IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

13/11/14

Case No: 77941/2014

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
13/11/14 DATE
SIGNATURE

CLOSE-UP MINING (PTY) LTD Applicant

and

CANYON RESOURCES (PTY) LTD Respondent

JUDGMENT

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1 This judgment must be read together with the judgment in Case No 69101/2014 between the same parties and Zonnebloem Coal (Pty) Ltd, a copy of which is annexed hereto. In the light of the urgency of the two matters issues that have been addressed in the former judgment will not be repeated here

2 Canyon Resources (Pty) Ltd, ('the respondent'), is the owner of the farm Brummersheim upon which the Hakahano Colliery is situated, and is also the holder of the mining right in respect of the coal found on the farm Close-Up

Mining (Pty) Ltd, ('the applicant'), is a mining contractor. The parties' particulars are set out in the previous judgment.

3 It is common cause that in September 2011 the parties entered into a written agreement in terms of which the applicant was appointed by the respondent as mining contractor to extract coal from the mining area through an opencast mining operation. This area was occupied by the applicant, together with the yard in which its vehicles were stored ('the Yard'), in executing the contract. It performed all mining activities that are required to extract coal lawfully and in accordance with the terms of the mining right, and housed some of its employees there.

4 As was entirely predictable after what had occurred at the Singani Colliery, a dispute arose between the parties in respect of payment of the amounts invoiced by the applicant for coal it had mined and delivered to the respondent. Respondent alleges that it overpaid the applicant by some R 50 million and that it is no longer obliged to make any payment to the applicant because the latter's claim has been erased by the operation of set-off. It is not disputed that applicant has delivered coal until the cancellation of the agreement and that payment of the invoices for this freshly mined coal is owing and due unless the alleged set-off does indeed apply

5 The cancellation of the agreement occurred on the 20th October 2014 when the applicant accepted, in writing, the respondent's alleged repudiation of the mining contractor's agreement. In the letter addressed by its attorney of record to the respondent's attorneys, the applicant immediately laid claim to a lien over the mining area and the Yard, claiming to be in peaceful and hitherto undisturbed possession thereof., until all its claims had been satisfied.

6 With reference to the occurrences at the Singani Colliery applicant demanded an undertaking from the respondent that it would refrain from interfering directly or indirectly or through third parties with its lien or attempt to dispossess the applicant of the mining area and the Yard An urgent application was threatened in the event of a failure to provide the undertaking

7 Mindful of recent happenings the applicant resolved to execute what might be termed a pre-emptive strike by employing about 100 security guards from the so-called Red Ants to proceed to the mining area and Yard and to create a protective ring of determined defenders, some of whom were armed with weapons that included shotguns, around the area it claimed to be covered by the lien. The Red Ants arrived unannounced and breached the berm around the mine and advancing over ground not covered by the lien and thus in the possession of the respondent, and proceeded to barricade the entrance to the mining area.

8 The respondent through various of its employees responded with an attempt to enter the mining area, which lead to an altercation with the guards and some of applicant's employees. The respondent's representatives had to abandon the attempt to enter the mining area and to turn to the court, after a complaint to the police was nullified by the latter's view that the dispute was purely civil.

9 Applicant was first to approach the court with an urgent application for an interdict to prevent the respondent from interfering with its lien pending the final resolution of the parties' dispute by arbitration. The respondent launched a counter application for the restoration of the possession of the mining area, claiming to have been in control thereof, particularly because many activities

such as washing coal, stockpiling of coal and administration were conducted on the premises next to and around the mining area such as the washing of the coal that was extracted from both collieries, the administration of sales and transport, the storage of chemicals and diesel and waste disposal. Some 50 of respondent's employees are said to be engaged on these and other related activities.

10. Applicant readily concedes that respondent had access to the car park and to all other installations and equipment situated around and near to the mining area. It is common cause that the washing plant was and still is operated by the respondent, that coal is still being transported from the Hakhano Colliery and that respondent still conducts administrative and management functions on the premises surrounding the mining area. Applicant maintains, however, that it was the primary user of the Yard, that its machines to the value of millions are stored there and that it never relinquished possession thereof.

11. As is set out in the earlier judgment, the work conducted upon the mining area by the applicant is by the very nature thereof such that the mining operator must have exclusive possession thereof in order to fulfil its statutorily determined functions and to carry out the work it contracted to perform, namely the removal of coal from the opencast mine. There can be no doubt that applicant's possession of the mining area and the – shared – possession of the Yard is such that it is capable of being protected by the exercise of a lien.

12. The next question that must be addressed is whether the applicant has a claim that justifies the recognition of a lien. Respondent commissioned impressive expert reports analysing the manner and fashion in which the

applicant allegedly executed the mining contract. The reports conclude that the mining operations were not conducted in the manner the applicant agreed to in the parties' written agreement and that its invoices reflect a distorted picture of the actual coal mined because of an incorrect reflection of the division of such mining produce into 'soft' and 'hard' material. In addition, it is said that applicant's mining practice is prejudicial to the environment and will increase rehabilitation costs of the mined area very significantly. The report concludes that respondent has been overcharged by more than R 50 million.

13. Respondent relies on these reports for its assertion that set-off operates and that it is not indebted to the applicant at all. Applicant counters these arguments by pointing out that its invoices reflecting the mining operations over the past years were approved by a surveyor appointed by the respondent for this purpose, who measured the applicant's coal production and detected no discrepancies between the applicant's invoices and his own measurements. Applicant therefore disputes the experts' reports and in particular the methodology they adopt to establish the division of the coal mined into 'hard' and 'soft' material. It is obvious that there will be extensive disputes between the parties' experts on this issue which disputes are impossible to address in these proceedings.

14. The court can therefore not find that the otherwise enforceable claims the applicant advances are extinguished by set-off, as the respondent's claims are clearly illiquid, while the applicant's unpaid invoices reflect liquid claims, which are calculated at R 21 812 851,34.

15. Respondent further argues that it was indeed the party that was spoliated by the invasion of the Red Ants over its property and their continued presence

upon the mining area and the Close-Up Yard, albeit in reduced numbers. As has been set out above, the applicant was clearly in possession of the mining area and the Yard, while the manner in which the Red Ants were directed to access these areas is clearly questionable. They had no permission to enter the area in the way in which applicant directed them to do and this action executed by stealth represents the kind of self help the court must discourage. There is no evidence in these papers that the applicant was prevented from obtaining a protective interdict, even by way of an *ex parte* application, prior to or simultaneously with the termination of the parties' agreement.

16. The applicant's possession of the Yard and the mining area was, however, not affected by the questionable action to establish the presence of the guards employed to protect the continued possession thereof. Neither is the presence of any guards on these two areas unlawful, provided they restrict their presence to these areas only. The court's disapproval of the applicant's approach will be reflected in the costs order.

17. It follows that the applicant's application must succeed on the merits and the counter-application must be dismissed. The interdict that is granted in the applicant's favour can obviously be terminated by the provision of appropriate security to cover the applicant's financial claims.

The following order is made:

1 Pending the finalisation of an action or arbitration proceedings to be instituted by the applicant within thirty days from date hereof, the respondent, its employees and any third party acting for and on behalf of the respondent are interdicted and restrained from interfering in any manner with the applicant's possession of the Mining Area and the Yard on the Hakhano Colliery as identified in Annexure X1 to the founding affidavit;

2 Should the applicant fail to institute the said action or arbitration within 30 days from date hereof, the interdict will be terminated automatically;

3 The interdict will terminate automatically upon the respondent providing acceptable security for the applicant's claim of R 21 812 851 34 plus 9% per annum pending the finalisation of the above action or arbitration proceedings;

4 No costs order is made.

Signed at Pretoria on this 24 day of 2014

E BERTELSMANN

Judge of the High Court.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No 69101/2014

In the matter between:

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CANYON RESOURCES (PTY) LTD First Applicant

ZONNEBLOEM COAL (PTY) LTD Second Applicant

and

CLOSE-UP MINING (PTY) LTD Respondent

JUDGMENT

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1. This matter is related to another application that was heard together with the present case, involving the present respondent as applicant and the present first applicant as respondent. To avoid confusion, the parties will be referred to a Canyon', 'Zonnebloem' and 'Close-Up' in this judgment The present application relates to the possession of the mining area of a colliery called the Singani Colliery ('Singani'); the second application to that of the Hakhano Colliery ('Hakhano'). Both matters were launched as urgent applications and were dealt with as such in the ordinary urgent court in spite of the length of the affidavits and annexures thereto. Because of the urgency of the

applications the court will deliver a judgment that deals only with the principal issues and that in broad strokes without pretence at erudition This will not do justice to the quality of the research and learning evidenced in both counsel's addresses and heads of argument, for which the court tenders its apology. Time unfortunately does not permit another course of action

2 Canyon is a coal mining company incorporated in accordance with the Company Laws of South Africa with registered office at 7th Floor Fredman Towers, 13 Fredman Drive, Sandown.

3 Zonnebloem is a coal mining company duly incorporated in accordance with the Company Laws of South Africa with the same registered office as Canyon

4 Zoonebloem is the owner of the property rights and the mining right for coal at the Singani Colliery.

5 Close-Up is a company duly incorporated in terms of the South African Company Laws with registered office at 90 Generaal Hertzog Avenue, Three Rivers Vereeniging. Close-Up is a mining contractor.

6 In 2011 Close-Up and Canyon entered into a written agreement in terms of which the former was appointed by the latter as mining contractor and operator of mining activities at the Hakhano Colliery. While this agreement was still in operation and executed by the parties thereto, another oral arrangement was entered into during May 2014 between Close-Up and either Zonnebloem or Canyon – or possibly both – to commence with mining operations at the Singani Colliery. Close-Up contends that it negotiated and contracted with Zonnebloem as the holder of the mining right Canyon and Zonnebloem assert that no contract was entered into but that the negotiations were conducted by and on behalf of Canyon. The parties are agreed that a

written agreement was envisaged in due course, which intention never came to fruition

7 It is common cause, however, that Close-Up established a presence in what was referred to as the mining area upon Singani in May 2014 and commenced opencast mining operations upon 26 May 2014, which included all activities from removing the top soil, blasting and collecting both soft and hard coal produce which was stored upon a coal pile. It rendered accounts to Zonnebloem which were paid without demur until September 2014

8 On 24 September 2014 the relationship between Close-Up and its contracting partner came to an end. Zonnebloem or Canyon asserted that Close-Up had overcharged its contracting party. Close-Up disputed that assertion and regarded the allegation that it would not be paid because of the over-invoicing as a repudiation, which it accepted. According to the invoices it produced in these proceedings it is still owed R 17 676 031, 36 which amount is owing, payable and due. It immediately asserted its right to a lien until it was paid, while the other parties demanded an immediate vacation of the mining area

9 It must be underlined at this juncture that it is not in dispute that Close-up brought heavy machinery on to the mining area to execute its contract. It alleges that the machinery is worth R 100 million. These machines are still on site.

10 Through its attorneys Close-Up immediately conveyed its intention to exercise a lien over the mining area to the other parties' attorneys, who in turn disputed any right to a lien and asserted that Close-Up was never in possession of the mining area as it entered the site under the alleged control of Canyon or

Zonnebloem. Both parties threatened urgent applications to protect their rights

11. On 25 September 2014 Close-Up reacted to the Canyon/Zonnebloem threat to enter the mining area and installing new contractors by blocking the access road called the Vuma Road some 4.5 kilometres from the mining site by parking a dumping truck across the road. On the same day Canyon advanced the allegation through its attorneys that it was in control of the site, while Zonnebloem had responsibilities as mining rights holder to ensure that the mining licence was not endangered by the actions of persons not entitled to occupy the mining area.

12. While the parties' attorneys were discussing the exchange of affidavits in their respective intended urgent applications, Bayoglu on behalf of Canyon and Zonnebloem decided to take matters in hand himself. On the morning of the 27th Septemver 2014 Close-Up, allegedly relying upon the fact that the parties had agreed through their attorneys that they would approach the court to determine their rights, and in the light of the termination of the Singani relationship, moved its workers to the Hakhano site, leaving only three persons in control of the Singani's mining area.

13. At 14h00 of the same day Bayoglu, the Chief Executive Officer of both Canyon and Zonnebloem, arrived in the company of a number of the latter two companies' officials, including one armed security guard Access had been gained to the Vuma Road by breaching the brem around the mining area with a front end loader. According to Bayoglu he told the three persons intending to exercise control over the mining area to leave. This description is deliberately neutral, as there is a vigorous dispute regarding the actual

occurrence. Close-Up's employees claim that they were threatened and rudely dispossessed, while Bayoglu claims to merely have told them that they had no right to be on the mining area and requested that they depart, which they did quite willingly. Viewed against the background of Close-Up's repeatedly expressed intention to assert a lien over the mining area, against the background that the attorneys appeared to be in agreement that the court should be approached to settle the parties' differences, and in view of the fact that Bayoglu later on the same day swore to an affidavit in support of an application, this, the present application, claiming restoration of the mining site without mentioning a word of his occupation of the site earlier of the day; the probabilities strongly favour the Close-Up version of events. There is simply no reason in logic why the Close-Up representatives should leave the mining area unless they were forcibly encouraged to do so. Given the exchanges between the attorneys immediately before the strong arm tactics were employed, Bayoglu's actions smack of impropriety and of the kind of self help the courts should be keen to discourage: *Nino Bonino v De Lange* 1906 TS 120.

14 The questions must then be examined whether Close-Up could be said to be entitled to a lien which it could exercise against the world until its claims are paid or sufficient appropriate security for its claim is provided. It is clear that Close-Up believed at all relevant times that it was lawfully in possession of the mining area and that it intended at all times to retain possession and to exercise a lien over the area and the coal on the stockpile.

15. It is also clear that Close-Up's machinery was brought on to the mining area and that it is still there. Its three employees that were persuaded to leave the

area intended to exercise control until the parties' disputes were settled. While mining was being conducted, Canyon and Zonnebloem had no business to conduct on the mining area and did not have a presence of any employee there on a permanent basis. The occasional access that the latter may have exercised was for a limited purpose and certainly not to assert possession, while Close-Up could not perform any of its functions without being in possession of the mining area.

16. Canyon and Zonnebloem claim that Close-Up was allowed to enter the mining area and to conduct its business there under the control of the holder of the mining right and the associated company and therefore were never in control of the area. While it is correct that the mining operator could not perform its work without the holder of the mining right allowing it to enter the operational area such permission is not in conflict with the mining operator's intention to take possession until its contract has been fulfilled and its remuneration has been paid. Possession sufficient to establish a lien need not be exclusive: *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA). *Beetge v Drenka Investments (Isando) (Pty) Ltd* 1964 (4) SA 62 (W); nor need it necessarily be exercised in respect of the entire property upon which work was performed: *Louw t/a Intensive Air v Aviation Maintenance & Technical Services (Pty) Ltd & Another* 1996 (1) SA 602 (T) at 609A

17 Canyon and Zonnebloem dispute the claim for payment advanced by Close-Up. Even if this dispute is *bona fide*, it is trite that unless the court is able to dismiss Close-Up's claim for payment as indisputably unfounded – which

cannot be found on these papers - Close-Up is entitled to retain possession until satisfactory security has been put up by Canyon and/or Zonnebloem.

18. There is a dispute between the parties whether the arrangement that led to Close-Up conducting mining operations in the mining area was entered into by Close-Up with Zonnebloem or with Canyon. This dispute need not be decided for present purposes as the two companies have made common cause in their application to have the access road's possession to Singani restored and for an interdict preventing Close-Up from accessing the mining area of the Singani Colliery.

19. This application was launched after Bayoglu and representatives of both applicant companies had forcefully deprived Close-Up of the possession of the mining area, which self help action is in conflict with the law. The application for restoration was therefore unnecessary and indeed vexatious in its failure to disclose the true state of affairs in the founding affidavit, which Bayoglu was in duty bound to the Court to do. Time and costs were needlessly wasted, with the submission being made during argument on behalf of the two companies controlled by Bayoglu that only costs need to be considered as events had overtaken the relief sought.

20. Close-Up launched a counter application for the restoration of the entire remaining extent of the Farm Zonnebloem upon which the mining area is situated. The claim for restoration was, in reply, correctly reduced to the mining area only. Close-Up furthermore claimed an interdict preventing Canyon and Zonnebloem from interfering with Close-Up's undisturbed possession of the Mining Area pending an action or arbitration to be instituted within 30 days from the date of judgment. In the alternative, Close-Up

suggested that the other two parties should furnish security for its claim, which it alleges stands at R 17 676 031, 36.

21. In the light of the above considerations the application launched on behalf of Canyon and Zonnebloem must be dismissed with costs. A punitive costs order is justified in the light of the needless launching of the application. The costs of this application are therefore to be calculated on the scale of attorney and client, including the costs of two counsel, payable by Canyon and Zonnebloem jointly and severally, the one to pay, the other to be absolved.

22. The counter application is granted. Canyon and Zonnebloem are ordered to forthwith restore possession of the mining area on the farm Zonnebloem 396 JS Middelburg to Close-Up. Close-Up is ordered to relinquish such possession as soon as Zonnebloem and/or Canyon have furnished acceptable security for Close-Up's claim in the sum of R 17 676 031, 36 plus interest calculated at 9% per annum. The possession is to be restored or the security is to be furnished pending the finalisation of an action or arbitration within 30 days from date of this judgment. Canyon and Zonnebloem are ordered to pay Close-Up's costs of the counter application, including the costs of two counsel.

23. Pending finalisation of the action or arbitration Canyon and Zonnebloem are interdicted and restrained from interfering with Close-Up's undisturbed possession of the mining area on the farm Zonnebloem 396 JS.

Signed at Pretoria on this 7th day of November 2014.

E BERTELSMANN

Judge of the High Court