

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

31/05/2010.

CASE NUMBER: 42267/08

In the application for leave to appeal:

ARMCOIL AFRIKA (PTY) LTD

and

PHILLIPUS GIOVANNI TORRE N.O.

RICHARD CASSIM N.O.

ABSA BANK LIMITED

NOT APPLICABLE
NO
OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. YES
DATE: 26/5/10
SIGNATURE: [Signature]

Applicant

Jointly referred to as the First Respondent

Second Respondent

In Re:-

ARMCOIL AFRIKA (PTY) LTD

First Applicant

PETER JACQUES FLINT

Second Applicant

JOHN MICHAEL ROBINSON

Third Applicant

MARTHINUS JACOBUS VAN WYK

Fourth Applicant

MARIA SLABBER

Fifth Applicant

and

ARMCOIL AFRIKA HOLDINGS (PTY) LTD

First Respondent

ELIAS SELLO NTSIHLELE

Second Respondent

SETENANE SEBASTIAN MABULU

Third Respondent

ABSA BANK LTD

Fourth Respondent

RONALD SHANLEY

Fifth Respondent

HAASBROEK STEYN

Sixth Respondent

JUDGMENT

- [1] The applicant seeks leave to appeal against the orders made in subparagraphs 34.2 and 34.4 of the judgment that was handed down on 11 December 2009.
- [2] The amended notice of application to appeal does not state whether the applicant seeks leave to appeal to the Supreme Court of Appeal or to the Full Court of this High Court. Mr Odendaal SC, who appeared on behalf of the applicant, however, informed me from the Bar that leave is sought to appeal to the Full Court.
- [3] Mr Odendaal's argument in support of the application is based on two grounds, namely:
- 3.1 The applicant was never in *mora debitoris*;
- 3.2 *Alternatively*, and in the event of it being found that the applicant was indeed in *mora*, and having regard to the provisions of section 1 of the Prescribed Rate of Interest

Act 55 of 1975 ("the Interest Act"), as amended, there were special circumstances relating to the debt owing by the applicant to the first respondent which justified an order that no interest was payable by the applicant.

[4] As regards the first ground, Mr Odendaal's argument can be summarised as follows:

- 4.1 *Mora debitoris* can arise only if the particular debt is due and enforceable;
- 4.2 When a debtor would have a good defence to any action brought against it to enforce the obligation, the debtor is not in *mora*;
- 4.3 A contracting party who demands restitution consequent upon a purported rescission of a contract must tender the return of what he himself has received under the contract or its equivalent in money;
- 4.4 For the applicant to have been in *mora debitoris* (as was found), it follows, that for purposes of the order made, the first respondent was the creditor, claiming payment of the

subscription price and interest thereon;

4.5 If the applicant was in *mora ex re*, the return of the shares and the repayment of the subscription price had to occur simultaneously;

4.6 It is common cause that the first respondent has at no time (to date) tendered to the applicant return of the shares;

4.7 In the premises, the applicant was never in *mora* and is therefore not liable for interest until it is placed in *mora*.

[5] As regards the first ground, Mr Odendaal, further, contended that:

5.1 the agreement between the applicant and the first respondent did not fix a date for performance in the event of the lapsing thereof;

5.2 it was the intention of the parties that the shares would be returned, and the subscription price repaid, within a reasonable period of time after the lapsing of the agreement;

5.3 the non-fulfilment of the relevant suspensive conditions would have fallen peculiarly within the knowledge of the first respondent, and it could not have been the intention of the parties that the applicant would be obliged and become liable to repay the subscription price and interest in circumstances where:

5.3.1 it would not immediately have known of the non-fulfilment of the suspensive condition and the consequent lapsing of the agreement;

5.3.2 the return of the shares would have taken some time;

5.4 in the circumstances, the applicant was not in *mora ex re*;

5.5 the applicant was never placed in *mora ex persona*;

5.6 in law, before a delay amounts to *mora*, it must be culpable, i.e. the debtor did not know or could not be reasonably expected to know that performance was due or, in other words, that the debtor must or should have been aware of

his obligation to perform timeously and of the nature of the performance;

5.7 the applicant only realised during or about April 2008 that the relevant suspensive conditions have not been timeously fulfilled;

5.8 there is no suggestion in the papers that the applicant could reasonably have ascertained at a prior date (i.e. prior to April 2008), that the suspensive conditions had not been fulfilled;

5.9 the applicant's ignorance that the subscription price became due pursuant to the non-fulfilment of the suspensive conditions on 1 October 2004 was reasonable and, consequently, the applicant did not automatically fall in *mora* on 2 October 2004.

[6] I am of the view that there is not a reasonable possibility that another court may come to a different conclusion based on Mr Odendaal's argument referred to in paragraph 4 above, and the grounds to which the argument pertains in the amended notice of application for leave to appeal. The reasons for this

are, briefly, the following:

- 6.1 The applicant applied for declaratory relief as stated in paragraph 1 of the judgment;
- 6.2 The only issue between the applicant, on the one hand, and the first and second respondents (i.e. the respondents in this application), on the other hand, was whether paragraph 3 of the notice of motion should be amended as set out in subparagraph 2.1 of the judgment;
- 6.3 Counsel for the applicant and the first and second respondents were *ad idem* that the sole issue could indeed be decided;
- 6.4 The fact that the first respondent did not oppose the application for declaratory relief (save for the issue of interest), is comparable with a situation where the first respondent itself sought such relief, against repayment to it of the amount of R998,000.00 by the applicant, on the same basis as that set out in the notice of motion – in such situation:

6.4.1 the first respondent would not, in law, have been obliged to tender restitution of the shares (the situation, therefore, clearly differs from the one alluded to by Mr Odendaal, where the applicant had instituted proceedings for the return of the shares or the respondent had instituted proceedings for the repayment of the amount of R998,000.00, i e not for declaratory relief);

6.4.2 the applicant would not have had a good defence.

[7] I am of the view that there is a reasonable possibility that another court may come to a different conclusion based on the argument of Mr Odendaal referred to in paragraph 5 above, and the grounds to which the argument pertains in the amended notice of application for leave to appeal.

[8] As far as the alternative argument and the grounds to which that argument pertains in the amended notice of application for leave to appeal are concerned, I am of the view that there is not a reasonable possibility that another court may come to a different conclusion. The reasons for this are, briefly, the

following:

- 8.1 Section 1 of the Interest Act does not empower a court of law to order that a debt shall bear no interest – it provides that a court of law may, on the grounds of special circumstances relating to that debt, order that interest shall be calculated at the rate other than the one prescribed under section 1(2) of that Act;
- 8.2 Theoretically, it may be possible that a zero rate be ordered – I am, however, not called upon to make a finding in that regard;
- 8.3 In the light of the facts of this case there is not a reasonable possibility that another court may come to the conclusion that interest on the amount of R998,000.00 that the applicant was ordered to pay to the first respondent should, in terms of section 1 of the Interest Act, be calculated at a zero rate.

[9] In the premises, the following order is made:

- 9.1 The applicant is granted leave to appeal to the Full Court of

the North Gauteng High Court, Pretoria, against the following parts of the judgment made by me on 11 December 2009:

- 9.1.1 The order set out in subparagraph 34.2 of the judgment;
- 9.1.2 The order set out in subparagraph 34.4 of the judgment.
- 9.2 The leave to appeal as set out in subparagraph 9.1 above is granted only in respect of the following grounds set out in the amended notice of application for leave to appeal: 1.2, 1.4, 1.5, 1.8, 2.5, 2.8 and 2.10;
- 9.3 The costs of the application for leave to appeal in respect of the grounds set out in subparagraph 9.2 above, will be costs in the appeal;
- 9.4 The application for leave to appeal in respect of subparagraphs 1.1, 1.3, 1.6, 1.7, 1.9, 2.1, 2.2, 2.3, 2.4, 2.6, 2.7 and 2.9 of the amended notice of application for leave to appeal is dismissed with costs.


VAN LOGGERENBERG: AJ

20/5/10
(Date)