IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 37252/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES/NO
2022-05-17

In the matter between:

FREDERICK WILHELM AUGUST LUTZKIE	**1st APPLICANT**
NEW SALT ROCK CITY (PTY) LTD	**2ND APPLICANT**
ZAMIEN INVESTMENTS 102 (PTY) LTD	**3RD APPLICANT**
CSHELL 80 (PTY) LTD	**4TH APPLIACNT**

And

KILKEN PLATINUM (PTY) LTD	**1st RESPONDENT**
KILKEN HOLDINGS (PTY) LTD	**2ND RESPONDENT**
KILKEN INVESTMENTS (PTY) LTD	**3RD RESPONDENT**
KILKEN ENTERPRISES (PTY) LTD	**4TH RESPONDENT**
ZUNAID ABBAS MOTI	**5TH RESPONDENT**
MIKAEEL MOTI	**6th RESPONDENT**
ASHRUF KAKA	**7TH RESPONDENT**
SALIM AHMED BOBAT	**8TH RESPONDENT**
DAVID GAVIN WILLOUGHBY	**9TH RESPONDENT**
WIID ROSSOUW	**10TH RESPODENT**
ANGLO AMERICAN PLATINUM CORPORATION LTD	**11TH RESPONDEN**

MAHENDREN MOODLEY	**12TH RESPONDENT**
SEBASTIAN (KGOSI) TSHIKARE	**13TH RESPONDENT**
KILKEN-IMBANI JOINT VENTURE	**14TH RESPONDENT**
UMBANI MINERALS (PTY) LTD	**15TH RESPONDENT**
GLENCORE OPERATIONS SA LIMITED	**16TH RESPONDENT**
COMPANIES AND INTERLLECTUAL PROPERTIES COMMISSION	**17TH RESPONDENT**

JUDGMENT

PHAHLAMOHLAKA AJ

[1] The Applicants approached this court for an order in the following terms:

1. That this application be heard on the semi-urgent roll and that in accordance with the provisions of Rule 6(12) the requirements pertaining to service and time periods be dispensed with;

2. That the 1st Respondent is ordered to forthwith grant to the applicants, alternatively the 2nd, 3rd and 4th Applicants, free and unfettered access to all its books of account and financial records including but not limited to:

2.1 monthly management's accounts;

2.2 bank statements in relation to all of its bank accounts;

2.3 records of all electronic fund transfer;

2.4 general ledger;

2.5 general journal;

2.6 cash receipts journal;

2.7 cash disbursement journal;

2.8 sales journal;

2.9 purchase journal;

2.10 invoices;

2.11 contracts;

2.12 worksheets and spreadsheets supporting cost allocations;

2.13 reconciliations;

2.14 inventories;

2.15 assets register;

2.16 details of all contingent liabilities;

2.17 liability as surety and/or guarantor;

2.18 Tax return/s as envisaged in Section 25(1) and Section 26, 27 and 28 if applicable, and the prescribed records as described in Section 29 read with Section 30 of the Tax Administrative Act, 28 of 2011;

2.19 In relation to the Value Added Tax Act, 89 of 1991:

2.19.1 Tax invoices as envisaged in Section 20;

2.19.2 Credit and debit notes as required in Section 21;

2.19.3 VAT returns as envisaged in Section 28;

2.19.4 Special records and payments as envisaged in Section 29;

2.19.5 Assessments as envisaged in Section 31;

2.19.6 Refunds in terms of Section 41;

2.19.7 Records as envisaged in Section 55.

2.20 A reconciliation of the flow of funds to shareholders since January 2020 by way of distributions as envisaged in Section 46 of the Companies Act, 71 of 2008 and clause 8.1.3.1 of the 1st Respondent's shareholders agreement;

2.21 Documents evidencing a cession of debtors (if any);

2.22 Documents evidencing a cession, if any, of any other right or interest which the company may hold including any interest in the Kilken-lmbani Joint Ventures or the Sale of Tailings and Concentrate Agreement with Rustenburg Platinum Mines Ltd.

3. All bank statements of the 1st Respondent in relation to the Kilken-lmbani Joint Venture for the period of January 2020 to date of order;

4. In relation to the Kilken-lmbani Joint Venture, likewise the documents and information as referred to in paragraph 2.1 to 2.19 above *mutatis mutandis.*

5. That the 1st respondent permit the applicants, alternatively the 2nd,m 3rd and 4111applicants, and their representatives to examine and make copies of the documentation described in paragraphs 2 to 4 above;

6. That the 1st respondent make available and furnish to the applicants, alternatively the 2nd, 3rd and 4th applicants, the following statutory information in relation to its metallurgy processing plant situate at Amandelbult, Waterberg District, Limpopo:

6.1 proof of compliance with the regulations pertaining to health and safety under the Mines and Work Act 27 of 1956as preserved by the Minerals Act 5 of 1991 and the Mines Health and Safety Act 29 of 1996;

6.2 proof of compliance with the provisions of the Minerals and Petroleum Resources Development Act 28 of 2002;

6.3 copy of the most recent annual health and safety report and all information on the provision of training and health and safety matters at the plant;

6.4 a copy of the plant's Health and Safety Policy and/or Code of Practice;

6.5 details of the health and safety committee, in particulars the identity of its members and dates of appointment.

7. That within one month of the receipt of the documentation and information set out in paragraphs 2 to 6 above Mr Schalk Strydom, alternatively Professor Harvey Weiner such a person with suitable qualifications as the court may direct, be appointed for the purposes of establishing the fair value of the shares of the 1st respondent;

8. That the appointed valuator report back to count within one month of his or her appointment on the outcome of the valuation or within such extended period as may be allowed on application to court;

9. That any application for an extension of time be limited to fifteen pages by the applicants and ten pages in response by the 1st, 2nd, 3rd or 4th respondent, if any, and be referred to a judge of this court for adjudication on the basis of the said affidavit/s;

10. That the appointed valuator shall be have the power to call for such additional documentation as he or she may require for purposes of the share valuation;

11. That upon the valuation being finalised the 2nd, 3rd and 4th respondents as shareholders of the 1st respondent (described as the *Newshelf Group* in its shareholders agreement) shall have the option to elect by written notice to the 2nd, 3rd and 4th applicants within ten days of receipt of the valuation whether to be sellers of their shares or buyers of the 2nd, 3rd and 4th applicant's share in the 1st respondent, at the valuation, or at their election shall be entitled within ten days of receipt of the valuation to place their own value on the total shareholding in the pt respondent and to notify the 2nd, 3rd and 4th applicants in writing of such valuation. In the event of the 2nd, 3rd and 4th respondents failing to exercise such option or to make such election within ten days of receipts of the valuation, the 2™1, 3rd and 4th respondent, either to sell their shares or to buy the shares of the 2nd, 3rd and 4th respondents at the determined value thereof;

12. That, should the 2nd, 3rd and 4th respondents elect to place their own value on the shares, as contemplated in paragraph 11 above, the 2nd, 3rd and 4th applicants within ten days of receipts of such valuation placed upon the shareholding by the 2nd, 3rd and 4th respondents, shall inform the 2nd, 3rd and 4th respondents in writing whether they are buyers or sellers at such valuation;

13. In the event of either the 2n<1, 3rd and 4th applicant, or the 2nd, 3rd and 4th respondent jointly (and for this purpose to be regarded jointly as a "party") electing to be a buyer at the valuation by the valuator or at the alternative valuation, such party shall within one month of such election deliver to the other party an unconditional bank guarantee by a major banking institution in South Africa guaranteeing payment of the purchase price against delivery of the shares certificate and securities transfer forms relating to the shares bought and sold;

14. If the procedure described in paragraphs 11 to 13 is unsuccessful for any reason whatever and does not result in a purchaser or sale of the shares, then the entire issued share capital in the 1st respondent held by the 2nd, 3rd and 4th applicant and the 2nd, 3rd and 4th respondents collectively, shall be sold at public auction in a single indivisible transaction, and the proceeds, after commission and expenses, shall be paid to the respective shareholders of the 1st respondent in accordance with their percentage shareholding;

15. That the 1st respondent be ordered to appoint Frederick Wilhelm August Lutzkie, alternatively such a person as the court may nominate, as a director of the 1st responded within 5 days after the grant of this order;

16. That the 16th respondent be authorised and directed to amend its records accordingly to reflect Frederick Wilhelm August Lutzkie, alternatively the person nominated in terms of paragraph 15 hereof, as a director of the 1st respondent;

[2] The application became opposed and on 01 September 2021 the application was before my brother Sibuyi AJ where he made the following order:

1. The matter is referred to the Acting Deputy Judge President for special allocation.

2. Costs reserved"

[3] The matter was set down for hearing in the Third Motion court on 16 February 2022. However, prior to the date of hearing the application Applicants filed a Notice in Terms of Rule 28 for the amendment of the Notice of Motion seeking an order in the following terms.

3.1 Existing paragraphs 7 to 14 be re-numbered as paragraphs 14 to 21 and be prefaced by the following words: *'In the alternative to paragraph 7 to 13 above.."*

3.2 New paragraphs 7 to 13 be inserted to read as follows:

7. It is declared that in the event of the failure by the second to fifth Respondents to perform by 31 January 2022 in accordance with the settlement agreement dated 19 October 2021, as amended on 25 October 2021, entered into by and between the First Applicant, Acting on behalf of the second to fourth respondents, Any Rental (Pty) Ltd and Citax Investments SA (Pty) Ltd:

7.1 The Leonardo A119 helicopter 'helicopter' bearing registration letters [....]; and

7.2 The 762,519,212 issued shares in Rebosis Ltd ('Rebosis shares') be forfeited by the second to fifth respondents as rouwkoop.

8. The second to fifth respondent be ordered to within 10 days do all things necessary to:

8.1 give effective transfer to the first applicant of ownership of the helicopter and deliver possession thereof of him;

8.2 transfer and deliver to the second applicant the Rebosis shares.

9. It be declared further that in the event of a failure by the second to fifth respondent to perform by 31 October 2021, as amended, the settlement agreement is cancelled; and

10. It is declared that the agreed value of the issued share capital of the first respondent is R1, 350, 000, 000.00 (One Billion Three Hundred and Fifty Million Rand) in accordance with settlement agreement dated 19 October 2021, as amended; and

11. The first to fourth Applicants are ordered to, within 30 days from date of this order, deliver to the fifth respondent as unconditional bank guarantee by a major banking institution guaranteeing payment of the sum of R900, 000, 000.00 (Nine Hundred Million Rand) as purchase price for the 64.9% majority shareholding held by the second to fourth respondents in the first respondent payable against delivery of the Share certificates and securities transfer forms relating to the said majority shareholding; and

12. Upon the set out in paragraph 11 above being complied with timeously, the second to fifth respondents are ordered to do all things necessary to give effect to the purchase and sale of the 64.9% shareholding in the first respondent held by the second to fourth respondents to the first to fourth applicants at a purchase price of R900, 000, 000.00 (Nine Hundred Million Rand); and

13. In the event that the order set out in paragraphs 11 above is not timeously complied with for any reason whatever, then the entire issued share capital in the 1st Respondent held by the 2nd, 3rd and 4th applicants and the 2nd, 3rd and 4th respondent collectively, shall be sold at a well-advertised public auction held by an auctioneer appointed by agreement between the parties, alternatively appointed by a judge sitting in chambers, in a single indivisible transaction to

the highest bidder, and the proceeds, after commission and expenses, shall be paid to the respective shareholders of theP[1] respondent in accordance with their percentage shareholding.

3 By the inclusion of the following new paragraph as paragraph 22:

"22. That pending the finalization of the relief sought under the main application and in the event that the main application is not resolved on or before 16 February 2022, then by way of interim relief:

22.1 the 1st respondent be ordered to appoint Frederick Wilhelm August Lutzkie and any other person nominated by him, as director or directors as the case may be of the 1st respondent within 5 days after the granting of this order to bring about equal representation by the NSRC Group on its board;"

22.2 the 17'h respondent be authorised and directed to amend its records accordingly to reflect Frederick Wilhelm August Lutzkie and any such other person nominated by him, as director or directors as the case may be of the 1st respondent;"

22.3 the 1st respondent be ordered to deliver to the first applicants, its audited annual financial statement for the financial period ending December 2020, its management accounts for the period October 2020 to December 2021 as well as May 2021 to December 2021, together with all books of account and all bank statements of the first respondent within 5 days after the granting of this order."

[4] This court was therefore, supposed to be seized with essentially two applications, namely the application in terms of Section 163(1) of the Companies Act and the application for amendment in terms of Rule 28 of the Uniform Rules of the Court. Both applications are opposed.

[5] Both Counsel for Applicants and Respondents filed Heads of Arguments.

[6] On the 15th of February 2022, the afternoon before the hearing of the application, the Applicants filed further Heads of Argument in which the Applicants submit in paragraph 11 that the court grants an order, among others, in the following terms:

> "11.3 It is submitted on behalf of the Applicants that a practical and pragmatic way of the Court, in the exercise of its discretion, to deal with this matter without attempting to make a final determination as to whether or not a valid and binding contract of compromise was concluded, will be to refer the disputes which have arisen in the main application, including the dispute as to whether the manuscript settlement agreement constitutes a valid and binding contract of compromise and, if so, who the parties to the contract are and what the terms of that contract are, to trial. It is submitted it would be proper and appropriate to also grant interim relief, pending the final determination of the issues on trial, directing that Lutzkie and one other nominee of the NSRC Group be appointed to the Board of Directors of Kilken Platinum (Pty) Ltd, which happens to be precisely what the respondent's representatives proposed in the draft settlement agreement they prepared, in the event of the R350 000 000.00 not having been paid by 31 January 2022. Should the Court make such an order, it is submitted it would be appropriate for all the costs in the main application either to be reserved for determination at the trial, or to be costs in the trial. A proposed draft order is attached to these heads of arguments as annexure "B".

[7] After my brother Sibuyi AJ referred the matter was referred to the ADJP for special allocation, and on 19 October 2021 the Applicants and first to fourth Respondents conducted a "full and final Settlement Agreement", which later became a subject of contestation by the parties. The settlement agreement was concluded in an endeavour to settle the matter. It is worth noting that the settlement

agreement was entered into and concluded after the first hearing and therefore, should this agreement be declared to be valid it would settle the original application. The application before this court is not the determination of the validity or otherwise of the settlement agreement, and therefore I will not enter into that terrain.

[8] In their heads of argument the Applicants confirm that the First Applicant (Lutzkie) and the Fifth Respondent (Moti) met on 19 October 2021 and drew up and signed a handwritten document, and that amendment and additions were made to the manuscript document on 25 October 2021.

[9] The manuscript document drawn and signed on 19 October 2021 was amended and added to on 25 October 2021 by insertion of the *"roukop"* provision in paragraph 3 thereof, the exclusion of the date of performance on paragraphs 3 to 31 January 2022, the insertion of paragraph 8.9 and 10 (which were not in the initial version) and the addition of the words "with prejudice" at the top right hand corner of the document.

[10] When addressing this court counsel for the Applicants started off by saying there is an elephant in the room, referring to the Settlement Agreement. I agree it is an elephant in the room because it caused the Applicants to now seek an interim relief and to refer the matter for trial based on, among others, the fact that there is this agreement that needs to be considered.

[11] The Applicants correctly content among others, that upon performance under the settlement agreement it would constitute a full and final settlement of the litigious disputes between the parties in the application and bring about an end to the pending litigation. However, the counsel for the applicants contends, the full and final settlement was conditional upon respondents performing their obligations.

[12] In terms of the agreement, there is nowhere in the agreement that if the parties fail to perform according to the Settlement Agreement the agreement would fall off. It is abundantly clear that there is a remedy of enforceability of the agreement available to the aggrieved party against the party to the settlement agreement who

fails to perform in terms of the agreement. The Applicants seek an order that the matter be referred for trial as in basis that there are disputes fact.

[13] I agree with the Respondent's counsel that if one considers the Settlement Agreement the section 163 application becomes settled. The Respondents argue that the remedy available to the Applicants in the circumstances is to enforce the Settlement Agreement.

[14] On the Section 28 Amendment the Applicants argue that if the Applicants were to choose not to persist with the amendment, or if the application to amend were to be refused; the main application remains before the court and the Applicants would be entitled to seek relief in terms of the main application and the Original Notice of Motion, unless the court finds on the affidavits before it that a valid and binding contract of compromise were concluded. The Applicants, have not pursued the section 163 and therefore, I consider this argument to be misplaced. I reiterate the interpretation of the contract of compromise is a new matter. The fact that the Applicants argue that *"unless the court finds on the affidavits before it that a valid and binding compromise were concluded"* is an admission that I cannot at this stage consider the original application without considering the contract of compromise.

[15] It must be noted that if the parties are *ad idem* that they concluded the settlement agreement in an attempt to settle the matter then the party aggrieved by the other party's non-performance must enforce the agreement. The application for the enforceability of the contract cannot be made on top of another application.

[16] The Applicants however, contend that in order for the court to find the a valid and binding contract of compromise was concluded the court would at least have to find who the parties to the compromise were, what the terms of compromise were, and which party was the holder of which rights and which party was the bearer of which obligations. It is clear that this court is called upon to interpret the terms of settlement agreement that was concluded after the application was placed on the roll. It cannot be contested that the Settlement Agreement is a new

aspect that was introduced very late albeit in an effort to settle the initial section 163 application. It is not there in the founding affidavit. The original application before this court did not have the interpretation of the settlement agreement as one of the prayers.

[17] Matters must get to finality and therefore applications cannot be adjusted as new developments occur, which were not present when the parties approached the courts. An application for amendment should not be used as a tool to introduce new matters.

[18] The Applicants seem no longer interested in pursuing both the Section 163 original application and the amendment application because in the Heads of Argument filed on the eve of the hearing of the application the Applicants are asking for the matter to be referred to trial and that the court grants an interim order.

[19] Counsel for the Respondents argues that the "Final Settlement Agreement" has rendered the Section 163 application ***res judicata***. When the Applicants lodged this application there was no Settlement Agreement or purported settlement between the Applicants and the Respondent and when the application was heard there was a new development, namely the settlement agreement.

[20] A compromise or settlement (transaction) is a contract which has its object the prevention, avoidance or termination of litigation. It has the effect of ***res judicata*** irrespective of whether it is embodied in an order of court.

[21] From the above, it is clear that a settlement agreement was entered into between Lutzkie and Moti. This was in an endeavour to settle the dispute between the Applicants and ttie Respondents. In my view this agreement has the effect *of res judicata* and any dispute arising from the agreement should be settled by way of enforcing the agreement by the aggrieved party to the agreement.

[22] From the further Heads of Argument filed on behalf of the Applicants on the eve of the hearing of this Application and from the arguments by Counsel on behalf

of the Applicants it is clear that the application are no longer asking for a relief in terms of the main application nor are the applicant's asking for an order in terms of the Rule 28 Application. I have been called upon to order an interim interdict but that was not the original relief sought by the application.

[23] It must be noted that the origin of this application was a relief in terms of the Notice of Motion among others in terms of section 163 of the Companies Act. The Applicants no longer seek that relief on an urgent basis. They introduce other prayers some of whom were as a result of the Manuscript Settlement Agreement that was entered into between the parties during the cause of the original application. It is clear from the Applicant's latest Heads of Argument that they are no longer pertaining the original Section 163 application nor are they pursuing the Rule 28 Application for amendment.

[24] I have been requested to refer the application for trial but that is in relation to the interpretation of the manuscript settlement agreement. It is clear that the Applicants introduced new issues and therefore a new application ought to be lodged. The Applicants cannot picky back on this application to refer the new aspects to trial.

[25] In my view the Applicant's argument that the matter be refereed trial cannot be sustained because the Settlement Agreement settled the section 163 Application.

[26] consequently I find the Applicants are no longer asking for a relief in terms of the original section 163 Notice of Motion nor are they pursuing the amendment in terms of Rule 28 of the Uniform Rules of Court. A new aspect has arisen, namely the interpretation of the Manuscript Settlement Agreement, and therefore the aggrieved party should enforce the agreement.

[27] In the result make the following order:

27.1 The application is removed from the roll.

27.2 The Applicants are ordered to pay costs including costs consequent upon the employment of two Counsel.

KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIA.

Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 17 May 2022.

JUDGMENT RESERVED ON	**: 16 February 2022**
FOR THE PLAINTIFF	**: ADV NGO MARITZ SC**
	ADV JAN SMIT
FOR THE DEFENDANT	**: ADV J GAUNTLET SC**
	ADV T DALRYMPLE
DATE OF JUDGMENT	**: 17 May 2022**