REPORTABLE ZLR (64)

Judgment No. SC 82/06
Civil Appeal No. 88/06

METALLON CORPORATION LIMITED v
STANMARKER MINING (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, JULY 4, 2006 & MAY 23, 2007

C E Puckrin SC, with him *A R Bhana*, for the appellant

J C Andersen SC, with him *G Mitha-Valla*, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the appellant ("Metallon"), a South African company, was ordered to pay to the respondent ("Stanmarker"), a Zimbabwean company, damages for breach of contract in the sum of US$7 400 000.00, together with interest on that sum and costs of suit. There is a cross-appeal by Stanmarker in respect of certain expenses incurred by Stanmarker which were excluded from the costs awarded to it.

The background facts are as follows. At the relevant time Independence Gold Mining Zimbabwe (Pvt) Ltd ("Independence"), a mining company registered in terms of the law of Zimbabwe, owned five gold mines in the country. These were Arcturus, How, Mazowe, Redwing and Shamva. Independence was a wholly-owned subsidiary of Cableair Ltd ("Cableair"), and Cableair was a wholly-owned subsidiary of Lonmin Plc ("Lonmin"). Both Cableair and Lonmin were incorporated in the United Kingdom.

In 2001 Lonmin decided to dispose of its shares in Cableair and, consequently, its interests in Independence as well as the five gold mines. Metallon and Stanmarker, acting independently of each other, expressed interest in the acquisition of all the shares in Cableair and, consequently, the five gold mines owned by Independence.

Thereafter, Metallon and Stanmarker decided that it was in their best interest to submit to Lonmin a joint bid for the Cableair shares ("the shares"). Accordingly, they concluded an agreement which they termed Heads of Agreement ("the Heads") on 24 June 2002.

However, before that date, on 20 June 2002, Metallon, acting through an associate company, First Gold Proprietary Ltd ("First Gold"), extended to Lonmin the offer to purchase the shares for 12 million United States dollars. In that offer First Gold reserved its right to nominate any person, company etcetera to replace it as the purchaser of the shares. This provision would have enabled Newco, a company which was to be incorporated by the parties following the signing of the Heads, to become the purchaser of the shares, had the negotiations between Lonmin and Metallon/First Gold been successful.

Subsequently, following the signing of the Heads by both parties, Metallon entered into negotiations with Lonmin in respect of the purchase of the shares.

However, by 24 September 2002 the negotiations had not been successful and no agreement had been concluded.

Thereafter on 26 September 2002 Metallon, acting through another associate company, Pemberton International Investments Ltd ("Pemberton"), negotiated with Lonmin the purchase of the shares. The negotiations culminated in a written agreement between Lonmin and Pemberton, in terms of which Lonmin sold the shares to Pemberton for 15.5 million United States dollars. That agreement was signed on 28 October 2002.

As a direct consequence of the purchase of the shares by Pemberton, Stanmarker sued Metallon for damages for breach of contract, the broad allegation being that Metallon had used Pemberton and acquired the shares for itself in breach of the provisions of the Heads.

The learned Judge in the court *a quo* found that Metallon had breached the provisions of the Heads, and ordered it to pay Stanmarker damages for breach of contract in the sum of 7.4 million United States dollars, together with interest thereon from 28 October 2002 to the date of payment, at the rates prevailing from time to time in the United States of America. Aggrieved by that result, Metallon appealed to this Court.

In my view, the learned Judge's decision was based on three main findings. The first was that the Heads constituted a partnership between Metallon and

Stanmarker. The second was that clause 3.5 of the Heads was legally binding on Metallon, and that Metallon had breached its legal obligations under that clause. And the third was that Metallon had breached its legal obligation after 24 September 2002 to continue negotiating with Lonmin on behalf of Newco until the negotiations were concluded or lawfully terminated.

I will consider the three findings by the learned Judge in turn.

DID THE HEADS CONSTITUTE A PARTNERSHIP?

Before answering the question, I would like to set out the relevant provisions of the Heads.

The status of the Heads was set out in clause 2 which, in relevant part, stated as follows:

> "2.1 The parties declare that they are prepared and intend to enter into detailed written agreements incorporating *inter alia* the terms and conditions set out below.
>
> 2.2 These Heads set out the main principles upon which the parties will negotiate the detailed written agreements referred to herein. These Heads (save for 2.3, 9, 10 and 11) accordingly do not constitute legally binding rights and obligations on the parties hereto. These Heads will fall away and be of no force and effect upon the signing of the detailed written agreements …".

In my view, it is clear from clause 2.2 of the Heads that the only legally binding provisions of the Heads were clauses 2.3, 9, 10 and 11.

Clause 2.3 stated as follows:

"The parties undertake with effect from the Signature Date and until the expiry of three months thereafter that they will negotiate with each other in good faith in respect of the detailed written agreements and that, subject to 3.5, they will not negotiate with Lonmin or any other person in respect of any matter relating to the acquisition of all or part of the share capital, assets or business of Independence or its immediate holding company."

Clause 9 stated as follows:

"Stanmarker shall use its best efforts to procure that:

9.1 all interested parties, relevant government officials and authorities are favourably disposed to Newco's acquisition of Independence or its holding company, such that the acquisition of Independence or its holding company is not unduly hampered, obstructed and/or delayed in any manner whatsoever; and

9.2 the Zimbabwean government substantially reduces the current Zimbabwean government dispensation referred to in 3.1 and Stanmarker shall, upon request, inform, hold discussions with and provide satisfactory evidence to Metallon of its progress in this regard."

Clause 10 stated as follows:

"No party shall disclose to any person other than its professional advisors and Lonmin any matter relating to these Heads or the transactions contemplated herein, except with the prior written consent of the other party."

Clause 11 stated as follows:

"11.1 From the Signature Date and for a period of three months thereafter, neither party shall, without the prior written consent of the other party, engage in or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate holding company and/or engage in or enter into discussions with any other party desirous of achieving similar objectives than, or competing with, Newco.

11.2 Either party shall procure that their respective shareholders and directors shall, within 7 (seven) days of the Signature Date, provide written undertakings to the other party similar to those set out in 11.1, *mutatis mutandis*."

And clause 3.5, which was mentioned in clause 2.3 of the Heads, stated as follows:

> "Metallon shall, on behalf of Newco, negotiate with Lonmin and make an offer to acquire Independence or its immediate holding company for the amount of approximately 12 million US Dollars or such other amount agreed upon between the shareholders;".

However, in determining whether the Heads constituted a partnership between Metallon and Stanmarker the only provisions to consider are clauses 2.3, 9, 10 and 11, i.e. the legally binding provisions. The rest of the provisions are irrelevant because they were not legally binding on the parties, and the existence of the partnership was in dispute.

The essentials of a partnership agreement were set out by STRATFORD AJA in *Rhodesia Railways and Ors v Commissioner of Taxes* 1925 AD 438 at 465 as follows:

> "… I think we are safe if we adopt the essentials which have been laid down in *Pothier on Partnership* … . These essentials are fourfold. First, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract."

Subsequently, in *Bester v Van Niekerk* 1960 (2) SA 779 (AD) the fourth essential, i.e. that the contract between the parties should be a legitimate contract, was dropped, on the ground that illegality as a ground of invalidation was part of the general law of contract and was not an essential peculiar to partnership agreements. I entirely agree with that decision.

Thus, in determining whether the legally binding clauses of the Heads constituted a partnership between Metallon and Stanmarker, only three essentials are relevant, i.e. the first three set out in *Pothier on Partnership*.

I will start by considering the second essential, i.e. "that the business should be carried on for the joint benefit of both parties". This essential is a crucial one.

After examining the legally binding clauses of the Heads, I am satisfied that none of them indicated that any business was to be carried on for the joint benefit of both parties during the relevant period, i.e. the period extending from the date when the Heads were signed by the parties to the date when the detailed written agreements would have been concluded or signed by the parties, had that stage been reached. The legally binding clauses, i.e. clauses 2.3, 9, 10 and 11, are silent on this. It is pertinent to note that clause 3.5 is not one of the legally binding clauses, although it is mentioned in clause 2.3. This issue will be dealt with in greater detail later on in this judgment.

In my view, the finding that none of the legally binding clauses indicates that any business was to be carried on for the joint benefit of both parties during the relevant period is fatal to the argument, which appears to have been accepted by the learned Judge in the court *a quo*, that some sort of interim partnership existed between the parties until the stage at which the detailed written agreements, referred to in clause 2 of the Heads, were concluded.

In the circumstances, it is not really necessary for me to consider whether the other two essentials of a partnership agreement, i.e. the first and third essentials set out in *Pothier on Partnership*, are present in the legally binding provisions, because their presence would depend upon there being a business to be carried on for the joint benefit of both parties.

Quite apart from the fact that the relevant provisions do not indicate that a business was to be carried on for the joint benefit of both parties, clause 2.2 of the Heads stated as follows:

> "These Heads set out the main principles upon which the parties will negotiate the detailed written agreements referred to herein …".

The Heads were, therefore, nothing more than a set of principles which formed the basis of the negotiation and conclusion of a future shareholders agreement.

In addition, apart from the bald allegation in its replication, filed long after the trial had started, that the relationship between it and Metallon constituted a

partnership, Stanmarker did not allege the existence of a partnership either in its declaration filed in April 2004 or in its further particulars supplied in response to Metallon's request for further particulars filed in June 2004.

The main allegation relied upon by Stanmarker was set out in para 10 of its declaration as follows:

> "In breach of the agreement and during the period of three months, the defendant made a bid for Independence for itself and pursued negotiations with Lonmin for the acquisition of Independence without the plaintiff's prior written consent, pursuant to which it acquired ownership of the shares in Cableair and effective control of Independence for itself to the exclusion of the plaintiff."

In short, the allegation was that during the three month restraint period Metallon had committed a breach of contract. No allegation of a partnership relationship was made.

On 3 June 2004 Metallon filed its request for further particulars to the declaration. The further particulars sought by Metallon included the following:

> "5.1 Does the plaintiff rely on a duty on the part of the defendant to act in good faith toward it or Newco?
>
> 5.2 What does the plaintiff contend was the extent of such duty and where does it arise from?".

In its further particulars filed on 15 June 2004 Stanmarker responded as follows:

> "**Ad paragraph 5.1**

The plaintiff relies both on the effective terms of the Heads of Agreement and the duty of good faith.

Ad paragraph 5.2

The duty arises *ex contractu* and, in the alternative, is implied, based on the nature of the agreement between the parties, and in the further alternative, it is implied by operation of the law."

In my view, if Stanmarker genuinely believed that the parties had intended to create and had created a partnership it would have said so in its further particulars when it dealt with the duty of good faith and where such duty had arisen from.

In addition, the allegation of a partnership was not made in the amendment to Stanmarker's declaration which was sought and granted in June 2005.

In the circumstances, it seems to me that the allegation of the existence of a partnership was an afterthought on the part of Stanmarker. It was only made in the replication filed in February 2006, after it had become clear that the main allegation set out in para 10 of Stanmarker's declaration (i.e. that Metallon had breached the agreement during the restraint period of three months) was unsustainable.

Accordingly, I conclude that the Heads did not constitute a partnership between Metallon and Stanmarker.

WAS CLAUSE 3.5 LEGALLY BINDING ON METALLON AND DID METALLON BREACH ITS OBLIGATIONS UNDER IT?

The learned Judge in the court *a quo* answered both questions in the affirmative. I respectfully disagree with him.

In concluding that clause 3.5 was legally binding on Metallon the learned Judge reasoned as follows:

> "It is true that clause 2.2 does not expressly mention clause 3.5 as one of the legally binding obligations of the HOA (Heads of Agreement). However, it must not be overlooked that clause 3.5 is expressly mentioned in clause 2.3 and therefore it forms part of the binding obligations of the HOA. …
>
> Simply put, the positive obligation to act in 'good faith' created by clause 2.3 permeates and extends to the defendant's mandate in clause 3.5. This means that the defendant had an express contractual obligation to act in good faith, when negotiating on behalf of the parties, in relation to the acquisition of the Cableair shares. …
>
> In my view, it appears that from very early in the negotiations the defendant failed to disclose or communicate important information and this stance was maintained throughout the three months restraint period. …
>
> In other words, in my view the defendant was in breach of its duty of good faith as created by the agreement it entered into with the plaintiff."

See *Stanmarker Mining (Pvt) Ltd v Metallon Corporation Ltd* HH-36-2006 (not yet reported) at pp 26-31 of the cyclostyled judgment.

As already stated, it is clear from clause 2 of the Heads that the only legally binding provisions of the Heads were clauses 2.3, 9, 10 and 11. If the parties had intended clause 3.5 to be legally binding they would have said so. The mere fact that reference to clause 3.5 was made in one of the binding clauses (i.e. clause 2.3) did not

thereby convert clause 3.5 into a binding clause. Clause 3.5 was merely mentioned as an exception to the restraint set out in clause 2.3.

Although the word "shall" was used in clause 3.5, the word is not always used in a peremptory sense. Its meaning would depend upon the context in which it is used. At times it could mean that there is a requirement to do something, and at other times it would not mean that, although the word usually carries a peremptory connotation.

However, if the manifest intention of the parties to an agreement so requires, a departure from the peremptory connotation of the word "shall" is justified. That is so in the present case. The manifest intention of the parties appears in clause 2.2, from which it is clear beyond doubt that the parties did not intend to make clause 3.5 legally binding.

In addition, to regard the word "shall" in clause 3.5 as peremptory would result in an absurdity and a contradiction within the Heads, because clause 3.5 is not one of the legally binding clauses set out in clause 2.2.

In the circumstances, Metallon was not legally obliged to negotiate with Lonmin for the acquisition of the shares on behalf of Newco. Accordingly, it did not have any legal obligations in terms of clause 3.5.

It therefore follows that the second question posed earlier, i.e. whether Metallon breached its obligations under clause 3.5, falls away.

DID METALLON HAVE A LEGAL OBLIGATION AFTER 24 SEPTEMBER 2002 TO CONTINUE NEGOTIATING WITH LONMIN ON BEHALF OF NEWCO AND DID IT BREACH SUCH OBLIGATION?

The learned Judge in the court *a quo* answered both questions in the affirmative. I respectfully disagree with him.

In my view, the learned Judge was influenced by his finding that the Heads constituted a partnership. From that premise he proceeded to find that Metallon was under a legal obligation, after the restraint period expired on 24 September 2002, to continue with the negotiations which it had commenced with Lonmin during the restraint period until the negotiations were finalised or lawfully terminated.

However, since I have already determined that the Heads did not constitute a partnership, the learned Judge's reasoning is inapplicable, and I need not comment on its applicability to partnership transactions.

In my view, it is very clear from clauses 2.3 and 11.1, both of which have already been set out in this judgment, that the restraint was for a period of three months only, i.e. from 24 June to 24 September 2002. After that period, neither party was precluded from acquiring the shares for itself to the exclusion of the other.

Metallon did not, therefore, have a legal obligation after 24 September 2002 to continue negotiating with Lonmin on behalf of Newco. Consequently, the second question falls away.

The appeal must, therefore, be allowed, but the cross-appeal must be dismissed.

In the circumstances, the following order is made –

1. The appeal is allowed with costs of two counsel.

2. The order of the court *a quo* is set aside and the following is substituted -

   "The plaintiff's claim is dismissed with costs of two counsel".

3. The cross-appeal is dismissed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners