IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number :
191905/20

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 10 September 2020 SIGNATURE:……..

IN THE MATTER BETWEEN:

BASSANI MINING (PTY) LTD	Applicant
and	
SEBOSAT (PTY) LTD	First Respondent
MASHALA RESOURCES (PTY) LTD	Second Respondent
HERMAN, KURT	Third Respondent
ANDERSON, ANDREA AVRIL	Fourth Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] The applicant ("Bassani") seeks leave to appeal the whole judgment of this court (save for the paragraphs 2 to 5 relating to urgency), delivered on 21 August 2020, in which its application for urgent interim relief *pendente lite* in the form of an anti-dissipation interdict was refused. The respondents ("Mashaba", "Herman" and "Sebosat") oppose the application.

[2] Section 17(1)(a) of the Superior Courts Act 10 of 2013 sets out the test for granting leave to appeal as being whether the appeal would have reasonable prospects of success, or whether there is some other compelling reason why the appeal should be heard. Respondents' submit that there is no reasonable prospect that another court would come to a different conclusion on any of the grounds of appeal raised by the applicant, nor is there a compelling reason why it should be heard.

Grounds of appeal

The Court erred in applying the test as being "intention to thwart" the applicant's pending damages claim

[3] Mr Eyles SC, appearing for the applicant, submitted that insofar as the Court found that *"intention to thwart"* the applicant's claim in the pending action to be instituted was a requirement for granting of an interdict, this did not take account of the lower threshold that the conduct of the respondents would leave it with a hollow judgment. Whilst the Court correctly referred to the test set out by Van der Linde J in *Carsten v Kullman,*[1] it then erred in failing to recognise the principles set out in paragraph 25 and footnote 6 of the judgment (as recognised in the relevant passages of *Knox D'Arcy Ltd v Jamieson and Others* [2] and as described in the passage from Herbstein and Van Winsen quoted in the judgment).

[1] 2018 JDR 0018 (GJ) at [33].
[2] (1996) 4 SA 348 (A) at 372G.

[4] Counsel submitted that at paragraph [25] Van der Linde J (footnotes excluded) clearly posited a lower threshold when he determined that in order for the applicants to *"succeed in obtaining the interdict they seek, the question is whether the applicants have made out a case that the respondents are dissipating their assets thereby intending to procure the result of a hollow judgment. Some authorities*[3] *have set a lower bar in this latter regard; if the effect of the respondents' conduct would be a hollow judgment, that would of itself be sufficient."*

[5] In failing to apply the lower threshold, Mr Eyles submitted, the Court erred in finding that Bassani had to show that the dispositions were made with the "*intention to thwart*" its pending damages claim. In circumstances (such as *in casu*, where the respondents are *mala fide*), Bassani submits that it is not a prerequisite to relief to establish an intention on the part of the respondent to frustrate an anticipated judgment, if the conduct of the respondent is likely to result in a hollow judgment. (Counsel's emphasis).

[6] As a result, the Court erred in failing to take into account that the conduct of the respondents fell into the category of "*exceptional cases"* referred to in the following paragraph in *Knox D'Arcy* [4] :
"*The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, i.e. that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases."* (Counsel's emphasis).

[7] The reference to "*exceptional cases*" in the judgment of Stegman J [5] on appeal in the passage quoted by Grosskopf JA, Mr Eyles submitted, makes it clear that that intention is not relevant, in particular when *mala fides* are

[3] Reference to authorities is to the paragraph in Herbstein and Van Winsen also quoted in the court's judgment.
[4] Ibid.
[5] (1995) 2 SA 579 (W).

alleged, as is in the present case. The above authorities dealt with instances where the anti-dissipation interdict was sought in circumstances of *bona fide* conduct. In *Knox D'Arcy* the interdict was sought where the respondent was in good faith [6] disposing of its assets, but the possibility of "*exceptional circumstances"* arises in relation to alleged *mala fide* conduct.

[8] Mr Eyles submitted that this Court ignored the fact that the respondents were committing a fraud upon it, and had as a result structured their affairs so as to leave it with a hollow judgment in its anticipated claim for damages. As a result the Court erred in finding that:

8.1 Bassani had not proven that there is a real risk that the respondents will take every step in the intervening period before the damages claim is heard, to dissipate and/or diminish their assets in order to avoid the efficacy of a court order and to leave it with a hollow judgment should it succeed; and

8.2 Bassani had not met the second threshold requirement in *Knox D'Arcy* [7] for obtaining an anti-dissipation interdict) and its application fell to be dismissed.

[9] Mr Eyles submitted that the Court ought to have found (at least on a *prima facie* basis) that the respondents had planned their affairs and structured their businesses in such a way that the effect will be that Bassani will be left with a hollow judgment. This finding should have been made for the following reasons:

9.1 The Court's finding (albeit *prima facie*) that there is substance to Bassani's damages claim against Herman and/or Sebosat arising out of an alleged fraud;

9.2 That Mashala was mining illegally;

9.3 That there was a pattern of conduct on the part of the respondents to use shelf companies and to interpose them between subcontractors and

[6] Groskopff JA at 373 E.
[7] Ibid at para [22].

Mashala to protect assets against the execution of a judgment; and

9.4 That there was a misuse or abuse of the distinction between Sebosat and Mashala by Herman, which misuse or abuse resulted in an unfair advantage to Mashala.

The Court erred in concluding that relief sought should be limited to coal mined by Bassani.

[10] Bassani submits that the Court erred in finding that it was common cause, or not in dispute that *"the coal is being mined by Sebosat and Mashala and disposed of in the ordinary course of business".* [8] The Court ought to have found that the disposal of the coal was part of the respondents' planning their affairs and structuring their business to protect assets against the execution of a judgment and leave Bassani with a hollow judgment. Mr Eyles submitted that in any event the meaning of "*ordinary course of business"* in this context is not clear.

[11] Mr Eyles emphasised that the relief sought by the applicant (and as stated in the notice of motion) is not limited to coal that it had mined. This was recognised in the Court's judgment at paragraphs 21 and 22. If regard is had to the founding affidavit [9] it is clear that the assets being referred to are minerals i.e. the coal already mined. The respondents are opportunistic in disputing this when they themselves make reference in their answering affidavit *inter alia* to "*coal"* and to "*coal mined".* Moreover, they do not deny that there is coal to the value of R 25 million on the mine, or that coal is on a daily basis leaving the mine and being sold.

The Court erred in finding that it was not required to make a finding on fraud

[12] Mr Eyles submitted that the Court erred in finding that it was not required to decide whether the respondents were in fact committing a fraud on

[8] At para [20].
[9] Paragraphs [67] and [68].

Bassani or whether Mashala was mining illegally. The Court should also have dealt with the issue of whether there is pattern of conduct by Herman to use shelf companies and interpose them between the subcontractor and Mashala to protect Mashala's assets, and whether there is a practice to use various contractors (i.e. Lateozest, Tamosys and Sebosat) as a front which is then allowed to be liquidated, thus protecting Mashala as owner of the coal. The Court further erred in failing to deal with the question whether Herman had abused the corporate personalities of Sebosat and Mashala in such a way that the respondents, including Mashala, had obtained an undue advantage. Counsel submitted that the Court ought to have dealt with these issues, on the basis as required in an application for an interim interdict, so as to determine whether the respondents had planned their affairs and structured their businesses in such a way that the effect would be that Bassani will be left with a hollow judgment.

[13] It would follow, having dealt with these issues, that the Court should have found that:

13.1 The respondents had committed a fraud on Bassani;

13.2 Mashala was mining illegally;

13.3 There was a pattern of conduct on the part of the respondents to use shelf companies and to interpose them between subcontractor and Mashala to protect assets against the execution of a judgment;

13.4 The respondents did so structure their affairs and used various contractors as a front to protect Mashala as the owner of the coal; and

13.5 There was a misuse or abuse of the distinction between Sebosat and Mashala by Herman, which misuse or abuse resulted in an undue advantage to Mashala.

[14] The Court furthermore, counsel submitted, failed to have regard to the misrepresentation in clauses 17 and 18 of the Subcontract Agreement. The

Court should also have accepted the evidence of what had occurred between Lateozest with the contractor Close Up Mining (Pty) Ltd, since this is uncontested.

The Court erred in finding that the coal was being disposed of in the ordinary course of business

[15] Mr Eyles submitted that the respondents do not dispute the terms of the Subcontract Agreement between Basani and Sebosat, nor do they dispute the structures put in place pursuant to the three subcontracts (Lateozest, Tamosys and Sebosat). This could never constitute conducting business in the ordinary course for the following reasons:

15.1 The preamble to the Sebosat Subcontract Agreement is incorrect when it refers to the "Contractor" concluding a main agreement with Mashala, as it is only the business rescue practitioners who could have approved such an agreement. This constitutes misrepresentation of the mining right.

15.2 Clause 17 provides that ownership of the coal mined by Bassani remains the property of the "Contractor", i.e. Sebosat, but this contradicts the allegation by the respondents that the coal in fact belongs to Mashala. This establishes the fraud that was committed.

15.3 Clause 18 provides that notwithstanding ownership remaining with Contractor, the mined minerals shall be used to provide security for the Subcontractor for any amounts due by the Contractor. The Contractor does not own the minerals and this is a misrepresentation.

15.4 Clause 36 makes provision for representations and warranties in regard to authorisation and powers and these are likewise based on misrepresentations.

Respondents' submissions

[16] Mr Cassim SC, appearing for the respondents, submitted that the Court fully analysed the facts and law in reaching a decision. In responding to the merits of the appeal (I deal with counsel's introductory point on mootness below), counsel denied that the respondents were opportunistic in referring to the relief being sought as being limited to coal mined by Bassani. This appears from the founding affidavit (at paragraph 8) where the applicant states that the relief it seeks is: "*first, an interim interdict pendente lite to restrain the respondents from concealing or dissipating assets (i.e. coal that was mined by Bassani) pending the outcome of an action for damages against them; and secondly, the return of certain equipment which belongs to Bassani".*

[17] Furthermore, in their answering affidavit, the respondents aver that coal mined by Bassani during March, April and May 2020 had already been sold in their entirety. This was in keeping with the intention of the parties as reflected in the Subcontract Agreement that the coal mined would be sold as soon as possible and hence there is no longer coal that was mined by Bassani on the property or in possession of Sebosat and Mashala. These facts was never refuted by the applicant. Mr Cassim submitted in these circumstances that, properly construed, the applicant pursued this application because it was seeking security for its future claim for damages. It was pursued *in terroram* and correctly dismissed as not meeting the essential requirements for an anti-dissipation interdict. The Court, he submitted, properly had regard to this feature in paragraph 7 of the judgment.

[18] In regard to the ground of appeal that that applicant need not show an intention to defeat the claims of creditors if it was shown that the conduct of respondents was likely to result in a hollow judgment, Mr Cassim submitted that the reference to "*exceptional circumstances*" in *Knox D'Arcy* does not create a definite and clear exception to the requirement of intention. It merely suggests that this is a possibility in certain instances. This Court correctly summed up the requirements for the anti-dissipation interdict in paragraphs 6-9 of the judgment and concluded that, on the facts of this case, the applicant had to show that the dispositions being complained of are being done with the

intention "*of thwarting"* applicant's pending damages claims. In the circumstances the Court correctly concluded that *"[t]here is no evidence that Mashala and Sebosat are arranging their assets or disposing of coal with the intention of defeating its claim".*

[19] Mr Cassim referred to the authority of *Carmel Trading v Commissioner for the South African Revenue Services and Others* [10]where the Supreme Court of Appeal confirmed the requirements for an anti-dissipation order as follows: " *[3] Such an order, which interdicts a respondent from disposing of or dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order the applicant has to satisfy the court that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors."* Harms ADP further held in regard to the anti-dissipation order granted in the court *a quo*, that " *[i]mportantly, the order does not create a preference for the applicant to the property interdicted."*

[20] Mr Cassim also referred to *Investec Employee Benefits v Electrical Industry KwaZulu Natal Pension Fund & Others* [11] where the court declined to develop the law to include a lower threshold in the following terms:

"[121] The main thrust of the argument advanced on behalf of the interdicting parties is that the law should be developed so that an applicant is entitled to an asset-preservation order where it is demonstrated that the respondent is disposing of property in a way that will defeat the applicant's right to levy execution upon it. It is submitted that what should be of paramount importance is the effect of the conduct, namely whether the likely effect of the conduct will be to leave the respondent with insufficient assets to satisfy the judgment that the applicant hopes to obtain. It is submitted that this court has the inherent power to develop the law, as well as the statutory power to do so in terms of s 173 of the Constitution.

[122] In support of their argument for the development of the law, counsel for

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[10] (447/07) [2007] ZASCA 160; [2007] SCA 160 (RSA); [2008] 2 All SA 125 (SCA); 2008 (2) SA 433 (SCA) (29 November 2007) at 3.
[11] SA 2010 (1) 446 (W).

the interdicting parties referred to English and Australian law. They referred to Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH [1984] 1 All ER 398; Ketchum International plc v Group Public Relations Holdings Ltd and Others [1996] 4 All ER 374; Derby & Co Ltd and Others v Weldon and Others D (No 2) [1989] 1 All ER 1002 (CA); Dixon & Webster v Liddy [2002] SADC 143; and Jackson v Sterling Industries Ltd (1987) 162 CLR 612.

[123] No point would be served in dealing with these judgments in any detail. The applicable law in South Africa was reinstated by the Supreme Court of Appeal as recently as November 2007. In the short space of time that has elapsed since then, it is inconceivable that the law would require development of the kind suggested by the interdicting parties. Moreover, the relief sought makes substantial inroads into the rights of a party to deal with his or her assets as he or she deems fit, in circumstances where it may well be established that the applicant for the relief is not entitled to any award at all from the party against whom the award was made. In circumstances such as these, potentially irreversible and prejudicial consequences can be caused to the party against whom the order is made. In these circumstances the interdicting parties' invitation to develop the law in the manner suggested must be declined."

[21] On these authorities Mr Cassim submitted that the applicant did not demonstrate "*exceptional circumstan*ces" nor did it demonstrate any grounds for the Court to have found that the requirement of intention should be departed from. In this regard he submitted it is significant that the applicant does not dispute that the coal currently being disposed of belongs to Mashala, and that it is being disposed of by Mashala and Sebosat in the ordinary course of business and that value is received for such disposition. Whilst it contends that this Court erred in making the finding that this was common cause or at least not disputed, this allegation is uncontroverted on the papers. There is moreover no suggestion, nor was any factual basis pleaded, that the coal and/or proceeds derived from the sale of the coal, were being spirited away and/or concealed.

[22] In regard to the applicant's grounds of appeal related to the Court's failure to make findings on fraud, illegality and abuse of corporate entities, Mr Cassim submitted that Bassani was never mistaken on its rights or role. The Subcontract Agreement clearly records that the parties to the agreement means "the Contractor", which is Sebosat, and the "Subcontractor", which is the applicant. The applicant could never have been induced to contract by any misrepresentation that it would have a right of recourse against Mashala at the time of concluding the Subcontract Agreement. Herman explained in his answering affidavit that Sebosat was formed as a special purpose vehicle through which a subcontractor would be appointed to perform mining operations at the mine. The reason for structuring the affairs in this way was to ensure that the risks associated with the operations do not fall in one specific entity but in several entities established for that purposes. This explains why Sebosat and not Mashala appointed it as a subcontractor. Moreover, clause 16.5 of the Subcontract Agreement stipulated that for the first three months, Bassani would only be entitled to payment of its invoices against receipt by Sebosat of payment from its clients. In other words, the coal mined by Basani would be sold, and Sebosat would use the capital obtained from the sale to pay it. The respondents explained that this clause was inserted to allow Sebosat sufficient cash flow from its operations. This was never disputed by Bassani, and in fact this allegation was never addressed at all. The use of the words " *to the extent that such ownership is allowed by the MPRDA..."* in clause 17 of the Subcontract Agreement excludes an unqualified right of ownership of the coal in favour of Sebosat. There could thus have been no misrepresentation. Furthermore, clause 18 does not provide an unqualified right of security to the coal in favour of Bassani nor any representation that the coal would be preserved by Sebosat pending payment to Bassani. This is so because the agreed manner for payment for services, as stipulated in clause 16.5 of the Subcontract Agreement, was made conditional on the sale of the coal. In relation to these submissions, Mr Eyles submitted that whilst it is correct that Bassani was never mistaken as to its rights or its role in terms of the Subcontract Agreement, the misrepresentations in respect of the validity of the mining rights remains relevant.

[23] In relation to the Lateozest and Close Up Mining (Pty) Ltd issue, Mr Cassim submitted that Bassani impermissibly raised this for the first time in reply. The respondents were entitled to know the case they were called upon to meet and were entitled to place before the Court a contrary factual version. As such these allegations cannot be considered to be uncontested and fell to be disregarded. In this regard *Betlane v Shelly Court CC* [12] is clear authority for the trite principle that the obligation is on a party to make out a case in its founding papers, and that a case cannot be made out in the replying affidavit for the first time. The rationale for this principle is set out in *Director of Hospital Services v Mistry* [13] where the Appellate Division stated:

"When...proceedings are launched by way of notice of motion, it is to the founding affidavit that a Judge will look to determine what the complaint is. As was pointed out in Krause J in Pountas' Trustees v Lahanas 1924 WLD 64 at 68 and has been said in many other cases:

"..an applicant must stand or fall by his petition and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, <u>because those are the facts the respondent is called upon to either affirm or deny".</u> (Counsel's emphasis)

[24] However, as Mr Eyles submitted, it was always available to the applicant even despite the urgency of the proceedings, to seek that the allegations pertaining to Lateozest should be struck out or to seek leave to file a further affidavit. This information appears to only have become known to the applicant in its consultations with the business rescue practitioners after the answering affidavit had been filed. Courts are more inclined to grant such indulgences in urgent proceedings, as was held by the Supreme Court of Appeal in *Lagoon Beach Hotel (Pty) Ltd v Lehane N.O and others,* [14] at para [16] *:*

"...Moreover, the initial application was moved as a matter of urgency, and the

[12] 2011 (SA) 388 (CC).
[13] 1979 (1) SA 626 (A) at 635H-636D.
[14] 2016 (3) SA 143 (SCA).

courts are commonly sympathetic to an applicant in those circumstances, and often allow papers to be amplified in reply as a result, subject of course to a right of a respondent to file further answering papers. Regard should also be had to the intricacy of....dealings that required intensive and ongoing investigations. Furthermore, the applicant, as respondent a quo, seeks not to avail itself of the opportunity to deal with the additional matter...set out in reply, and I see no reason why these allegations should therefore be ignored".

Conclusion

[25] The applicant seeks leave to appeal to the Supreme Court of Appeal, relying on the submission that issues of considerable public importance involving an important question of law are involved. This is the question of the "*exceptional case"* referred to in *Knox D'Arcy* and whether it is required in such cases for an applicant to establish an intention on the part of the respondent to dissipate its assets or whether a lesser threshold is sufficient. Mr Eyles submitted that this "lower bar" test has not been dealt with previously by the Supreme Court of Appeal, and that in *Carmel Trading (supra)* the court was not dealing with "*exceptional circumstances*" when it determined that "*wasting or secreting assets with the intention of defeating the claims of creditors*" remains the applicable test.

[26] It is so that the court in *Investec (supra)* declined the invitation to further develop the law to incorporate a lower threshold. However, Van der Linde J's decision in *Carstens (supra*) does in fact do so. I am therefore persuaded that there are merits in this ground of appeal in addition to the factual grounds. I am of the view that there is a reasonable prospect that another court would conclude that the lower threshold test should have been applied and that the alleged *mala fide* conduct of the respondents falls within the category of possible "*exceptional circumstances"* espoused by Stegman J and the Appellate Division in *Knox D'Arcy*.

[27] Lastly, Mr Cassim's introductory point that leave to appeal will be moot in that, *inter alia,* the declaratory order sought by the applicant, should it be

granted on appeal, would have no practical effect, remains to be considered. The conduct of the applicant is also relevant, he submitted, in that the applicant has not instituted an action for damages; has not referred the dispute to mediation or arbitration in terms of the Subcontractor Agreement; and has not taken back its equipment despite the respondent's tender made prior to hearing of the urgent application. Mr Eyles in reply submitted that the damages claim would be instituted within the 30 day period as set out in the notice of motion; that the applicant was not amenable to arbitration or mediation as those proceedings would be limited to the issues in the Subcontract Agreement; and that the applicant was in the process of collecting its equipment. Mr Eyles submitted that the appeal is not academic given the fact that the respondents do not dispute that there is sufficient coal on the premises to form the subject of an interdict. I agree.

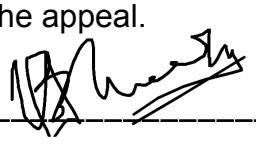
[28] I am therefore of the view that there are reasonable prospects that another court would come to a different conclusion and determine that the anti-dissipation interdict should have been granted and/or that respondents had planned their affairs and structured their businesses in such a way that the effect will be that Bassani will be left with a hollow judgment.

Order

[29] In the result, I make the following order:

29.1 The applicant is granted leave to appeal to the Supreme Court of Appeal.

29.2 The costs of this application to be costs in the appeal.



U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing: 8 September. Heard by videoconference as per the Consolidated Directive of the Judge President of 11 May as extended to 15 September 2020.

Date of judgment: 10 September 2020. This judgment was handed down electronically by circulation to the parties' legal representatives by email, by being uploaded onto the CaseLines digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on September 2020.

Appearance:

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