

47/98

Case no: 464/97

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

In the appeal of

RANDCOAL SERVICES LIMITED

First Appellant

DAMOCLES THOMAS WATT

Second Appellant

HARRY PARKER

Third Appellant

and

RANDGOLD AND EXPLORATION

Respondent

COMPANY LIMITED

CORAM: Van Heerden DCJ, Smalberger, Howie, Schutz and Plewman JJA

Heard: 18 May 1998

Delivered: 27 May 1998

JUDGMENT

VAN HEERDEN DCJ**The factual background**

During 1992 the Rand Mines group of companies commenced negotiations with the object of concluding unbundling agreements. This resulted in inter alia a written agreement ("the restructuring agreement") which was signed in November 1992.

The ultimate holding company of the Rand Mines group was Barlow Rand Ltd. In the group itself Rand Mines Ltd ("Rand Mines") was the holding company. It controlled inter alia Randcoal Ltd ("Randcoal"). The latter in turn controlled the first appellant and as a result of the unbundling became its only shareholder. The first appellant was, until 1992, registered under the name of Rand Mines (Mining and Services) Ltd.

The Rand Mines group consisted of three divisions or, as they were called, arms, i.e. a coal, gold and property arm. The property arm, however, played a very minor role in the unbundling process. That process was essentially directed at a splitting up of the group's coal and gold interests. At all material times there was no doubt that the first appellant, being a subsidiary of Randcoal, fell within the coal arm.

For ease of reference I set out in alphabetical sequence the names of those who represented the coal and gold arms or were concerned with the relevant events leading up to this appeal. I intend no disrespect by referring to them simply by their surnames.

Ashworth: A representative of the gold arm and a director of the respondent from its incorporation in November 1992 until the present time.

Cook: A representative of the coal arm and chief executive officer of Randcoal.

Hall: An Executive Director of Barlow Rand.

Heyns: A representative of the gold arm and from November 1992 to 1994 financial director of the respondent.

Howard: Financial Director of Rand Mines and a director of the respondent from November 1992 to 1994.

Macleod: Financial Director of Randcoal and a representative of the coal arm.

Sealey: A representative of the gold arm and from November 1992 to 1994 a director of the respondent.

Stevens: Financial director of Rand Mines and a director of the respondent from November 1992 to 1994.

Turner: Chief executive of the gold division of Rand Mines, a representative of the gold arm and from November 1992 to 1994 a director of the respondent.

Watt: Managing director of Rand Mines who became chairman of Randcoal.

I turn to the first appellant's role in the structure of companies. Until the restructuring agreement was signed it provided managerial services to the companies in the Rand Mines group and to this end employed inter alia managerial staff and mine employees, who in effect rendered services for various companies in the group.

When restructuring negotiations were set in train the main interests of the group could roughly be divided into gold mining, coal mining and, to a far lesser extent, property holding. By 1990 Barlow Rand had set up the Barlow Rand Mineral Resources Division ("BRMR") managed by a team with the responsibility of determining policy, making high-level decisions and determining disputes in respect of companies which fell within the Rand Mines group. On an executive level this team ("the Exco") thus exercised effective control over what became known as the gold, coal and property arms of the group.

The main purpose of the above negotiations was to allocate or transfer each of the three

arms to three separate entities. This was achieved by allocating to Randcoal all of the group's coal interests and to the respondent all the gold interests. In essence Rand Mines Properties Ltd ("Properties") retained the property interests. The respondent was incorporated (on 29 September 1992) specifically for the purpose of becoming a party to the restructuring agreement and hence acquiring the group's gold interests.

As from 1 October 1992, and as a result of the restructuring, the first appellant ceased providing management services to companies in the former Rand Mines Group other than those falling within the coal arm. In consequence a number of the first appellant's employees were transferred to the respondent and Properties. They were henceforth employed by those two companies on otherwise unchanged terms and conditions.

During the negotiations a further matter was discussed. It was this. There were a substantial number of erstwhile employees of the first appellant who had retired and who, or whose widows, were members of either the Corner House Pension Fund ("CHPF") or the Mines Officials Pension Fund ("MOPF"). It was a term of their employment that, also after retirement, 80% of their contributions to their medical aid fund (Barlow Rand Medical Scheme) would be

paid by the first appellant. In case of death such payments would continue to be made on behalf of their widows and/or children. (In what follows I shall use the word "ex-employee" as denoting either a retired employee or his widow or dependent child.) As far back as 1984, however, it had been agreed that 100% of ex-employees' contributions who were members of the CHPF would be paid by the first appellant.

Prior to, or at the time of , their retirement the first appellant undertook to pay supplementary pensions to a number of its senior employees with long service records. The amounts of such pensions were increased from time to time subsequent to the retirement of those ex-employees. The third appellant is one of them.

During the restructuring negotiations the future liability in respect of the medical aid contributions of ex-employees cropped up for discussion. At meetings of the Exco on 11 and 17 August 1992 so-called continuation medical aid subscriptions (relating to ex-employees) were discussed. Present was inter alia Turner, who it will be recalled, was the chief executive of the gold arm. A number of ex-employees could easily be allocated to one or other of the three arms of the Rand Mines Group. The minutes of the above meetings recorded that the first appellant's

liability in respect of medical aid contributions of ex-employees would be allocated to the three arms. There were, however, certain ex-employees, called the central employees, who had rendered services to more than one of those arms and could not easily be linked to a specific arm.

The original proposal was that the gold arm would assume responsibility for the medical aid contributions (hereinafter referred to simply as contributions) of 75% of the central ex-employees.

On 26 October 1992 Stevens wrote a letter to Macleod and Heyns. Stevens was also a director of the respondent which had by then become incorporated. The suggestion in the letter, in line with that proposal, was that the first appellant's liability for contributions of ex-employees should be so divided that the respondent would assume liability for 75% of these contributions. (The restructuring agreement was signed by the parties thereto, including the first appellant and the respondent, on 26 November 1992. As will appear, it did not deal at all with the contributions of ex-employees.)

Stevens's proposed allocation was not acceptable to Turner who was to become a member of the respondent's first board of directors. The result was that at an Exco meeting on 11 February 1993 it was resolved that Randcoal "would pick up 50% of [the first appellant's] liability in

accordance with the established restructuring principle of sharing the burden". Present were inter alia Cook and four of the respondent's eight directors, i.e. Stevens, Hall, Turner and Ashworth.

There was no reference to the respondent in the recorded resolution, but, as will appear, it was impliedly resolved that the obligations in respect of the other 50% would devolve upon the respondent.

A further Exco meeting was held on 18 March 1993. Present were inter alia six directors of the respondent, including Howard and Sealey, the chairman of the respondent's board of directors. It was resolved that "Randcoal should pick up 50% of the cost of medical aid for those pensioners who could not be directly allocated to a company" (i.e. the central employees).

On 15 June 1993 the respondent wrote to Macleod stating that it was agreeable to accept liability for payment of medical aid contributions of those central ex-employees whose names appeared on a list attached to Stevens's letter of 26 October 1992. The only reservation was that the contributions of three ex-employees (out of a total of some 160) should be paid by Properties. The author of the letter was Abbott, the respondent's financial controller.

Macleod informed Barlow Rand Medical Scheme ("the Scheme") of the receipt of the

above letter and the latter then confirmed the arrangement in writing.

On 12 July 1993 Heyns wrote a letter to the Scheme. It was written on the respondent's letterhead, a copy was sent to Stevens, as a member of the Exco, and it read as follows:

"Following the restructuring of the Rand Mines Group it has been agreed internally, that continuation members of the medical aid scheme should be split up and allocated to companies which formerly formed the Rand Mines Group. Randgold will be responsible for continuation members as per the attached lists which totals R49 686,54 based on the August 1992 membership schedule."

The attached lists ("Heyns's lists") contained the names of central ex-employees whose contributions totalled some 50% of the contributions of all such employees. From the middle of 1993 until May 1995 the respondent gave effect to this letter by regularly paying to the CHPF the contributions in respect of those ex-employees whose names appeared on Heyns' lists. Then, without any prior warning, a letter, dated 28 April 1995, was written to the CHPF by one De Villiers who was apparently the respondent's secretary. Without giving any reason De Villiers wrote that with effect from June 1995 the respondent would cease making payment of the above contributions, and no further payments were made after that date.

In passing I should emphasize that the first members of the respondent's board of directors were Sealey, Stevens, Turner, Heyns, Hall, Ashworth, Howard and Waterson. (The latter two did not make affidavits in the proceedings in the court a quo.) However, in August 1994 a so-called hostile take-over of the respondent took place. In consequence all its directors, with the exception of Ashworth, were voted out of office and replaced by new directors.

The proceedings in the court a quo

After it became aware of the above letter from de Villiers the first appellant endeavoured to establish from the respondent and its attorneys why the respondent had undergone a change of heart. (It had also stopped paying supplementary pensions to a number of ex-employees whose names appeared in Heyns's lists, including the third appellant in this matter.) All the first appellant's efforts were to no avail. In consequence the three appellants initiated motion proceedings against the respondent in the Witwatersrand Local Division. The main relief sought were orders declaring that the respondent was obliged to continue paying to the Scheme the contributions in respect of the ex-employees whose names appeared on Heyns's lists, and specifically the second appellant, and to continue to pay to the the third appellant his

supplementary pension. They based their entitlement to relief on contractual undertakings by the respondent and, as far as the contributions were concerned, more specifically on Heyns's letter to which his lists were attached. Five members of the respondent's first board of directors (Sealey, Stevens, Turner, Heyns and Hall) all deposed to the effect that such an undertaking in respect of contributions had been given and, either expressly, or by necessary implication, that Heyns was authorised to write his letter of 12 July 1993.

When the opposing affidavit was filed it emerged for the first time why the respondent had stopped making the payments in question. Its defence may be thus summarised.

- 1 Since it was incorporated only on 29 September 1992 nothing that was agreed during the restructuring process could have been legally binding on the respondent.
- 2 Ashworth denied that any relevant undertaking had been given on behalf of the respondent, i.e. an undertaking relating to contributions, after that date.
- 3 Ashworth averred that the only material resolution of the respondent's directors was adopted on 16 November 1992 and read thus:

"David Ashworth and Ian Geoffrey Stevens, being two directors of the company,

or in the absence of either or both of them any other one or two directors, as the case may be, be hereby authorised on behalf of the company to settle the terms of The Rand Mines Group Gold Restructuring Agreement and to sign that agreement and any amending agreements of a minor nature thereafter, and such other documents as may be necessary to give effect thereto.”

4 The respondent took up the stance that no amendment of the restructuring agreement providing for payment of contributions by the respondent was signed by Ashworth or Stevens or one of them.

5 The respondent also relied on clause 16.4 of the restructuring agreement reading:

“No agreement to vary, add to or cancel this agreement shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties to this agreement.”

6 The reason why the respondent had paid contributions to the scheme for nearly two years was, so it was alleged, because the respondent had laboured under the mistaken impression that it had in fact agreed to do so.

The respondent also made a counter-application. Its contention was that it could recover from the first appellant, by way of a condictio indebiti, the total amount it had paid to the Scheme

in respect of the ex-employees set out in Heyns's lists, and also the supplementary pensions paid to seven such employees.

The court a quo (Du Plessis J) found for the respondent. In the result he dismissed the application and granted the counter-application with costs. The findings of the court a quo, in regard to the application itself, may be thus summarised.

- a) On 11 February and again on 18 March 1993 at least five (it should have been six) of the respondents' eight directors agreed that the latter would take over the first appellant's obligations in respect of the contributions of 50% of the central ex-employees. When he wrote his letter of 12 July 1993 Heyns intended to contract on behalf of the respondent when he identified specific ex-employees in the lists attached to his letter. And he wrote the letter with the consent of at least four other directors of the respondent.
- b) However, the appellants failed to prove that Heyns's conduct was authorised by a resolution of the respondent's board of directors. This was so for two reasons. The first was that the respondent's articles of association required that a resolution must either be adopted by a majority of votes of the directors present at a meeting of directors, or must

be in writing and signed by a quorum of directors present in the town where the respondent's office is situated. The second reason was that in motion proceedings a denial of alleged facts by a respondent - in casu Ashworth's above mentioned denial - must be accepted for the purpose of adjudication on the papers before the court.

- c) Nor could the appellant rely upon the respondent's resolution of 16 November 1992 (quoted in (3) above). Although in the context of the restructuring process the taking over of the first appellant's obligations relating to ex-employees' contributions involved an amending agreement of a "minor nature", the resolution authorised Ashworth and Stevens to sign amending agreements - which did not happen. In any event, Heyns was not authorised to sign such an agreement save in the absence of Ashworth and Stevens who were not "absent" when Heyns wrote his letter of 12 July 1993.
- d) At worst for the respondent the appellants could not clear the insurmountable hurdle created by clause 16.4 of the unbundling agreement (quoted in (5) above). This was so because the agreement found to have been concluded constituted an addition to the restructuring agreement and was therefore of no legal effect unless signed by all the parties

to the latter agreement, which did not occur.

- e) As regards the alleged obligation of the respondent to pay supplementary pensions, the appellants relied upon no more than the facts that for nearly two years the respondent did make the payments in question and that the obligation was mentioned in the respondent's 1993 and 1994 annual reports. Those facts, however, by no means amounted to proof of an obligation undertaken by the respondent as against the appellants. And even if they did, the agreement would have been void because of the provisions of clause 16.4 of the restructuring agreement.

Du Plessis J refused the appellant's application to appeal against the whole of his judgment, but the necessary leave was subsequently granted by this court. And so the matter has come before us. *Whatever view one may take of the respondent's commercial morality, the issues in the appeal must, of course, be decided strictly in accordance with the law.*

The point in limine

It is convenient to deal at the outset with a virtual point in limine raised by counsel for the respondent. It is, however, inextricably linked to a further contention. Together they

amount to this:

Even if the agreement relied upon by the respondent ("the substitution agreement") had been proved, the central ex-employees, as a class, should have consented, but did not consent, to the substitution. Moreover, they should have been joined in the application proceedings. The reasons are that the substitution agreement (on the first appellant's version) envisaged a delegation of the first appellant's obligations as against the ex-employees concerned. The primary obligation to the scheme in regard to contributions vested in each employee. It was, however, a term of their contracts that the first appellant would pay such contributions on their behalf. The purpose of the substitution agreement was for that liability of the first appellant to be "allocated to" or "assumed by" the respondent. That purpose could have been achieved by the respondent stepping into the shoes of the first appellant as the employees' debtor ("the substitution route"). Alternatively the first appellant could have retained its liability to its ex-employees but could have stipulated that the respondent would discharge that liability by paying the contribution to the Fund. Thus the respondent would have become the first appellant's debtor whilst the latter would have remained its ex-employees' debtor ("the back-to-back route"). On the first appellant's version the first route

was followed when the substitution agreement was concluded. But since a delegation was intended, the respondent did not incur any liability unless and until the ex-employees consented thereto. On the papers before the court a quo only the second appellant did so consent. However, what was contemplated was that all the ex-employees in question should so consent. The substitution agreement therefor remained inchoate. And since that agreement called for their consent, the ex-employees have a direct and substantial interest in the outcome of the application, which consequently is fatally flawed by non-joinder.

In my view the basic fallacy underlying the whole argument is the assumption that only the substitution or back-to-back route could have been followed. If A is a debtor of B nothing prevents A and C from agreeing that with immediate effect C will discharge A's obligation. They may, or may not, in addition agree that B will be entitled to accept the "benefit" bestowed upon him. If that happens B's acceptance will bring about a true delegation of A's obligation. Non constat, however, that in the absence thereof A cannot call upon C to pay the amount owing by A to B. In such a case the agreement between A and C is therefore enforceable by A even if B's consent cannot be obtained. It is then a simple case of one party undertaking to discharge the

other's debt.

Counsel for the respondent relied upon three selective passages in the founding affidavit in support of his contention that the substitution route was contemplated. I do not think that those passages really support counsel's argument. Be that as it may, when regard is had to the whole history leading up to Heyns's letter of 12 July 1993 there is little room for doubt that, on the first appellant's version, the parties intended that the respondent would with immediate effect become liable, vis-a-vis the first appellant, to pay the ex-employees' contributions to the scheme. Put differently, that obligation devolved upon the respondent whether or not the ex-employees accepted the "benefits" under the agreement. It is, indeed, unthinkable that the respondent and the first appellant could have intended that the former's liability to pay the contributions would, so to speak, be suspended until such time as the ex-employees (on the respondent's argument all of them) signified their consent to the replacement of their debtor. And that is precisely why the respondent started paying the contributions before any of the ex-employees had intimated consent.

In the light of what has been said above the argument concerning non-joinder has no real

merit. We are concerned with the obligations of the respondent as against the first appellant and not with a substituted obligation the former may or could have incurred in respect of some or all of the ex-employees. At all events the only one of those employees who may have accepted the benefit - the second appellant - was a party to the application.

Was consensus reached?

It will be recalled that according to the findings of the court a quo (see (a) above) five of the respondent's directors agreed on 11 February and again on 18 March 1993 that the respondent would assume liability in respect of the contributions of 50% of the central ex-employees. Du Plessis J also found that those employees were identified in Heyns's list who intended to contract on behalf of the respondent.

These findings were assailed on appeal by the respondent. Firstly, it was submitted that it is not apparent that the first appellant was represented at the two meetings. The point is without any real substance. Present was inter alia Cook, the chief executive officer of Randcoal, which held the entire issued share capital of the first appellant and clearly represented both companies. Second, it was argued that the agreement "that Randcoal would pick up 50% of [the first

appellant's] ... liability" said nothing of the remaining 50%, and in particular of a taking over of the remainder by the respondent. However, if regard is had to what had gone before, and especially to Stevens's letter of 26 October 1992, there can be no doubt that it was agreed that the respondent would assume liability for 50% of the contributions and not for 75% thereof as suggested by Stevens and which Turner did not accept.

It may be that a final agreement was reached at the two Exco meetings. In favour of the respondent I shall assume, however, that it was contemplated that consensus still had to be reached as to the practical implementation of what was agreed in principle. I therefore turn to Heyns's letter of 12 July 1993. Counsel for the respondent contended that this letter was not written animo contrahendi. I disagree. The letter clearly contained an offer by the respondent to pay the contributions (some R50 000 per month) of the ex-employees whose names appeared on the attached lists. It is true that the letter was written to the Scheme and not to the first appellant, but it was copied to Stevens who was a member of the Exco. There can thus be little doubt that Heyns intended the letter to be brought to the attention of the first appellant, as it certainly was. There is as little doubt that the offer contained in the letter was accepted by the first appellant;

if not expressly then tacitly, to the knowledge of the respondent, by making no further payments of contributions as from July 1993.

Another point made by counsel for the respondent was that Heyns's lists do not in all respects correspond with the lists of ex-employees to which the main relief sought by the first appellant was directed. However, this point and a further one relating to the extent of the contributions fell away when counsel consented to an amendment of the first appellant's prayers proposed by its counsel.

Then it was submitted that Heyns made the allocation in the mistaken belief that a substitution agreement had been incorporated in the unbundling agreement. In this regard reliance was placed upon the letter written on 15 June 1993 by Abbott, the respondent's financial controller, to Macleod of Randcoal and Abbot's evidence thereanent. In the letter it was said that the respondent would accept the charge for the balance of the central ex-employees with three exceptions. Abbot averred that he wrote the letter on the instructions of Heyns and that he understood from Heyns that an obligation had been undertaken by the respondent in terms of the restructuring agreement and that he was required to attend to the finalization of the detailed

allocation. Heyns's answer in the motion proceedings was that he did not recall the use of the words "unbundling agreement" but that if he used them he was not referring only to the written restructuring agreement but also to the negotiations preceding them. Since Heyns was aware of the Exco resolutions adopted on 11 February and 18 March 1993 there is no room for concluding that when writing his letter of 12 July 1993 Heyns was labouring under any misapprehension. The inference of a mistake on Heyns's part - and it was no more than a mere inference - which the respondent sought to draw is therefore clearly untenable.

I accordingly agree with the findings of the court a quo (see (a) above) that consensus on the question of substitution was in fact reached.

Was the substitution agreement authorized?

It must be accepted that the conclusion of the agreement was not authorized under the specific provisions of the respondent's articles of association. Paragraphs 107 and 109, in so far as material, read:

"107 Resolutions shall be determined by a majority of votes of the directors present at a meeting of directors and in the event of an equality of votes the chairman shall only have a second or casting vote if more than 3 (three) directors are present at

the meeting.

- 109 A resolution in writing signed by a quorum of directors who may at the time be present in the town where the office of the Company is situate shall be as valid as if it had been passed at a meeting of the directors duly held and constituted."

Ashworth says, either explicitly or by implication, that the only relevant resolution adopted by the respondent's directors was that of 16 November 1992 which authorized him and Stevens, or in the absence of either or both of them, any one or two directors to sign the restructuring agreement and any amending agreements of a minor nature; that no amending agreement was signed and that no resolution in writing was signed in terms of clause 109 of the articles of association.

Counsel for the appellants contended that the word "sign" in the above resolution should not be literally interpreted and that both Ashworth and Stevens were parties to the substitution agreement but, as will appear, I am of the view that the substitution agreement did not constitute an amendment of or addition to the restructuring agreement.

In the founding affidavit it was alleged that five of the respondent's directors including Ashworth, were aware of the obligations which had been undertaken by the respondent. This, it

was said, appeared from the letters and minutes referred to above. In the answering affidavit Ashworth's only material response was a denial that he had agreed to a substitution agreement in his capacity as a director of the respondent. It is certainly not easy to grasp the import of this denial since there is no doubt that Ashworth was a party to the decisions reached at the above two Exco meetings.

In the replying affidavit Heyns alleged that all the respondent's directors had knowledge of the conclusion of the substitution agreement. This was not denied by Ashworth in a supplementary answering affidavit filed by the respondent.

Ashworth furthermore did not aver that he, or any other director of the respondent, was aware of the contents of Heyns's letter of 12 July 1993. His only response was that Heyns "clearly was mistaken in believing that an agreement had been reached". (My emphasis.) This inference was denied by Heyns and rightly so. I may add that it is more than passing strange that the mistaken impression only dawned on Ashworth in 1995.

In a nutshell the position is then this. Six of the respondent's directors attended the first or second Exco meetings. The absentees were Heyns, who clearly was aware of what had been

decided, and Waterson. The latter was the chairman of the respondent's audit committee and it is highly unlikely that he would have been kept in the dark in regard to the agreements reached at the Exco meetings and Heyns's letter.

There are other pointers to knowledge and consent on the part of all the directors. They must have known that as from July 1993 the respondent was making monthly payments in respect of contributions of central ex-employees and did not demur until after the hostile take-over. The reason why the new board of directors decided in April 1995 to stop paying contributions, says Ashworth, was because it was then discovered that no binding substitution agreement had been concluded. On a fair reading of his affidavit this was not based on an absence of knowledge and consent on the part of the directors who served as such until the take-over but on a conception that, notwithstanding such consent, no binding substitution agreement had come into being.

I am therefore of the view that all the respondent's directors had at least impliedly resolved to authorize the conclusion of the substitution agreement as amplified by Heyns's letter. I am not unmindful of the fact that this resolution was not adopted at a properly convened board meeting. But the doctrine of unanimous assent does not require that all the directors should meet together.

See Alpha Bank Bpk v Registrateur van Banke 1996 (1) SA 330 (A) 348 G-I; Levitan NO v Petrol Conservation (Pty) Ltd 1962 (3) SA 233 (W) 235 C-D, and cf Gohlke and Schneider v Westies Minerale (Edms) Bpk 1970(2) SA 685 (A) 693-4. Counsel for the respondent countered by submitting that Alpha Bank, and, by implication also Levitan, which deal with the doctrine in relation to directors, were wrongly decided. That doctrine, so it was argued, applies only to meetings of shareholders.

It may be that some provisions in the articles of association of a company relating to directors may not be altered by their unanimous assent. The test, I would suggest, is whether a particular provision is capable of waiver, and that is the case if the provision enures for the benefit of the directors as opposed to the company. In my view the above quoted clause 107 clearly is such a provision. Its purpose is to give all the directors an opportunity to partake in a decision of the board. Hence there is no reason why the doctrine of unanimous assent could not have governed the conclusion of the substitution agreement(s). (As to the corresponding position in English law see TCB Ltd v Gray [1986] Ch 621, 636-7, and Re Bonellis Telegraph Co Collies Claim (1871) LR 12 Eq 246, 258-60.)

The above conclusion can also be reached along a different route. Heyns was an executive director of the respondent, i.e. the financial director. As such he had prima facie authority to bind the respondent in regard to financial matters, which the conclusion of the substitution agreement clearly was. See Gower, Principles of Modern Company Law 5th ed. pp 188-9, and Pennington, Company Law, 7th ed, p 156. And that prima facie authority has not been refuted by the respondent.

In the light of what has been said above, I find it unnecessary to deal with the appellants' alternative submission that the respondent in any event ratified the substitution agreement, particularly because of its directors' acknowledgment of the respondent's liability in the 1993 and 1994 financial statements signed by them.

The effect of clause 16(4) of the restructuring agreement

The sub-clause has been quoted above. In so far as material, it provides that no agreement to vary, add to or cancel the restructuring agreement shall be valid unless it is in writing "and signed by the parties to this agreement". The court a quo found (see (d) above) that the substitution agreement fell foul of clause 16(4). If it did, it would no doubt have been of no force

and effect: SA Sentrale Ko-op Graanmaatskappy v Shifren 1964(4) SA 760 (A) 766 H-767 B.

However, in my view a non-variation clause curtails common law freedom to contract and must hence be restrictively interpreted.

The parties to the restructuring agreement were the first appellant, the respondent, Rand Mines and Virginia-Merriespruit Investments Limited ("Virginia"). Its main objects were:

- (i) a disposal by Rand Mines of its property rights (in the main gold rights) to the respondent.
- (ii) a disposal by the first appellant of its non-coal property rights to the respondent;
- (iii) a disposal by Virginia of its Harmony shares to the respondent;
- (iv) a disposal by Rand Mines of 200 000 ERPM preference shares to the respondent.

Various other assets were also sold to the respondent. The agreement, with annexures, comprised some 100 pages, and made provision for numerous warranties, but did not deal at all with liability for the payment of ex-employees' contributions. That, of course, was an aspect which did not directly concern either Rand Mines or Virginia. The substitution agreement consequently did not amend the restructuring agreement. But did it constitute an addition thereto

as contemplated by clause 16(4)?

I am of the opinion that the answer must be in the negative. Clause 16.1 provides that "this document and the Schedules thereto" contain the entire agreement between the parties in regard to the subject-matter contained in this document. Moreover, in clauses 1.8, 1.22 and 1.23 there are references to a coal restructuring agreement to be concluded between Rand Mines and Rand Coal; a platinum restructuring agreement entered into between Rand Mines, the first appellant and another company, and a property restructuring agreement to be entered into between Rand Mines, Barlow General Investments Ltd and Randgold.

It is therefore apparent that the unbundling of the Barlow Rand group of companies involved far more than the topics dealt with in the restructuring agreement under consideration. Hence it cannot be said that the substitution agreement was an addition to the subject matter contained in the restructuring agreement. For, at the risk of repetition, it must again be emphasized that the question of liability for contributions was not at all dealt with in the restructuring agreement in question.

It is in any event questionable whether the substitution agreement, concluded by two of

the parties to that agreement, could be said to be an addition required to be signed "by the parties to this agreement", i.e. all four parties.

It follows that in my view the substitution agreement was not hit by clause 16(4).

The supplementary pensions

I need say little more than that I agree with the court a quo (see (e) above) that no case was made out for fixing the respondent with liability to pay those pensions. There is nothing in writing relating to the pensions; there is no resolution of the respondents' board of directors authorizing payment thereof, and it is not possible to infer that all the respondents' directors knew of some or other undertaking by somebody on behalf of the respondent to take over the first appellant's liability to the pensioners concerned. In the result counsel for appellant was virtually driven to concede that the claim in question must fail.

This means that the appeal of the third appellant cannot succeed. His joinder in the court a quo and lack of success in the appeal have, however, had such an insignificant impact on the costs incurred in both courts that no special costs order is called for. The same holds good for the very minor lack of success of the first appellant.

The counter-application

It is hardly necessary to say that in the light of my above findings the counter-application, in so far as it sought payment from the first appellant of the contributions paid by the respondent, should have been dismissed by the court *a quo*. What remains to be considered is whether the respondent was entitled to claim from the first appellant the supplementary pensions paid by it to the seven pensioners concerned.

The onus of establishing the counter-claim under consideration rested, of course, on the respondent. If the application contains little detail concerning the pensions and the cause of the respondent's payment thereof, the answering affidavit and counter-application are virtually silent on it. It can be inferred from the third appellant's affidavit that he thought that a delegation had been effected, and it may well be that the other six pensioners entertained the same belief. For all that we know, the respondent may also have believed that it had become the pensioners' debtor. The claim in question must therefore be decided upon this assumption.

Counsel for the respondent nevertheless relied upon cases such as Licenses and General Insurance Co v Ismay 1951(2) SA 456 (E), in support of the proposition that a payment

in error may be recovered with the condictio indebiti from what may be called the legal recipient of the money even if another was the factual receiver thereof. In that case an insured had incurred a liability to X. Under the mistaken impression that it was obliged to compensate the insured in respect of that liability, the insurer paid X. It then discovered that the policy was void and sought to claim the amount in question from the insured. Sampson J rejected a proposition that the amount had to be claimed from X; held that the condictio indebiti lies against “the person who is in law considered to have received the money”, and dismissed an exception against the insurer’s claim. But, and this is important, the decision proceeded from the premise that the insurer had no right to claim the money from X since the payment had been made “on behalf of the insured” (at p 461 G-H).

In support of his approach Sampson J referred to the following example of Paulus, D 12.4.9.1, cited with apparent approval by Voet 12.6.11: One who believes himself to be the debtor of an affianced woman on her instructions pays the debt as dowry to her fiancé . After the marriage he discovers his mistake. He may now prefer the condictio indebiti against the wife as if what had been paid on her instruction had in law been paid to her.

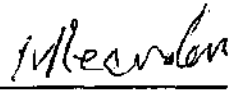
It is hardly necessary to say that the judgment of Sampson J and the authority of Voet do not support the submission now under consideration. They are, indeed, destructive of it. On the above assumption the respondent did not make the payments to the pensioners on the instruction of the first appellant. Nor did the respondent labour under the mistaken impression that it was discharging the first appellant's liability. On the contrary, the pensioners were paid because the respondent thought that it had become the pensioners' debtor. Hence the first appellant was neither in fact nor in law the recipiens. In the result the counter-application must fail in all respects.

This court's order

The appeal of the first and second appellants is allowed with costs, including the costs of two counsel, and the following is substituted for the order of the court a quo:

- “(1) The applications of the first and second applicants are allowed with costs, including the costs of two counsel, and the counter-application is dismissed, also with such costs.
- (2) The appeal of the third appellant is dismissed.

- (3) The respondent is directed to pay, and continue to pay, to the Barlow Rand Medical Aid Scheme the monthly medical aid contributions of all those persons whose names are set out in annexure "C" to the founding affidavit on the same basis as it did prior to its repudiation of April 1995, subject to the provisions of that Scheme, as from the date(s) that the respondent stopped making such payments.
- (4) It is declared that the respondent is obliged to continue to pay to the Barlow Rand Medical Scheme the monthly medical aid contributions of the second applicant".


HJO VAN HEERDEN
DEPUTY CHIEF JUSTICE

Concur:

Smalberger JA
Howie JA
Schutz JA
Plewman JA