



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 851/12

Not reportable

In the matter between:

CRONIMET CHROME MINING SA (PTY) LTD
CRONIMET CHROME SA (PTY) LTD
CRONIMET CHROME PROPERTIES (PTY) LTD

FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT

(Fourth, Eighth and Ninth Defendants in the court a quo)

and

BRODSKY TRADING 224 CC t/a PLATINUM UNLIMITED
ESTATES

RESPONDENT

In re:

BRODSKY TRADING 224 CC t/a PLATINUM UNLIMITED
ESTATES

PLAINTIFF

HENDRIK PETRUS NELL
CHARLOTTE FRANCIENA NELL
LOURENSIA NTSWAKI KWENAESELE
CRONIMET CHROME MINING SA (PTY) LTD
NIGHT FIRE INVESTMENTS 110 (PTY) LTD
JOHAN NIEMÖLLER

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT
FIFTH DEFENDANT
SIXTH DEFENDANT

(In default in the proceedings in the court a quo)

NIEMCOR AFRICA (PTY) LTD
CRONIMET CHROME SA (PTY) LTD
CRONIMET CHROME PROPERTIES (PTY) LTD

SEVENTH DEFENDANT
EIGHTH DEFENDANT
NINTH DEFENDANT

Neutral citation: *Cronimet Chrome Mining SA v Brodsky Trading* 224 CC (851/12) [2013] ZASCA 155 (22 November 2013)

Coram: Cachalia, Malan, Pillay JJA, Van der Merwe and Zondi AJJA

Heard: 7 November 2013

Delivered: 22 November 2013

Summary: Where an order given in the high court is final in effect, but is not definitive of the rights of the parties, nor disposes of a substantial part of the relief claimed, the order is not appealable.

JUDGMENT

CACHALIA JA (MALAN, PILLAY JJA, VAN DER MERWE AND ZONDI AJJA CONCURRING):

[1] This matter came before us on appeal against an order of the North Gauteng High Court (Tolmay J) on two issues separated for determination under Rule 33(4) of the Uniform Rules. The first was whether the plaintiff (the respondent on appeal) had complied with s 26 of the Estate Affairs Agency Act 112 of 1976, and the second whether it had complied with ss 34A(1) and (2) of the Act. These provisions require estate agents to have valid fidelity fund certificates before rendering services entitling them to claim remuneration. The high court issued a declaratory order to the effect that the respondent had ‘substantially complied’ with those provisions, but granted the appellants leave to appeal the order.

[2] Before the hearing in this court the parties were given an opportunity to lodge supplementary heads of argument on whether the order was appealable in the sense of being definitive of the rights of the parties and also dispositive of at least a substantial part of the relief claimed. After hearing argument on this question the court decided that the matter was not appealable. The matter was accordingly struck

from the roll and the appellants ordered to pay the costs of their opponents, including the costs of two counsel. The court indicated at the time that its reasons would follow. These are the reasons.

[3] In order to decide whether the order of the high court is capable of being appealed it is necessary to identify the parties and the nature of the dispute between them. In its particulars of claim the plaintiff describes itself as a close corporation conducting business as an estate agent and business broker. It claims payment of approximately R15 million in agent's commission. The claim arises from a mandate given to the plaintiff by the first, second, third and fifth defendants ('the sellers'). The mandate encompassed finding a purchaser for their interests, in the 'whole of the mining operation', which includes the first, second and third defendants' shareholding in the fourth defendant, an immovable property owned by the fifth defendant and a crushing mining permit, also owned by the fifth defendant. The value of the transaction is R190 million.

[4] The plaintiff alleges that it introduced the appellants to the sellers as a result of which a sale agreement was concluded whereby the appellants bought the sellers' mining interests and also agreed to pay the commission on the transaction. It also alleges that it and its members held valid fidelity fund certificates as required by the Act. As I have mentioned the validity of these certificates was the only issue separated for determination in the high court.

[5] The appellants deny liability for payment of the commission on various grounds. For present purposes, and as result of the order of the high court, we are concerned with only one of these: they assert that when the mandate was agreed and thereafter, the plaintiff, its members and its employees did not have valid fidelity fund certificates as required by s 26 of the Act. Accordingly, say the appellants, without valid certificates the plaintiff was not entitled to act as an estate agent and is therefore prohibited by ss 34 A(1) and 34 A(2) of the Act from enforcing its claim.

[6] The sellers were sued together with the appellants, but in the alternative. They do not contest the plaintiff's claim for commission, nor do they appear to take

issue with the validity of the certificates. Their case is that it is the appellants – not they – who are liable for payment of the commission.

[7] The appellants applied for the issues concerning the validity of the fidelity fund certificates to be separated for prior determination and the parties subsequently agreed on this course. The court accordingly allowed the separation and proceeded to hear evidence on this issue.

[8] The plaintiff called several witnesses to prove that it had complied with the relevant provisions of the Act. The second defendant, Ms Nell, testified on behalf of the respondent. The appellants elected not to testify. After considering the evidence the court found that the respondent had 'substantially complied' with these provisions and made a declaratory order to this effect. The appellants seek to reverse this order.

[9] For present purposes it is not necessary to consider whether or not the high court was correct in reaching this conclusion. Here we are concerned only with whether the order of the high court is appealable. In this regard the court is guided amongst others by the following considerations: whether the order of the high court is definitive of the rights of the parties; has the effect of disposing of at least a substantial portion of the relief claimed; would lead to a prompt resolution of the real issue between the parties and whether the balance of convenience favours a piecemeal consideration of the case. Ultimately the court adopts a flexible and pragmatic approach in deciding whether or not it is appropriate to entertain the appeal in the particular circumstances.

[10] Bearing these principles in mind I turn to consider whether the high court's order is appealable. The appellants contend that if the merits of the appeal are upheld and the court upholds its contention that the Act was not complied with in respect of fidelity fund certificates, this would end the dispute and lead to an immediate dismissal of the plaintiff's action. Indeed that is the order it seeks.

[11] The plaintiff on the other hand contends that the issue regarding the validity of the fidelity fund certificates may affect only a minor portion of the relief claimed

pertaining to the immovable property, which is worth R1 million, and that that constitutes an insignificant part of the claim. The sale of shares, it says, constitutes the main part of the transaction and may not fall within the definition of a 'business undertaking' in s 1 of the Act. It is an issue yet to be decided by the high court. The order of the high court is accordingly not definitive of the rights of the parties and will not dispose of a substantial part of the relief claimed. The sellers support this view.

[12] But the appellants say that the issue as to whether the sale of shares, which was part of the composite transaction also involving the immovable property and the crushing permit, fell within the definition of business undertaking, is not an issue on the pleadings, and is therefore not an issue the high court need consider.

[13] A perusal of the pleadings reveals that in its particulars of claim the plaintiff pleaded that it had complied with the provisions of the Act regarding the required fidelity fund certificates and then went on to plead that it was required to find a buyer for their 'interests in the whole of the mining operation' inclusive of the shareholding, immovable property and crushing permit. This means that the composite transaction constituted the sale of a 'business undertaking' as contemplated by the Act and required compliance with the Act. Pleaded thus, say the appellants, the inapplicability of the Act to the share transaction did not arise on the pleadings.

[14] But I do not think that this is the only reasonable interpretation of the pleadings. In my view the pleadings can also reasonably be construed to read that the respondent had complied with the Act to the extent necessary or required, but that it is not precluded from claiming any other part of the commission where the subject matter of the transaction falls outside the ambit of the Act. In this regard there is no dispute that any claim for commission on the sale of the immovable property may be enforced only if the agent has a valid fidelity fund certificate as the Act requires. But it is less clear that the sale of shares in this transaction also requires compliance with the Act.

[15] The high court considered that the 'essence' of the transaction was the sale of the shares. And it expressly declined to rule on whether, for this reason, the transaction fell outside the scope of the Act because, so the learned judge said, this

was not an issue separated for determination under Rule 33(4). She thus concluded that the evaluation of the transaction could not be dealt with at that stage. Put simply, the issue of the applicability of the Act to the transaction as whole was not dealt with, did not fall within the ambit of the order granting leave to appeal and consequently was not an issue over which this court now has jurisdiction. The dispute over the characterisation of the transaction therefore remains and a decision by this court on the separated issues would clearly not dispose of this question. This means that even if the issue concerning the fidelity fund certificates is decided in favour of the appellants this will not dispose of a substantial part of the relief claimed or be definitive of the rights of the parties.

[16] Even if the appellant is correct in its submission that the applicability of the Act to the transaction did not arise on the pleadings, it was open to any of the parties to raise the issue as a question of law. For as this court said in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA (A) at 24B-C:

'If . . . the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision.'

[17] In this case it is clear that it would be fruitless exercise for this court to entertain the appeal on the separated issues if the high court ultimately determines that the Act did not apply to the transaction or to a large part of it. For these reasons I concluded that the decision is not appealable.

[18] Turning to the question of costs, all parties were given adequate notice that the presiding judge was of the prima facie view that the matter was not appealable and that the parties would be required to address the court on this issue in the event that they decided to proceed with the appeal. In response the appellants persisted with the appeal. The plaintiff and the sellers adopted the stance that the matter was not appealable but nevertheless were required to attend the hearing in the event the court entertained the merits of the appeal. In those circumstances I considered it

appropriate to order the appellants to pay the costs of both the plaintiff and the sellers, including the costs of two counsel.

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

For Appellants: A Kemack SC (with him E Eksteen)

Instructed by:

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For Respondent: S J Bekker (with him W J Bezuidenhout)

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For 1st, 2nd, 3rd

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S Güldenpfennig (with him H J Snyman)

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