

AM
REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

02/11/2012

CASE NO: 12960/11

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
02/11/2012	
DATE	SIGNATURE

In the matter between:

METALMIN MINERALS & INVESTMENTS (PTY) LTD

Applicant

and

CROSS ATLANTIC ASSET MANAGEMENT (PTY) LTD

First Respondent

XANADO CHROME (PTY) LTD

Second Respondent

HULBERT TRADING 1 (PTY) LTD

Third Respondent

THEUNIS JOHANNES SCHOEMAN

Fourth Respondent

J U D G M E N T

MSIMEKI, J

INTRODUCTION

[1] The Applicant, in this application, seeks an order against the First Respondent for:

1. payment to it by the First Respondent of the sum of R2.120.000.00;
2. payment to it by the First Respondent of interest on the aforesaid sum calculated at the rate of 15% per annum a **tempore morae** to date of final payment;
3. In the alternative to prayers 1 and 2 above:-
 - 3.1 payment to it by the First Respondent of the sum of R2.346.843.49;
 - 3.2 payment to it by the First Respondent of interest on the aforesaid sum, calculated at the rate of 11% per annum from 1 February 2011 to date of final payment;
4. payment by the First Respondent of the costs of this application on the attorney and client scale.

[2] **BRIEF FACTS**

On 5 February 2010 and at Johannesburg the parties duly represented, concluded a written Loan agreement. The agreement was subject to the fulfilment by not later than 3 business days after the signature date of certain suspensive conditions. The Fourth Respondent bound himself by way of an acknowledgement of debt. The third business day after the signature date was 10 February 2010. The suspensive conditions were, inter alia, that the Applicant shall have received the security documents, in negotiable form, contemplated in, and in accordance with, the provisions

of the deed of pledge and cession of the claims; together with a certificate from the auditors of the Borrower and Xanado confirming that such share certificates represent as less than 25% of the shares in issue in each of these companies; Xanado and Metalmin Metals and Minerals Limited (MML) a company incorporated in Mauritius under registration no 079954 shall have entered into and signed the preliminary offtake agreement annexed to the Loan agreement as schedule 3; that the Borrower, Xanado and Hulbert shall each have delivered to Metalmin certified copies of resolutions signed by the directors and all shareholders in each of these companies approving the transactions recorded in this agreement and the deed of pledge and confirming that they will see to the timeous implementation of the transactions outlined in the agreement; that the First Respondent shall have delivered to the applicant an audit certificate duly signed by the First Respondent's appointed auditors confirming that the chrome recovery plant and related assets are unencumbered and beneficially owned by the First Respondent; that the land on which the chrome recovery plant is situated is subject to a lease agreement concluded with the First Respondent for a period of 12 months and that the Respondent has an option to purchase the land at an agreed price; that the First Respondent shall have delivered to the applicant five year forecasts of its chrome beneficiating operations in a form acceptable to the Applicant. The Applicant, in writing, neither waved the suspensive conditions nor extended their fulfilment. The conditions were not fulfilled and the loan agreement lapsed on 10 February 2010. The Applicant launched this application seeking restitution of the R2.120.000.00 that was

paid to the First Respondent on various dates after the lapsing of the loan agreement. The application is opposed by the Respondents.

[3] **THE ISSUES**

The issues to be resolved are:

1. whether there are disputes of fact.
2. whether the Applicant is entitled to restitution regard being had to the nature of its cause of action.
3. whether the issues raised by the Respondent's are of any consequence.
4. whether the Applicant has made out a case for the relief that it seeks.

[4] **COMMON CAUSE FACTS**

These are that:

1. A written Loan agreement was concluded by the parties
2. The agreement was concluded on 5 February 2010
3. The Fourth Respondent signed an acknowledgement of debt on behalf of the First Respondent on 5 February 2010
4. The Capital sum of the loan agreement was increased by R170.000.00 from R2.000.000.00 to R2.170.000.00 during May beginning June 2010. (Annexure M9 being Annexure to the Loan agreement)
5. The suspensive conditions were not fulfilled.
6. The agreement lapsed on 10 February 2010.

7. The Applicant advanced the following amounts on the respective dates set out hereunder to the First Respondent:-

- 7.1 R1 Million on 17 February 2010
- 7.2 R60.000.00 on 28 February 2010
- 7.3 R300.000.00 on 24 March 2010
- 7.4 R350.000.00 on 14 April 2010
- 7.5 R240.000.00 on 23 April 2010
- 7.6 R170.000.00 on 4 June 2010

In total the amount of R2.120.000.00 was advanced.

- 8. The amounts were advanced to the First Respondent after the written loan agreement had lapsed.
- 9. The amounts referred to in paragraph 7 above were received by the Respondent who admit receipt of the amounts.
- 10. The Fourth Respondent promised repayment of the monies owed to the Applicant in a document dated 21 June 2010 within 10 – 12 weeks.
- 11. No repayments were made, prompting the Applicant to issue a “Breach Notice”.
- 12. The conditions precedent had to be met within 3 days from the signing of the agreement by the parties. The conditions were not met.

[5] **THE LAW**

The author Kerr in his work: The Principles of the Law of Contract Sixth Edition at 840 says that

"because the remedy of restitution is not appropriate in all cases it appears that the court has a discretion to grant or refuse it whenever it is doubtful whether it is appropriate"

Considering restitution in South African Law and in English Law he says:
"hence in circumstances in which a South African Lawyer thinks of conditions an English Lawyer is likely to think of "restitution". In English Law, he says, the primary meaning of restitution relates to enrichment claims".

[6] **SUSPENSIVE CONDITIONS**

Bliden J in Melamed and Another v BP Southern Africa (PTY) LTD 2000 (2) SA 614 (WLD) at 625 D describes a suspensive condition as
"a condition suspending the operation of the obligations from the contract, pending the occurrence or non-occurrence of a particular specified event"
(Design and Planning Service v Kruger 1974 (1) SA 689 (T) at 695 C – D, Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 432 C and Briscoe v Deans 1989 (1) SA 100 (W))

Tebbutt J in ABSA Bank Ltd v Sweet and Others 1993 (1) SA 318 (C) at 322 C – F said:

"it is trite law that, in a contract which is made subject to a suspensive condition, the rights of the parties created by the contract remain in abeyance pending the fulfilment of the condition".

The agreement, however, remains binding between the parties which neither can renounce pending fulfilment of the condition. Upon fulfilment of a suspensive condition the agreement and the mutual rights of the

parties relate back to, and are deemed to have been in-force from, the date of the agreement and not from the date of the fulfilment of the condition i.e. **ex tunc**. Before a suspensive condition is fulfilled neither party can demand performance of the suspended obligation. However, whatever is paid over in that period is recoverable simply by the invocation of **condictio indebiti**. If the condition is not fulfilled the contract is discharged **ipso iure** with retrospective effect and the parties have to restore that which they have performed. (see **Melamed and Another v BP Southern Africa (Pty) Ltd (Supra)** at G – H and **Christie: The Law of Contract of SA, 6th Ed at 152**).

Bliden J, at 626 H – I, in Melamed and Another v BP Southern Africa (Pty) Ltd (Supra) said:

*“the claim for restoration of both which was paid **pendente conditione** and which was paid **condictione extincta** is based on enrichment whatever the nature of the **condictione** may be. Although it is conceivable that a claim for restoration can be based on contract the cases cited above do not expressly rely on contract”.*

- [7] Mr Naude, for the Respondents, relying on the matter of **Laco Parts (Pty) Ltd trading as ACA Clutch v Turners Shipping (Pty) Ltd 2008 (1) SA 279 (W)**, submitted that the Applicant's application ought to be dismissed. Mr De Beer, for the Applicant, disagreed submitting that the facts of the two matters were distinguishable. Indeed, they are. In the **Laco** matter, there had been no agreement at all as the minds of the contracting parties had never met. The minds of the contracting parties in the current matter,

indeed, met. An agreement came into being. However, the suspensive conditions were not fulfilled and that resulted in the discharge of the contract. Payments were effected because the agreement had been concluded although later discharged.

- [8] Mr Naude argued that the Applicant could not speak of enrichment where the Applicant held the shares of the First Respondent and where the values of the shares were not known. The argument loses sight of the fact that once the main agreement was discharged the ancillary agreements, too, were affected. Why would the Applicant remain holding the shares if the agreement which led to the holding of the shares by the Applicant is gone. It, in my view, would make no sense.
- [9] The Respondents raised a defence that there had been short payment by the Applicant to the First Respondent in the amount of R50.000.00. The defence does not assist the Respondents because the agreement was discharged because of non-fulfilment of the conditions. The Respondents, in any event, admitted receiving the amount that the Applicant is claiming.
- [10] The Respondents alleged that the Applicant had conspired to and interfered with the relationship between the First Respondent's supplier Pinco Logistics. Mr De Beer, in his argument, dismissed the allegation as an attempt to confuse the issues. He submitted that the issue was dealt with in the replying affidavit which discloses that Pinco was never a supplier of the First Respondent. The allegation, according to Mr De Beer,

amounted to hearsay. Mr De Beer submitted that the Applicant could not financially assist the First Respondent in order to thereafter plan its destruction. The Applicant would then fail to recover its money that it advanced to the First Respondent.

- [11] The Respondents raised the issue of non-joinder alleging that MML which was a party to the initial agreement ought to have been joined in the proceedings. The issue was not seriously argued by Mr Naude. Mr De Beer submitted that no order was sought in respect of MML. The non-joinder, in my view, appear to be of no consequence.
- [12] The Respondents further alleged that the application is premature in that The **Vis maior (majeure)** clause was invoked. This, as Mr De Beer correctly submitted, was not helpful to the Respondents.
- [13] Mr Naude lastly submitted that the court, in the event that the court found that the Respondents were/are liable to pay restitution, ought to exercise its discretion and hold over such order pending the finalization of the counter claim. As Mr De Beer correctly submitted, there is no counter claim and no action for damages to date has been instituted by the Respondents who had more than a year and a half to do that. Nothing, in any case, stops the Respondents from bringing a separate action should they so wish.
- [14] The Respondents then argued that restitution and unjust enrichment are

mutually exclusive. Mr De Beer submitted , correctly in my view, that the two can always be argued and pleaded in the alternative.

- [15] What is clear is that the Applicant paid the R2.120.000.00 after the agreement had lapsed. The payment was, at the time, without causa. The First Respondent was not supposed to have received the amount which was not supposed to have been paid to it. The evidence at the disposal of the court demonstrates this.

The Applicant's case, in particular its founding affidavit, contains sufficient particulars to substantiate a claim for repayment now that the agreement has been discharged. The claim is clearly directed at repayment of the amount of R2.120.000.00 that the Applicant, without causa, paid to the First Respondent and which, without causa, received it.

RH Christie at page 152 of his work: *The Law of Contract in South Africa*, 6th Edition says:

"A party who, in anticipation of the fulfilment of a condition precedent, has made payment under the contract is entitled to the return of the money, unless the contract provides otherwise, as in the common hire-purchase agreement which provides that instalments of the purchase price shall be taken as rent for the use of the property and are therefore not refundable. Likewise, a party who has paid in the mistaken belief that the condition has been fulfilled is entitled to the return of his money, unless fulfilment takes place before his claim for repayment has succeeded".

(**Wilkens v Bester 1997 (3) SA 347 (A) 358A-C**). The Applicant's application, in my view, should succeed.

[16] In the circumstances of the current matter, it will not, in my view, be in the interest of justice to stay or hold over the order pending the finalization of what the Respondents refer to as 'the counter claim' or damages claim which is unliquidated and has to date not been instituted.

[17] There are no disputes of fact which prevent the granting of an order in favour of the Applicant.

[18] **COSTS**

The circumstances of this case and the conduct of the First Respondent, warrant the granting of costs on a punitive scale against it.

[19] The following order in the result, is made:

1. An order is made in terms of prayers 1, 2 and 4 of the Notice of Motion dated 13 April 2011.



MSIMEKI M.W.
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

Counsel for applicant:	Advocate J De Beer
Counsel for respondent:	Advocate G Naude
Attorneys for applicant:	Gary Janks Attorney
Attorneys for respondent:	S C Vercueil Attorney
Date heard:	28 February 2012
Date of judgment:	