the MOU. If it was contended that the applicant would acquire the 40% shareholding unconditionally, it would simply have been easier to transfer the shares directly to Ronhold from Holdings.¹⁵

[25] On 5 September 2018, a management meeting was convened in Miranda Coal. This meeting was recorded by Shaik. He, at the outset, indicated that he requested that Nel be appointed as a director on the basis that he is a shareholder of at least 40% of the shares. Nel as representative of a shareholder in Miranda Coal was entitled

¹² Founding Affidavit para 7.18 p 24

¹³ Answering Affidavit para 57 p 326

¹⁴ Founding Affidavit para 9.1 p 25

¹⁵ Answering Affidavit para 59 p 327

to nominate a director to that company board.¹⁶ The minutes of this meeting which was compiled by Mr. Shaik, reflected that Shaik recognized the applicant as a *de facto* shareholder of Miranda Coal.¹⁷

[26] The respondents deny that the applicant became a shareholder and their denial is premised on the tripartite agreement having failed.¹⁸ In addition to this the respondents further allege that these agreements were put in place in anticipation that the suspensive conditions would be fulfilled and the warranties honoured. None of these materialized. These discussions were in any event in the course of settlement discussions, because, already at the outset there was a dispute, Ronhold was claiming its shares unconditionally whilst SIAFA was unequivocally disputing that right.¹⁹

[27] In answer to this the applicant alleges that there is simply no basis for the applicant to claim 40% shares on any basis other than an unconditional basis.²⁰

[28] Considering what has been extrapolated from the affidavits as set out above, it is clear that a material dispute of fact between the parties exists on the issue of the applicant's shareholding and that a decision on this aspect will first have to be determined with the aid of oral evidence before any other relief could be considered.

ORDER

[29] Consequently, the following order is made:

29.1 The application is postponed *sine die*.

29.2 The order granted on 20 November 2018 by the Honourable Justice Khumalo will

¹⁶ Founding Affidavit para 9.3 p 27

¹⁷ Founding Affidavit para 9.3 p 26 & Annexure "RN 9"

¹⁸ Answering Affidavit para 61 p 328

¹⁹ Answering Affidavit para 64 p 329

²⁰ Replying Affidavit para 11 p 380

remain in force until the matter has been finally determined, alternatively until the Court orders otherwise.

29.3 The application is referred for the hearing of oral evidence, at a time and on a date to be allocated by the Registrar, on the following questions:

29.3.1 The issue of the applicant's entitlement to shares in the first respondent;

29.3.2 The issue of the applicant's loan account in the first respondent;

29.4 Once this dispute has been resolved by oral evidence, the case will be determined on the basis of that finding together with the affidavit evidence that is not in dispute.

29.5 Costs, of this application is reserved and to be determined by the court hearing the oral evidence.



COLLIS J

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

Appearances:

For the Applicant: Adv. S.J. VAN RENSBURG SC

Attorney of the Applicant: TINTINGERS INC

For the Respondents: Adv. G.M. AMEER SC

Attorney for the Respondent: ZAKARIYYA AREINGTON ATTORNEY

Date of Hearing: 03 June 2019

Date of Judgement: 05 February 2020