

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE	NO / YES
(2)	OF INTEREST TO OTHER JUDGES	NO / YES
(3)	REVISED.	
SIGNATURE		DATE

[Handwritten signature] 18/5/2023

CASE NO: 2022-005679

In the matter between:

JACKPOT DIAMONDS PTY LTD

Applicant

and

REABETSOE MOTSEPE DIAMONDS

AND MINERALS PTY LTD

Respondent

Jackpot Diamonds (PTY) LTD v. Reabetsoe Motsepe Diamonds and Minerals (PTY) LTD (Case No: 2022-005679) [2023] ZAGPJHC 506 (18 March 2023).

JUDGMENT

THOMPSON AJ

Introduction

[1] The controversy in this matter is whether a valid agreement exists between the applicant and respondent. The following are the salient facts relevant to this judgment:

- 1.1 On 16 June 2020, the parties duly represented entered into a written agreement. For ease of reference I will refer to this herein after merely as "*the agreement*". In terms of the agreement, the applicant would fund certain litigation on behalf of the respondent presently pending in the Gauteng Division, Pretoria under case number 36103/2020. This litigation is between the respondent and, *inter alia*, the Minister of Mineral Resources and Energy ("*the Minister*"). The gist of this litigation pertains to certain mining rights which the respondent is laying claim to.
- 1.2 The agreement provides that if the litigation is successful in favour of the respondent, the parties will cause a new company to be incorporated. For ease of reference I will refer to this new company as "*the newco*". The prospecting permit (in other words the mining rights) will be transferred into the name of the newco for the purpose of exploration, mining and processing of diamonds. (I pause to mention that this aspect of the agreement is contained in clause 3.1).
- 1.3 The percentage shareholding in the newco is agreed to and set out as 70% in favour of the applicant and 30% in favour of the respondent.

1.4 The applicant will be the sole contractor in respect of the exploration, mining and processing of diamonds. (This aspect is contained in clause 3.4 of the agreement).

1.5 The diamonds recovered in terms of the agreement will be put out on a tender basis to the highest bidder and the net income thereof will be paid on a 15% basis to the respondent and 85% basis to the applicant.

There is also an addendum to the agreement. Nothing material to this matter turns on the addendum. For clarity purposes, where I refer to the agreement herein after, it includes the addendum.

[2] It is common cause that the agreement was entered into on the terms as set out in the agreement.

[3] On 17 November 2021, the respondent by way of a letter by its attorneys, sought to resile from the agreement on the basis that the agreement is void alternatively voidable. At this juncture the respondent relied thereon that the agreement does not have a provision allowing for its amendment or cancellation. Certain other complaints relating to the agreement was also raised in this letter, none of which are relevant to this application. The respondent's attorneys indicated that it was their instructions to launch a High Court application to have the agreement set aside. No such application was ever brought by the respondent.

- [4] Attempts were made to resolve the dispute raised at the instance of the respondent extra-curially and by 7 March 2022 the dispute had not been resolved. At this juncture in time, the applicant's attorneys suggested that the parties agree to have the dispute resolved by way of arbitration. In principle there was an agreement that the dispute be resolved by way of arbitration, which came to nought as the parties could not agree on the identity of an arbitrator or the method for holding the arbitration. As a result, the applicant launched these present proceedings, seeking no more than an order declaring the agreement valid.
- [5] The respondent's answering affidavit delivered in response to the application is replete with irrelevant and argumentative material. Mixed in between the irrelevant and argumentative material is an averment that clause 3.1 of the agreement is void, alternatively voidable. In this regard, the respondent in a bald and vague assertion states that "*the Environmental Authorization in terms of the National Environmental Management Act, Act 107 of 1998 (as amended) was issued to the Respondent. In terms thereof the Respondent is granted rights and imposed with described obligations and responsibilities. No provision is made in the agreement. . . dealing with such rights, obligations and responsibilities.*" It is difficult to discern any real meaning from this averment and it would seem to me that the respondent seeks to contend that the agreement only seeks to transfer rights and not obligations, which is impossible.

- [6] This contention is simply untenable on even the most cursory reading of clause 3.1 of the agreement. Clause 3.1 envisages the transfer of the permit, which permit no doubt has rights and obligations attached thereto.
- [7] A second contention is raised to the effect that the party who is issued a prospecting and/or mining license (the permit contemplated in terms of the agreement), is under an obligation to comply with Section 38(1)(d) and (e) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"). This contention can swiftly be disposed of. Section 38 of the MPRDA was repealed by Section 31 of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, with effect from 7 June 2013. Therefore, by the time the agreement was entered into, Section 38 of MPRDA was no longer on the statute books.
- [8] Within this jumble of allegations, a terse allegation was made that there is no provision which allows for a permit holder to transfer statutory obligations. This terse allegation is simply untenable as Section 11 of MPRDA allows for a transfer of prospecting and/or mining rights in the discretion of the Minister.
- [9] The next ground upon which the respondent relies is that the agreement does not set out the shareholding, the rights of shareholders and any possible limitation of those rights. The averment goes further to state that "*it is notable that the party to which the permit would be issued before its proposed transfer will have no voting rights, no right to attend any meetings, no participation in company affairs.*" These allegations are as bald and uncreditworthy as an

allegation can get. The shareholding percentages are agreed to and set out in the agreement. It is trite that a shareholders' agreement is not a necessary requirement for parties to hold shares in a company as the rights, duties and obligations of shareholders are set out in relevant legislation.

[10] Lastly, the respondent contends that there is a fatal conflict between clause 3.1 and 3.4 of the agreement. The argument by the respondent in this regard is that it is impossible for both the newco and the applicant to simultaneously have sole rights. This argument is contrived. The newco will be the holder of the prospecting and/or mining rights and the applicant will be the contractor who will do the prospecting and mining on behalf of the newco.

[11] A subsequent supplementary answering affidavit, for which no permission was sought from this court for its admission, was also delivered by the respondent. Nothing turns on this supplementary affidavit as it pertains to a point *in limine* raised in the applicant's replying affidavit, which point *in limine* is not persisted with.

[12] Applying the **Plason-Evans**-rule¹ in conjunction with that which was said in the **Zuma**-judgment,² this should be the end of the matter. However, the respondent belatedly raised issues in the heads of argument filed on its behalf. Although *Mr Hollander*, appearing for the applicant, correctly in my view indicated that he should not be dealing with those issues raised as they do not

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C

² *NDPP v Zuma* 2009 (2) SA 277 (SCA) at para [26]

appear from the answering affidavit, he did elect to deal with them in argument. As there is no prejudice to the applicant in this regard, I will briefly deal with these additional issues raised on behalf of the respondent in so far it was advanced and persisted with during argument by *Mr Msiza* appearing on behalf of the respondent.

[13] The lesser of the two arguments persisted with is the bald and unsubstantiated allegation that the agreement is void as it violates the mining sector's legislative framework in respect of Broadbased Economic Empowerment Policies. In this regard I enquired from *Mr Msiza* exactly which pieces of legislation, with reference to specific sections and which regulations, rules or policies, with specific reference to the applicable provisions, reliance is being placed. This query was necessitated by me as the submission proffered in the respondent's heads of argument went no further than "*the status quo* [sic] *of the Agreement as* [sic] *addendum unquestionably violates the legal framework i.e. (Sections 11(1). . .section 17. . .section 23(1). . .and section 48* [of the MPRDA]". No argument is elucidated in the heads of argument how the agreement violates any of those aforesaid sections.

[14] During argument, *Mr Msiza* elected to, firstly and foremost focus thereon that the respondent's representative is a black female and, accordingly, the agreement violates Section 12 of MPRDA. This violates is found therein that the respondent is only afforded a 30% shareholding in the newco whilst section 12³ of MPRDA envisages assistance to historically disadvantaged

³ "12 Assistance to historically disadvantaged persons

persons, with the respondent's representative clearly falling into that category. The fallacy of this argument lies therein that the parties were both able to enter into negotiations with each other in concluding the agreement. There is no allegation that the applicant held a disparate degree of power over the respondent and that negotiations could not take place on equal footing. Even if there were a disparity in negotiation power, the degree of such disparity is not disclosed that any recognized ground upon which a contract may be void or voidable cannot be found to exist.

- [15] There is a further problem that arises for the respondent in this regard. Section 12 of the MPRDA does not affect the agreement itself. It may, in the future if the respondent is successful in its litigation against the Minister, affect the transferability of the prospecting and/or mining rights to the newco in terms of Section 11(1)⁴ of the MPRDA if the Minister has regard to Section 12 thereof. This is a possible future event that may affect the exercise of the Minister's

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- (1) *The Minister may facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations.*
 - (2) *The assistance referred to in subsection (1) may be provided subject to such terms and conditions as the Minister may determine.*
 - (3) *Before facilitating the assistance contemplated in subsection (1), the Minister must take into account all relevant factors, including-*
 - (a) *the need to promote equitable access to the nation's mineral resources;*
 - (b) *the financial position of the applicant;*
 - (c) *the need to transform the ownership structure of the minerals and mining industry; and*
 - (d) *the extent to which the proposed prospecting or mining project meets the objects referred to in section 2 (c), (d), (e), (f) and (i).*
 - (4) *When considering the assistance referred to in subsection (1), the Minister may request any relevant organ of State to assist the applicant concerned in the development of his or her prospecting or mining project."*

⁴ "11 **Transferability and encumbrance of prospecting rights and mining rights**

- (1) *A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies."*

discretion, however in itself it does not violate the terms of an agreement voluntarily entered into.⁵ When I directed *Mr Msiza*'s attention to the aforesaid, he did no more than stating he cannot take the argument any further.

[16] The second point that was dealt with by *Mr Msiza* is the fact that the application is premature. His argument at this juncture became rather confusing. He submitted that the application is premature as there is no dispute between the parties relating to the newco at this stage and that it will only arise in the future if the respondent's litigation is successful. He also submitted, in this regard that there is no repudiation or attempt to resile from the agreement by the respondent. This submission conflicts the earlier argument that the agreement is void due to Section 12 of the MPRDA. The allegation that the agreement is void is a clear attempt to resile from the agreement and, in so far the agreement is found to be valid, constitutes a repudiation of the agreement. The premature argument also conflicts the earlier stance by the respondent set out in its attorney's correspondence prior to the litigation ensuing, namely that a court must be approached to set the agreement aside.

[17] On a factual level, the argument that the application is premature is simply not understood. The respondent itself was, as early as 2021, intent on launching an application to have the agreement set aside on the basis that it is void or voidable. In addition, the respondent participated in a process to have the dispute whether the agreement is void or voidable determined by arbitration.

⁵ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 (1 December 2017); 2018 (2) SA 314 (SCA) at para [23]

The respondent's conduct evidenced a clear and unequivocal intention not to be bound by the agreement and, accordingly, the applicant cannot be faulted for launching this application. In light of the respondent's aforesaid conduct, this belated reliance on the application being premature is nothing more than an opportunistic, uncreditworthy afterthought to overcome the deficiencies in its own case.

[18] On a legal principle level, the premature argument is also untenable. The applicant relies on Section 21(1)(c) of the Superior Courts Act⁶ that it has the right to approach this court to determine whether the agreement is valid and binding, despite the fact that it cannot claim any relief, at this juncture consequential upon such determination. The applicant's right to such determination, or issuing of a declaratory order, is subject to the court's discretion. A court should decline to issue a declaratory order, as it may amount to an advisory opinion on abstract propositions of law if there is no existing or live controversy.⁷ Otherwise stated, a court should refuse to issue a declaratory order if it will not have some kind of practical effect.⁸

[19] The applicant clearly has an immediate interest in having the validity of the agreement determined. The applicant has agreed to fund the respondent's litigation against the Minister with the ultimate pay-off to the applicant being that it will enter into a newco with the respondent on an agreed shareholding and profit share basis, in the event of the litigation against the Minister being

⁶ 10 of 2013

⁷ *Mbotwane Security Services CC v Pikitup SOC (Pty) Ltd & Others* [2019] ZASCA 164 (29 November 2019) at para [15]

⁸ *Minister of Justice & Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA) at para [22]

resolved in favour of the respondent. The applicant clearly entered into the agreement with such benefit in mind. Had there been no suggestion of a benefit in the long term to the applicant, I highly doubt whether the applicant would have entered into the agreement. This doubt is fortified by the lack of any averment and evidence by the respondent that the applicant is a benevolent funder of litigation without expecting any benefit in return.

[20] It seems to me that the respondent has grown discontent with the agreement it had voluntarily entered into and has embarked on a course of action to find any way to resile from the agreement, even inconceivable ways. In my view the respondent is *mala fide* in its actions in seeking to resile from the agreement on such inconceivable grounds.

[21] In light of the aforesaid, the applicant is entitled to know whether it has cause to continue funding the litigation on behalf of the respondent or not. An immediate live controversy exists, which determination will have the practical effect for the applicant to decide whether the litigation against the Minister should continue to be funded by it or not.

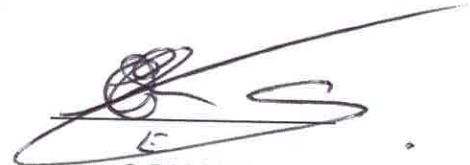
[22] Accordingly, in my view, a declaratory order is appropriate in this matter.

[23] The applicant sought no more than an ordinary costs order against the respondent. In my view, the conduct of the respondent is so opportunistic, *mala fide* and ill-founded that had the applicant sought a punitive costs order against the respondent I would have been inclined to grant such an order.

However, as the applicant did not seek a punitive costs order and the respondent's legal representative did not have an opportunity to address me on this aspect, I do not deem it fair to grant a punitive costs order, even where the facts clearly warrant such an order.

[24] In the premises I make the following order:

1. It be and hereby is declared that the written agreement entered into between the applicant and the respondent on or about 16 June 2020, inclusive of the addendum thereto entered into on or about 11 September 2020, is declared valid, binding and enforceable.
2. The respondent is to pay the costs of the application.



C THOMPSON

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT:	ADV L. HOLLANDER
APPLICANT'S ATTORNEYS:	THERON, JORDAAN & SMITH INC
COUNSEL FOR THE RESPONDENTS:	S.J MSIZA
RESPONDENTS ATTORNEYS:	MSIZA & ASSOCIATES ATTORNEYS
DATE OF HEARING:	15 MAY 2023
DATE OF JUDGMENT:	18 MAY 2023