IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 21468/2021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

06 JULY 2021
DATE

Jehapi
.....
SIGNATURE

In the matter between:

WEARNE AGGREGATES (PTY) LTD **APPLICANT**

and

AFRICA'S BEST MINERALS 146 LIMITED **RESPONDENT**

(IN LIQUIDATION)

PETRUS JACOBUS CORNE VAN STADEN N.O **SECOND RESPONDENT**

JOHANNA NINI MAHANYLE N.O. **THIRD RESPONDENT**

THE UNKNOWN PURCHASER OF THE PROPERTY **FOURTH RESPONDENT**

OF PORTIONS OF THE FARM VARKENSLAAGTE 119

JUDGMENT

TLHAPI J

[1] This is an application brought on urgency in which the following relief is sought:

> "2. Ordering the respondents to refrain from selling/ processing / loading/ removing the processed aggregate until the parties have reached an agreement on the value that was added by the applicant by processing the processed stockpiles of aggregate;
>
> 3. Ordering the first to third respondents to preserve the proceeds of the sale of property/ portion of the farm Varkenslaagte 119 until the parties have reached an agreement on the value that was added by the applicant by processing the processed stockpile of aggregate;
>
> 4. Ordering the first to third respondents to supply the applicant with a copy of the sale agreement of the property / portion of the farm Varkenslaagte 119 between the respondents to allow the applicant to peruse the documents to determine if the processed stockpiles were included in the sale agreement or not.
>
> 5. In the alternative to 4 above ordering the first to third respondents to inform the applicant in writing whether the processed stockpiles were sold to the fourth respondent and on which terms such sale took place'

5. The cost of this application is to be paid by the applicant in the event that the matter remains unopposed."

[2] The application was aimed at recouping what was believed to be value added to the property of the fourth respondent who had purchased property from the liquidated estate of the first respondent. The application was opposed by the first to third respondents and they raised points *in limine* relating to urgency and *locus standi*.

BACKGROUND

[3] On 4 March 2016 the applicant and the second and third respondents acting in their capacity as joint liquidators of the first respondent, entered into an agreement for the sale of stockpile material / aggregate material on Portions of the farm known as Varekenslaagte 119, (the property), in the district of Carltonville. The applicant engaged in processing waste rock dumps, crushing and separating the rock, sifting and sorting the crushed rock according to size and prepared same for removal from the property.

[4] The applicant was responsible for installing a weigh-bridge where the processed aggregate would be loaded and weighed and, a weighbridge slip handed over to a representative of the first respondent before the removal of processed aggregate from the property and, the applicant would be free to sell the aggregate. The applicant was invoiced on a monthly basis for the processed aggregate so removed and payment made into a stipulated bank account.

[5] The applicant fell into arrears with its monthly payments due to poor demand in the construction industry. It nevertheless continued to make regular payments and

continued with its activities on the property until 28 January 2021. On the latter date the applicant by letter informed the first to the third respondents that it was struggling to keep up with the minimum payments for the aggregate removed and, requested an arrangement for the removal of the stockpiles of aggregate already processed. This was followed by letter on 4 February 2021 where the applicant was informed that its letter of 28 January 2021 was taken as a form of repudiation and, the contract entered into was cancelled with immediate effect and a demand was made for payment of the outstanding amount. The first to the third respondents, represented by their attorney engaged in discussions and *without prejudice* offers were made (which were neither accepted or rejected).

[6] A meeting on 23 February 2021 was held in an attempt to resolve the issue around the already processed stockpile of aggregate. The applicants contend that they were not informed during such meeting that the property had been sold on auction and that the stockpiles would be included in such sale. The applicant contended that even from the auction brochure the stockpile aggregate was not ''included, marked or specified" "J" and "K" were annexed to the founding papers.

[7] The applicant contended that it had an enrichment claim in that there was contributory value added in the form of the already processed stockpile which was ready to be loaded and removed. The applicant was also aware that it would not be able to claim the sellable or market value of the aggregate that that it's claim related to its input and other costs during the production of the aggregate.

[8] The applicant contended that it only learned on 19 April 2021 that the waste rock and stockpile of processed aggregate were sold on auction. The attorney for the first to third respondent was contacted and that was followed by letters dated 20 and 22 April 2021 to address applicant's concerns. A document indicating processed stock sheet volumes and values was annexed as "M" were provided and it was also alleged that the fourth respondent had proceeded to load 2 loads of processed stock piles on

21 April 2021 without the knowledge and consent of the applicant. Also annexed were images of the stockpile, a size/volume description and chart including selling price. The reply which came through on 22 April 2021 was to inform, that the property had been sold at an auction to one Jannes and another letter which informed that the 'property had been sold "lock stock and barrel."

[9] The urgent application was resorted to after all remedial efforts had failed and after the applicant had failed to obtain a written undertaking from the respondents to refrain from 'selling, removing or loading the processed stockpiles.' Further, it was necessary to determine what value was added to the sale price and a copy of the sale agreement had to be scrutinized alternatively, that the applicant to be informed in writing whether the processed stockpiles were sold and the terms thereof. The applicant contended that it had complied with the requirements for interdictory relief. It could not wait to launch the application in the ordinary course in that it would take several months before the matter was heard, that the processed stockpiles could not be left unchecked for a significant period of time.

[10] In the first point *in limine* the first to third respondent contended that the application lacked urgency because the applicant knew as far back as November 2020 that the property was be sold at an auction. The applicant was a participant in the auction proceedings and was present when the sale was concluded. The applicant proceeded to make a higher offer by contacting the auctioneer direct. Further, the urgency was self-created. The applicant stopped its operations in January 2021 and removed his equipment from the property on 27 April 2021 before launching the urgent application.

[11] In the second point *in limine* the first to third respondents contended that the application was without merit in that applicant lacked *locus standi.* It relied on a cancelled agreement for the relief sought. The agreement gave "permission" to the applicant to do its operations on site if it wished to and there was no provision for the

applicant to render service to the Company on site. Besides it was only the applicant which derived benefit and was charged amounts for the aggregate far below market value.

[12] The first to third respondents contend that the applicant being present at the auction failed to exercise diligence in identifying the proper name of the present owner of the property, and that there was a misjoinder of the present owner Seri.co 474 (Pty) Ltd. The agreement annexed to the founding affidavit was replaced by another annexed as "C" to the answering affidavit. In terms of the agreement it was the applicant who derived more benefit from its operations at the site and was paid far below the market value for the aggregate removed from the site. As at January 2021 the applicant was in arrears to the tune of R1 561 453.86 and the first respondent reserved the right to recover such monies owned.

[13] The first to third respondents contend that the processed aggregate remained the property of the first respondent. The agreement did not provide for a return of any processed aggregate which accumulated as a result of the activities of the applicant. No issue was raised by the applicant as a participant at auction about any value added to the property as a result of the accumulated processed aggregate. Further, what also needed to be dealt with were the large rock deposits, a by-product of the applicant's operation which remained a liability to the first respondent and to the new owner. The applicant had also failed to provide any information to sustain its view that value had been added to the property by the accumulated processed aggregate. In as far as the enrichment claim is alleged the applicant is invited to proceed by way of action to prove its claim. It was also denied that the applicant had made out a case for reimbursement of any alleged value added to the property.

[14] In reply the applicant stated that it was contacted by the auctioneer after the offer at the November auction was not accepted. The applicant's equipment was not sold at the auction and the processed aggregate stockpile was not included in the

November 2020 auction, despite the assertion that the property was sold "lock stock and barrel." The applicant became aware that the sale was finalized on 19 April 2021 and this included the processed stockpile aggregate. In the agreement the rock dump was referred to as property which the applicant still had to crush and screen and the processed stockpile aggregate could not be sold together with the property. The purchasers own risk did not relate to financial risk. The applicant contended that it could not bear the risk of "processing the processed stockpile if it was aware that the stockpiles could be sold at any given time" alternatively that it would be willing to process large stockpiles for someone else's benefit without being compensated and that the stocklist in annexures "M" and "N" to the founding affidavit had significant value as railway blast.

[15] The applicant stated that the original offer of R2 600 000.00 was not accepted, and this resulted in a new offer where the purchase price was pushed up to R5 499 500.00. This made it clear that the purchase price went up after inclusion of the processed aggregate stockpiles and the sale of property agreement was only signed on 26 March 2021.

URGENCY

[16] I am satisfied that a case has been made out for urgency. In this regard I take into account the time line of events. The applicant and first to third respondents' agreement regarding the rock dump and processed aggregated endured from 2016 until January 2021 when it was allegedly repudiated by the applicant. The second and third respondents were administering the estate of the first respondent for the benefit of its creditors and, in the process the property had to be sold and the applicant had interest in acquiring ownership thereof. Although the applicant participated in the November 2020 auction, the sale of the property was not finalized and the applicant continued with its activities on the property from November 2020 up to January 2021. It is not disputed that the applicant engaged with the attorneys for the first to third

respondents and it is not disputed that the sale of the property at an increased price was finally concluded in March 2021. It is further not disputed that the applicant only became aware of what was included in the revised purchase price mid-April 2021 and that its equipment was removed from the property thereafter. The issue revolved around the added value the processed aggregate gave and was contributory to an increase in the, purchase price arose shortly before the urgent application was launched.

NON-JOINDER

[17] The first to third respondents contend that the fourth respondent is not properly before the court or cited. Counsel for the applicant in the supplementary heads of argument submits that the fourth respondent is properly before the court in that the notice to oppose and the opposing affidavit was filed on behalf of all the respondents. In my view the second and third respondent can by law only represent the first respondent and I do not understand the answering affidavit to make out a case for the fourth respondent. The second prayer in the relief sought impacts upon the fourth respondent. In the founding affidavit the removal of two truck loads of processed aggregate was witnessed. In my view the applicant having finally come to the knowledge that the person who bought the property was not one Jannes, and had been advised in the answering affidavit who the purchaser was and, conducted a search to establish the true identity, should as a matter of urgency sought leave to joined the correct fourth respondent and to stand the matter down. The second prayer seeks to interdict the fourth respondent from dealing with the dump rock and processed aggregate on the property it had purchased and for this reason such prayer cannot succeed because it also affects the fourth respondent directly.

[18] However, in my view the issue raised by the applicant being the value added to the property by the processed stockpile aggregate still present on the property, is about whether the applicant stood to benefit from the value placed on the processed

aggregate when the property was sold. The applicant seeks to be given opportunity to measure and put value on the stockpile aggregate. As I see it, no case has been made out for the value added to the dump rock. In this regard only it is my view that the fourth respondent is indirectly affected. It has paid over the purchase price and there is potential of it resiling if performance like registration does not follow through because of the dispute.

LACK OF LOCUS STANDI /REPUDIATION OF THE AGREEMENT/ CANCELLATION/ UNJUST ENRICHMENT / THE SERVICES RENDERED BY THE APPLICANT

[19] Counsel for the applicant contends that it has been proved that a business relationship existed which establishes locus standi and, further, that it has been proved that the stockpiles of processed aggregate have significant value. It is contended to the contrary that the applicant having repudiated the agreement and, it having being cancelled such rights that the applicant had with the first to third respondent was cancelled and cannot be enforced against the new owner, the fourth respondent.

[20] It is common cause that the first to third respondent interpreted the applicant's notification communicated in writing in January 2021 to be a repudiation and elected to cancel the agreement. It is trite law that the test for repudiation is objective, Erasmus v Pienaar 1984 (4) SA 9 (T) at 20C-H. The subsequent cancellation put an end to the existing agreement and to any relationship that may have prevailed since 2016. In my view whatever was attempted to be negotiations with the attorneys for the first to third respondent's attorneys related to a possible conclusion of an agreement pertaining to the stockpile processed aggregate that was on the property, before the actual conclusion of the agreement of the sale of the property in March 2021. Any attempted negotiation subsequent thereto required the involvement of the purchaser. As I see it the applicant lacks locus standi in as far as it seeks to assert any right to the stockpile

aggregate or any right to what it would perceive as valued added to the property after the property was sold. However, can one say that the applicant has a claim of unjust enrichment against the first to the third respondent in as far as the first respondent, represented by the second and third respondent and the creditors of the first respondent would be enriched by the amount the stockpile processed aggregate was sold to the fourth respondent?

[21] In my view the issue of enrichment is firstly premised on the nature of the agreement. What needs to be determined is whether services were rendered by the applicant to the respondent or whether the applicant rendered services to itself and was the sole beneficiary in the agreement. Further, the issue of the risk undertaken needs to be determined, and whether it also related to the applicant taking upon itself the financial risk in the agreement it concluded with the first to the third respondent.

[22] My understanding of the nature of the agreement from the version of first to third respondent is that the dump rock and any product thereof including the stockpile of processed aggregate remains with the property and that it transfers to ownership by the applicant only when it has passed through the weighbridge. The price per ton relates to the amount which the processed aggregate is sold for by the owner of the land. The applicant provided its own workforce and equipment and expended its own money to process the dump rock.

[23] In my view the applicant understood the implications of the cancellation and never attempted to remove of its own accord the processed aggregate despite cancellation, and sought to negotiate a new order. The applicant is determined in its view that there was an enrichment claim in view of the increase in the purchase price, which could only have been as a result of the inclusion of the stockpiles and that significant value was added. In my view the applicant concedes that it would not be in a position to recoup market value of the stock file and that it was entitled to recoup its expenditure incurred in the processing. It is questionable to me whether the applicant

can convincingly show that it has a claim based on unjust enrichment but this is for another court to decide. However, I am of the view that in the interests of justice I should find that there may be a case made out by the applicant for interim relief. I will therefore will not grant the relief as sought in the notice of motion as is, but give such relief to the applicant as will enable it to properly institute proceedings for enrichment if it so wishes against the respondents.

[24] In the result the following order is granted:

1. Prayer 1 is granted;
2. The applicant is granted six weeks to obtain a proper measurement and valuation of the existing stockpile processed aggregate on the farm Varkenslaagte 119;
3. The prayers 2, 3, 4, 5,6, are dismissed
4. Costs are reserved

Tlhapi

TLHAPI VV
(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**13 MAY 2021**
JUDGMENT RESEVED ON	:	**13 MAY 2021**
ATTORNEYS FOR THE APPLICANT	:	**PAGEL SCHULENBURG**
ATTORNEYS FOR THE RESPONDENTS	:	**DREYER & DREYER ATT.**