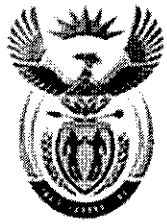


IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA

(1)	REPORTABLE: ~~YES~~ / NO	
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO	
(3)	REVISED. ✓	
23/10/2014		
DATE		SIGNATURE

CASE NO: 5456/13

DATE: 24 OCTOBER 2014

In the matter between:

ELECTRONIC SORTING SERVICES CC **APPLICANT**

and

NORTH AMERICAN MINING CORPORATION

PROPRIETARY LIMITED **FIRST RESPONDENT**

MAXRETURN INVESTMENTS 106 PROPRIETARY LIMITED **SECOND RESPONDENT**

JUDGMENT

RAULINGA J,

[1] The applicant seeks certain interdictory relief against first and second respondents pursuant to a written contract entered into by and between the applicant and the first respondent.

[2] In its notice of motion the applicant seeks the following relief:

> (a) that the first respondent be ordered to immediately cease processing and screening approximately 600 000 tons of broken and unbroken material which is mined from Palmiegat 34, registration division J.R, Bela-Bela Limpopo Province ("the mine");
>
> (b) that the first and second respondents be ordered to allow the applicant access to the mine to allow the applicant to remove the material and equipment; and
>
> (c) that the first respondent be ordered to immediately return the movable scrubber and classifier and motor on the fresh water pump of which the applicant is the owner.

[3] The applicant and the first respondent concluded a written agreement in the following terms:

3.1 the first respondent sold to the applicant the material for R4million;

3.2 the first respondent also sold movable goods to the applicant for the sum of R400 000.00 ; and

3.3 the first respondent let the mine to the applicant for a period of 5 years.

[4] Pursuant to the conclusion of the agreement, on 1 July 2011, the applicant took possession of the mine and material. The applicant paid to the first respondent the amount of R1530 000.00 in part payment of the purchase price for the material. The

applicant took delivery of some of the goods which were sold to it. The material would be processed and screened for diamonds.

[5] During January 2012, various disputes existed between the parties in respect of; the payment of monthly rental and the payment of the purchase price for the movable goods.

[6] On 20 January 2012 the first respondent's attorneys wrote a letter to the applicant in which the first respondent alleged that the applicant breached the lease portion of the agreement and the portion dealing with the movable goods.

[7] The first respondent issued a summons in this Court under case number 20197/2012 in which it sought payment of arrear rental. This culminated in a number of negotiations through exchange of letters, until the first respondent cancelled the entire agreement on 30 January 2012. Eventually, the applicant concluded a lease with the landowner of the adjacent property where it is now operating since its processing plant was moved to this property on the 31 August 2012.

[8] The applicant contends that initially three oral agreements were concluded before they were reduced to writing and that three separate agreements should have been drafted for the signature of the parties. That since the applicant had paid a deposit of R1million, it was the understanding between the parties that the balance of R3 million would be paid to first respondent out of proceeds of the profits of the mining of the material; as well as the interest on the purchase amount. Further that it was never agreed between the parties that the breach of one of the issues provided for in the agreement could result in the cancellation of the entire agreement.

[9] On the contrary, the respondents aver that it is the applicant's own version that the written agreement pertaining to the sale (inter alia) the movable goods, has been terminated and the relevant lease agreement has been terminated and the applicant vacated the mine at the end of August 2012. They also submit that even in the event that a portion of the written agreement which relates to the material was not cancelled, then the respondents still rely on the contents of the written notice of

cancellation addressed to the applicant by the respondent's attorneys dated 30 January 2012.

[10] It seems to me that although the lease agreement was concluded between the applicant and the first respondent, the second respondent is the owner of the immovable property. It is also apparent that the agreement concerns three issues, namely:

(i) the purchasing of the material for the sum of R4million;

(ii) the purchase of the equipment; and

(iii) the letting and hiring of the premises.

[11] It is common cause that the respondents tender the return of the mobile scrubber and classifier and motor on the fresh water pump ("the movable equipment"), as referred to in prayer 3 of the notice of motion. There is no reason therefore to deal with prayer 3.

[12] In my view there is no need to consider the *in limine* point pertaining to a dispute of fact, since there is no material dispute of fact in this application.

[13] However, I am in agreement with the first respondent that the applicant did not make out a proper cause and that there is no tender from the applicant to fulfil its reciprocal contractual obligations. It is also true that the second respondent is the registered owner of the mine as well as the immovable property thereon. The first respondent is the owner of the material on the mine.

[14] The contention by the applicant that the agreement ["ES53 to the founding affidavit] is a divisible contract cannot be sustained. In *Affirmative Portfolios CC v Transnet Ltd t/a Metro Rail 2009(1) SA 196 (SCA)* the Supreme Court of Appeal confirmed the well-established principle that where the parties decide to embody their final agreement in written form the execution of the document deprives all previous statements of their legal effect. The decision in *National Board (Pretoria) (PTY) LTD and Another v Estate Swanepoel 1975[3] SA 16 (A) at 26 A-D* is quite enabling.

"This Court has accepted the rule that, when a contract has been reduced to writing, the writing is, in general, regarded as exclusive memorial of the transaction and in a suit between the parties, no evidence to prove its term may be given, save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered to or varied by personal evidence."

[15] It is for this reason that the submission by the applicant, that the three issues were separately negotiated and three separate oral agreements were concluded in respect of those three issues, before the agreement was reduced to writing, cannot be supported.

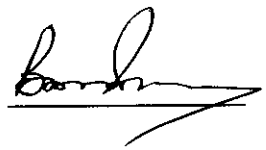
[16] One must also bear in mind that the written contract pertaining to the sale of (inter alia) the movable goods has been terminated and the relevant lease agreement has been terminated as well. The applicant vacated the mine at the end of August 2012. Moreover, despite the written notice of demand being received by the applicant, no interest payments whatsoever were made by or on behalf of the applicant to the first respondent and further that the applicant has failed to remedy the remainder of its breaches of the written contract. The first respondent was in the premises entitled to cancel the written contract.

[17] It is not the applicant's case that the relevant written contract entered into by and between the applicant and first applicant provides for delivery of the material on a specific date independently of the applicant's obligations in terms of the written contract. Clause 3.1.1 of the relevant contract confirms that the first respondent is the owner of the material and not the applicant.

[18] In the circumstances, the application must fail.

[19] I make the following order:

(a) The application is dismissed with costs.



TJ RAULINGA

JUDGE OF THE NORTH GAUTENG HIGH COURT