IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

| DELETE WHICHEVER IS NOT APPLICABLE |
| --- |
| (1) REPORTABLE: YES / ~~NO~~ |
| (2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~ |
| (3) REVISED ✓ |
| 31/07/2015 DATE SIGNATURE |

CASE NO: 11826/2010

DATE: 19/8/15

IN THE MATTER BETWEEN

WYNAND WILLEM BOOYSEN — 1ST APPLICANT

WYNAND WILLEM BOOYSEN N.O.
(In his capacity as sole trustee of the
Booysen Family Trust IT 1563/05) — 2ND APPLICANT

AND

MICHAEL JOHN BRYANT — RESPONDENT

AND

TAUROCK RESOURCES (PTY) LTD — INTERVENING PARTY

JUDGMENT

SITHOLE, AJ

1. INTRODUCTION

1.1 This is an opposed application for a declaratory order and an unopposed application by a third party for leave to intervene and to oppose the main application. It was heard by me on 20 March 2013 in the opposed motion court. At the close of argument I reserved judgment so as to apply my mind and to consider all issues raised as well as the authorities referred to by the respective counsel in their arguments.

1.2 There has been a somewhat inordinate delay on my part in putting my decision on the two matters on paper, This has unavoidably occurred an account of factors beyond my control because soon after hearing these matters I was called upon and deployed to go and preside over criminal cases in the Eastern Circuit of Mpumalanga province, Palm Ridge and Randburg. Needless to say that the Escom load-shedding program also caused the delay in jotting down my decision on these matters.

1.3 The delay is deeply regretted by me and I hereby record and express my heart-felt regret to the relevant legal representatives and their clients involved in these matters, for this occurrence.

1.4 All parties were legally represented during the hearing of these matters. The First and Second Applicants were represented by Adv Hattingh, duly instructed by Jeanne de Klerk Attorney of Pretoria. The Respondent was represented by Adv Myburgh on instruction of Attorneys Vezi & De Beer Inc of Pretoria, and the Intervening Party was represented by Adv Van Wyk on instruction of Attorneys Boshoff Smuts Inc of Pretoria.

2. FACTUAL BACKGROUND

2.1 The factual background of these two matters is elaborately documented in the founding papers as well as in the opposing papers and shall not be repeated here. Suffice it to say firstly, that relevant details of the background appear *ex facie* the summaries of the arguments of the parties which have been composed and delineated by me below.

2.2 In the second instance, it has to be mentioned that it is clear from the case number of these matters that they have a long and checkered history. The application for a declaratory order was initially set down for hearing on 9 March 2010, *coram* my learned brother Prinsloo J, who removed the matter from the roll with costs. It was then again set down on 16 March 2010 *coram* my learned brother Claassen J, who struck it from the roll for lack of urgency and ordered costs to include those of two counsel.

2.3 Subsequently, the matter was set down on 10 February 2011 *coram* my learned brother Mavundla J, who postponed it *sine die* and that the Applicants file their replying affidavits within fifteen days from that date and the Respondent's one be filed ten days thereafter; that Applicants pay the costs occasioned by the postponement jointly and severally, the one paying the other to be absolved and such costs to include of two counsel employed in the main application and for the Intervening Party.

2.4 On 29 October 2012 before my learned brother Van Loggerenberg J the matter was postponed *sine die* and the Respondent was ordered to pay wasted costs. On 28 January 2013 the matters served before my learned brother Bam AJ, and they were removed from the roll and costs were reserved. The matters were finally heard by me on 20 March 2013.

3. THE LEGAL ISSUE TO BE DECIDED BY THE COURT

3.1 The legal issue for decision in these matters is whether the oral agreement of 9 May 2006 between the first and second Applicants and the Respondent is valid and enforceable.

4. THE FIRST AND SECOND APPLICANTS' ARGUMENT AND CONTENTIONS

4.1 The Applicants seek relief in relation to a share transfer transaction between the first applicant and the Respondent of the acquisition by the first applicant and second applicant of a 50% share interest in a company called Maranda Mining Company (Pty) Ltd.

4.2 The transaction was formalised in May 2006 on the basis of certain documents prepared and signed by the Respondent. The facts of the transaction were confirmed in a subsequent document of which the Respondent was the author.

4.3 The Applicants complied with the obligations of the agreement. It is common cause that the Respondent failed to comply with the terms of the transaction and failed to contribute to the process for the transfer to the Applicants of 50% of shares in Maranda held by it.

4.4 The Respondent entered into a share sale transaction with Taurock Resources (Pty) Ltd (the Intervening Party). Taurock acquired 34% of the issued shares in Maranda from the Respondent. The 34% share acquired by Taurock could only have been from the Respondent's remaining 50%.

4.5 In the 2009 urgent application the relief claimed was for the removal of First Applicant as a security services provider, unilateral decision-making and for arrear payments in respect of vehicles.

4.6 The Respondent raised the issue of non- and/or mis-joinders. The rights of the so-called other parties are not affected and there is no relief sought against them. Non- or mis-joinder would not have had the effect of making the application defective.

4.7 The Respondent argues that the reason for the transfer of shares in Maranda by the Respondent to the Applicants was merely *in securitatem debiti* which is not borne out by the contents of annexures "A" and "B", which are clear and unambiguous.

5. THE RESPONDENT'S ARGUMENT AND CONTENTIONS

5.1 As stated in paragraph 2.2 *supra*, the matter was struck off the roll with costs, including the costs of two counsel. The Respondents subsequently applied for a stay of proceedings pending the payment of the taxed costs.

5.2 Besides, the Applicant (in an application for the stay of proceedings) must prove that the parties are substantially the same; that the issues between the parties are substantially the same or connected and that the costs of previous proceedings have not been paid.

5.3 The Respondent contends that it is the same application between the same parties and exactly on the same issues. Respondent then makes the submission that it is entitled to a stay of proceedings and that this application should be removed from the roll with costs, including the costs of two counsel.

5.4 If the application for a stay of the proceedings is not successful the application cannot succeed on the following grounds:

5.4.1 the company (Maranda Mining Company (Pty) Ltd) in respect of which the Applicants seek an order is not a party to these proceedings;

5.4.2 Taurock Resources (Pty) Ltd (the Intervening Party in the application to intervene) is not a party to these proceedings;

5.4.3 Nedbank Ltd (ie the bankers of Maranda Mining) is not a party to these proceedings;

5.4.4 Equity Partners CC (who allegedly took transfer of the shares in question) is not a party to these proceedings;

5.4.5 Ngapo Resources and Exploration (Pty) Ltd is not a party to this application;

5.4.6 Kinderwood Investments (Pty) Ltd is not a party to this application.

All of the parties mentioned above have a clear interest in the relief sought as set out in the opposing affidavit.

5.5 The Second Applicant is not entitled to be represented by the First Applicant because the trust deed clearly states that the trust must be represented by a maximum of two trustees.

5.6 The application is fatally flawed as neither the relief claimed nor the procedure followed comply with the provisions of section 115 of the Companies Act.

5.7 There are numerous disputes of fact which cannot be resolved on application. The version of the Applicants is confusing and ambivalent – as the First Applicant stated under oath that the trust became the shareholder of Maranda Mining Company.

5.8 The Applicants seek a declaratory order declaring the share transfer transaction between the First and Second Applicants and the Respondent to be valid. An order transferring the shares to the First, alternatively the Second Applicant will be vague and incapable of being executed.

5.9 Applicants have no regard for the Companies Act and proper procedure as previous actions show that they unilaterally placed the company "onder 'n staat van besleg", appointing random new directors and taking control of the company.

5.10 Respondent then made the submission that the application ought to be dismissed with costs on an attorney and own client scale. Also that the court ought to mark its disapproval of litigants approaching the court with no sustainable cause of action where they disregard previous cost orders against them.

5.11 In the 2009 application the Respondent also sought an order for costs since the application was simply withdrawn without a tender for costs.

6. INTERVENING PARTY'S ARGUMENT AND CONTENTIONS

6.1 Taurock Resources (Pty) Ltd, as the Intervening Party, pointed out that in the 2009 urgent application the Applicants sought relief against the current Respondent and the Intervening Party interdicting them from taking any decision (for which decision all shareholders need to be consulted) without first consulting with the Second Applicant.

6.2 The current application did not join Maranda Mining or the Intervening Party. The validity of the share transfer transaction affects the Intervening Party's position in the governance of Maranda Mining wherein a 34% minority shareholding is held.

6.3 In an application for leave to intervene the following test must be applied:

6.3.1 Whether the party has an interest in the action. (The Intervening Party is a minority shareholder in Maranda. If an order is made it will influence the governance of Maranda and the Intervening Party may be prejudicially affected.)

6.3.2 Whether the party has a *prima facie* case. (Applicants failed to comply with section 11 of the Mineral and Petroleum Resources Development (MPRD) Act no 28 of 2002; there exists a foreseeable factual dispute; there is non-joinder and non-compliance with section 252 of the Companies Act; the transfer of shares as envisaged by the Applicants contravenes section 38 of the Companies Act; the parties failed to comply with section 91A of the Companies Act which makes the transfer null and void.)

6.3.3 Whether the application is made seriously (the Intervening Party has grave concerns regarding the future of Maranda); and

6.3.4 whether the application is not frivolous.

6.4 The Intervening Party opposes the application because the written consent of the Minister was not obtained for the transfer of interest in accordance with section 11(1) of the Mineral and Petroleum Resources Development Act no 28 of 2002. Any transfer of an interest in the company is void if it is made in contravention of the provisions of section 11(1).

6.5 Another ground for opposition by the Intervening Party is that the issues in dispute need to be referred to oral evidence since credibility findings will have to be made by the court and these can only be done on trial.

6.6 Furthermore, the test for the joinder of a party is, if such a party has a legal interest, in any order the court might make, or if such order cannot be sustained or carried in effect without prejudicing that party. The party should be given an opportunity to be heard.

6.7 The applicants failed to join the Director-General of Mining Affairs who has a legal interest in the subject-matter of the litigation. The Applicants failed to join Maranda Mining which has a legal interest in the order sought and whose rights will be infringed by seeking signing rights on Maranda's bank accounts and making changes to the shareholding in Maranda. The Applicants failed to join Equity Partners CC (ie the close corporation to which the Applicants purport to have sold their shares).

6.8 Besides, the transgression of section 28 of the Companies Act by the Applicants renders the transfer of the shares void. There is sufficient cause not to enter the names of the Applicants into the register of members. The Intervening Party concludes its argument by stating that the application of the Applicants ought to be dismissed with costs, including the costs of two counsel, especially if the court has regard to the Intervening Party's argument above.

## 7. <u>THE COURT'S FINDINGS AND CONCLUSION</u>

7.1 Having carefully read the application papers of this matter and having patiently heard argument by the respective counsel for the parties, and having applied my mind to such arguments and contentions, the court, having regard to the legal issue it has to decide, makes the following findings, that:

7.1.1 It is common cause that annexure "A" to the founding papers is a resolution for the transfer of ordinary shares by the sole director and shareholder of Maranda Mining Company (Pty) Ltd dated 8 May 2006 and duly signed by the Respondent, Michael John Bryant.

7.1.2 It is also common cause that annexure "B" of the said papers is a Memorandum of Agreement (MOA) by and between the Booysen Family Trust and the Respondent dated 9 May 2006 and duly signed by the Respondent and the First Applicant.

7.1.3 It is so that notwithstanding the words couched in the said MOA as well as alleged frequent requests of the First Applicant, the Respondent just never took any steps for the formalisation of the share transfer and the appointment of the First Applicant as director of Maranda Mining Company (Pty) Ltd. This reluctance to formalise on the part of the Respondent turned the First Applicant into a nominal director of Maranda, as regarded by the Respondent. Apart from this fact, it subsequently transpired that the formalities for First Applicant's appointment were never concluded with a CYPRO registration.

7.1.4 What is more, the First Applicant, by his own admission, provided financial support to Maranda far in excess of the initially agreed loan facility of R500 000,00, which action is not one of the terms of the agreement. This implies that both signatories to annexure "B" never complied with the terms of the so-called agreement as contained in the said annexure.

7.1.5 Over and above that, the wording of some of the terms of the MOA is vague. For example, the first term in annexure "B" reads *inter alia* as follows:

> "The loan will be repayable as agreed by the parties and <u>dependent on available funds</u> in MMC." (My underlining for emphasis.)

And the fifth term of the said annexure reads as follows:

> "Dividend payments will be agreed between the parties."

I find these terms to be imprecise and lacking in specificity. In simple language, they are vague. Little wonder none of the parties fulfilled his obligations arising from the agreement.

7.1.6 Furthermore, on the face of it annexure "B" has some discrepancy as to who the purchaser is and either the First Applicant or his Family Trust (a name which was inserted later) is the purchaser. At the time when annexure "B" was signed the purchaser was Mr Booysen, the First Applicant himself and not the Family Trust. Such discrepancy, in the context of the law of contract, I find to be unjustifiable.

7.1.7 It was contended on behalf of the Respondent that in so far as the loan he wanted from the First Applicant is concerned, Respondent, as the author of annexures "A" and "B", was misunderstood by the First Applicant, because he told the latter that he wants a loan and if he is unable to repay it he would give the First Applicant the shares in Maranda *in securitatem debiti*. Such misunderstanding is, however, not borne out by the contents of annexures "A" and "B". Also, the words *in securitatem debiti* do not appear on annexure "B".

7.1.8 The Respondent has also contended that in so far as the Applicants seek a declaratory order declaring the shares transfer transaction to be valid, such order transferring the shares to the Applicants will be vague and incapable of execution. I find that this vagueness finds its origin from annexure "B" as stated in subparagraph 7.1.5 *supra*. It follows that applicants' contention that the contents of annexures "A" and "B" are clear and unambiguous does not hold any water and is unconvincing.

7.1.9 It is a matter of record that the 2009 urgent application of the Applicants was simply withdrawn without a tender for costs. The Applicants now seek a declaratory order without having paid the costs of the 2009 urgent application. I find that it is definitely unjust that a litigant should bring a party into court, cause him to incur costs, refuse to pay them and still be allowed to continue the litigation *ad infinitum* (see *Win & Son v Levin* 1916 WLD 36 at 38). It is clear from the checkered history of this matter that the action of the Appellants in seeking relief in relation to a share transfer transaction borders on vexatiousness, more so that it is *prima facie* vexatious to bring a matter for decision by the court without paying the costs previously awarded by the court (see *Meyer v Meyer* 1945 TPD 118).

7.1.10 In the light of the aforementioned findings, coupled with the compelling argument of the Respondent, in particular on his crisp contention about a stay of proceedings, as well as the argument by the Intervening Party on Applicant's non-compliance with the imperative provisions of the Mineral and Petroleum Resources Development Act no 28 of 2002, I am constrained to answer the issue which is to be decided by the court negatively. Stated otherwise, I conclude that the oral agreement of 9 May 2006 between the applicants and the Respondent was invalid and unenforceable for reason of utter vagueness.

In the result, I make the following order:

The Applicant's application for a declaratory order and the unopposed application by a third party for leave to intervene and to oppose the main application are hereby refused and dismissed with costs on an attorney and client scale.

M N S SITHOLE
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

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| Heard on: | 18 March 2013 |
| For the Applicant: | Adv HATTINGH |
| Instructed by: | JEANNE DE KLERK ATTORNEYS |
| For the Respondents: | Adv MYBURGH |
| Instructed by: | VEZI & DE BEER INC |
| For the Intervening Party: | Adv VAN WYK |
| Instructed by: | BOSHOFF SMUTS INC |
| Date of Judgment: | 04 August 2015 |