REPORTABLE
CASE SA 31/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

METALS AUSTRALIA LIMITED	**FIRST APPELLANT**
METALS NAMIBIA (PTY) LIMITED	**SECOND APPELLANT**

and

MALAKIA JOSES AMAKUTUWA	**FIRST RESPONDENT**
MINISTER OF MINES AND ENERGY, NAMIBIA	**SECOND RESPONDENT**
BRIAN MOORE	**THIRD RESPONDENT**

Coram: Maritz JA, Chomba AJA *et* O'Regan AJA

Heard on: 05/07/2010

Delivered on: 05/11/2010

APPEAL JUDGMENT

O'REGAN AJA:

[1] This appeal concerns the validity of two agreements entered into between the first appellant, Metals Australia Limited, and the first respondent, Mr M J Amakutuwa, relating to two mineral licences to prospect exclusively for uranium in certain parts of Namibia. The High Court held that both agreements were null and void and the appellants are appealing that decision.

Facts

[2] In mid-2005 Mr Amakutuwa (the first respondent) was issued two licences in terms of section 70 of the Minerals (Prospecting and Mining) Act, 1992 (the Minerals Act) by the Ministry of Mines and Energy to prospect for uranium in Namibia. Given the geographical areas to which the licences relate, Exclusive Prospecting Licence (EPL) 3306 was referred to as the "Engo Valley" EPL and EPL 3308 as the "Mile 72" EPL.

[3] In November 2005, after several months of negotiation between the first appellant and the first respondent, a contract was entered into between the first appellant (then known as Australian United Gold Ltd), Mr Amakutuwa and a purported close corporation called Reliance Investment Agencies CC ("Reliance"). Mr Amakutuwa signed the agreement on his own behalf and purported to sign the agreement on behalf of Reliance. The terms of the agreement recorded that Reliance was "the beneficial owner" of the two EPLs and was entitled to be the registered owner of them. The agreement also recorded that Mr Amakutuwa was the current registered owner of the EPLs and that he held the beneficial interest in the licences "in trust' for Reliance.

[4] The nub of the agreement was that Reliance agreed to sell and the first appellant or its nominee agreed to purchase the EPLs in exchange for a payment of US $30 000 and the issue of 5 million ordinary shares in the first appellant to Reliance. A condition of the agreement was that the consent of the Minister of Mines and Energy (the second respondent *a quo* and in this appeal) to the transfer

of the EPLs would have to be obtained. A further term was that Mr Amakutuwa would "do all things necessary" to transfer the EPLs to Reliance.

[5] Reliance was not in existence at the time the agreement was signed and indeed it has never come into existence. Mr Amakutuwa was aware of this but the appellants were not. Despite the non-existence of Reliance, Mr Amakutuwa took steps to transfer the EPLs from his name into that of the first appellant's nominee and, on 5 February 2006, the Mining Commissioner transferred the EPLs directly to New Mining Company (Pty) Ltd the predecessor to Metals Namibia (Pty) Ltd, the second appellant.

[6] Once the EPLs had been transferred, Metals Australia discovered that Mr Amakutuwa had overstated the known ore bodies in the geographical areas for which the EPLs were issued and also misrepresented both the size and location of the geographical areas for which the licences had been granted. After a preliminary investigation, the independent metallurgist advising the first appellant put it thus: "you have been had".

[7] In the light of this information, the appellants tendered return of the EPLs to Mr Amakutuwa and Reliance against reimbursement of the expenses they had incurred (approximately Aus $100 000). Mr Amakutuwa was unable to reimburse them and so the licences were not returned. Instead, on 2 February 2007, the first appellant entered into a "deed of amendment and release" with Reliance, Mr Amakutuwa and a Mr Moore (whose involvement in the events it is unnecessary to describe). Mr Amakutuwa again signed this agreement on his own behalf and

purportedly on behalf of Reliance (which was still not in existence, again without the appellants being aware of this). One of the recitals to this agreement (recital E) stated: "It has become apparent to all parties that the Prospecting Licences do not contain the orebodies that the parties mistakenly thought they did, and accordingly the parties have agreed to amend the terms of the Heads as herein set out".

[8] The terms of this second agreement were that the parties agreed that no consideration was payable to Reliance in respect of the transfer of the EPLs; that "the unencumbered legal and beneficial interest" in the EPLs would be retained by the first appellant or its nominee free of all claims by Reliance, Moore and Amakutuwa. In consideration for this, the appellants agreed to release and discharge Reliance, Moore and Amakutuwa from all claims that the appellant might have had against them.

[9] Subsequently, the appellants undertook a metallurgical exploration of the areas in respect of which the EPLs were issued. That investigation suggests that there are in fact good deposits of uranium in the Mile 72 EPL area, although this had not previously been known. The appellants thus approached the Minister of Mines and Energy to obtain a renewal of the two EPLs.

Proceedings in the High Court

[10] Two years after the second agreement had been signed, and following a public announcement by the first appellant of the potential mineral value of Mile 72, Mr Amakutuwa launched proceedings in the High Court seeking a declaration

that both the first and second agreements were void *ab initio* and an order that the EPLs be transferred back to him. The High Court granted the relief he sought on the ground that, as Reliance was not in existence at the time of signature of either agreement, no-one was authorized to sign on its behalf and both agreements were thus null and void. The order made by the High Court was the following: (a) both agreements were declared null and void *ab initio*; and (b) the Minister of Mines and Energy was ordered to transfer both EPLs back to Mr Amakutuwa. The appellants now seek leave to appeal that order to this Court.

Appellants' submissions in this Court

[11] The appellants submit that the High Court erred in concluding that the agreements were null and void simply because Reliance was not in existence. Their arguments may be summarized as follows:

(a) The non-existence of Reliance did not render the contracts void because Mr Amakutuwa had signed the contracts in his personal capacity (as well as in a representative capacity on behalf of Reliance,) and he was thus personally bound to perform in terms of the agreements despite the non-existence of Reliance.

(b) The non-existence of Reliance did not render the contracts objectively impossible of performance.

(c) Section 46(a) of the Minerals Act was not a bar to the validity of the contracts. (The first respondent argues that section 46(a) of the Minerals Act does not permit a close corporation to hold mineral rights.)

(d) The second agreement constituted a *transactio* or compromise, the validity of which is not dependent on the validity of the first agreement. The effect

of a compromise, they argue, is to settle all past and future obligations between the parties.

(e) Recital E of the second agreement which states that it has become apparent to all the parties that the EPLs "do not contain the ore bodies which the parties mistakenly thought they did" is not a fraud as suggested by the respondents, but reflects the state of affairs as known to the parties to the second agreement at the time it was concluded.

First Respondent's submissions in this Court

[12] The first respondent's submissions may be summarized thus:

(a) The first agreement was void because its conditions precedent were not fulfilled (in particular, the consent of the Minister to the transfer of the EPLs and the regulatory authorization for the transfer of the shares to Reliance given the non-existence of Reliance).

(b) Both agreements were void because an agreement entered into on behalf of a non-existent close corporation is null and void.

(c) To the extent the agreements contemplated the transfer of the EPLs to Reliance,[1] they would be void because section 46(a) of the Minerals Act does not permit close corporations to hold mineral rights.

(d) The moral turpitude and unclean hands of the appellants should deprive them of any defence.

Application to adduce further evidence on appeal

[1] It should be noted here that only the first agreement contemplated the transfer of the EPLs to Reliance.

[13] A preliminary procedural question arises. Mr Amakutuwa lodged an application to adduce further evidence on appeal just over a month before the hearing. In terms of this application, Mr Amakutuwa seeks leave to introduce affidavits as evidence in these proceedings that were lodged by the appellants in the High Court in opposition to a rule 49(11) application by Mr Amakutuwa. The rule 49 application sought leave, pending the outcome of the appeal, to implement the relief requiring the Minister of Mines and Energy to transfer the EPLs back to Mr Amakutuwa. As it turned out, the rule 49(11) application was overtaken by events. It was enrolled for hearing only eight court days before the hearing of the appeal. In the circumstances, Mr Amakutuwa withdrew the application and the parties agreed that the costs in that application would be costs in the appeal.

[14] The evidence the first respondent seeks to have admitted is contained in a supplementary affidavit made on behalf of the appellants to resist the rule 49(11) application. In the affidavit, the appellants disclose that low-level airborne radiometric data, that became available from a Geological Survey of Namibia in 2007, had established potential uranium deposits in the area of the Mile 72 prospecting licence. Thereafter extensive sampling by the appellants over a substantial period of time had confirmed significant uranium deposits within the area of Mile 72 that could have an in-ground value of billions of dollars. The respondent seeks to tender this evidence, over objection by the appellants, to establish that the appellants' assertions prior to 2007 that the EPLs had little value to them were "disingenuous". The appellants oppose the admission of this evidence on the grounds, amongst others, that it is irrelevant to the determination of the appeal.

[15] The test for the admission of late evidence on appeal is well established. An appellate court will exercise its powers to admit such evidence "sparingly".[2] Leaving aside the question of the timing of the application to tender evidence, and the need to avoid prejudice to the other party, an applicant will also have to show that the evidence is "weighty and material and presumably to be believed…".[3]

[16] The question is whether the evidence in this case is material and weighty given the issues that must be determined in the appeal. In my view, it is neither material nor weighty. The evidence proffered shows that the appellants now consider the Mile 72 prospecting area to contain substantial uranium deposits. The discovery of uranium deposits in the Mile 72 prospecting area is of no relevance to three of the four arguments made by the first respondent (see para 11 above) and could not be admitted in relation to them.

[17] The only argument to which the tendered evidence could have some tangential relevance is the argument relating to moral turpitude. There is a dispute as to whether the first respondent abandoned this issue in the court below. Assuming that the issue is live in this Court,[4] there is a sharp factual dispute

[2]*Van Eeden v Van Eeden* 1999 (2) SA 448 (C0 at 450 J – 451A (per Comrie J), cited with approval in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 42.
[3]*Colman v Dunbar* 1933 AD 141 at 162. This approach has often been cited by South African courts. See, for example, *Knox d'Arcy and Others v Jamieson and Others* 1996 (4) SA 348 (SCA) at 378; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*, cited above n1, at para 41.
[4]An appellate court is not ordinarily bound by an abandonment of a legal argument in the court below. See *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16(A) at 23H – 24D (per Jansen JA).

between the parties as to whether the appellants behaved improperly in the manner in which they conducted their relationship with Mr Amakutuwa.

[18] The evidence concerning the discovery of uranium deposits in Mile 72 does not assist Mr Amakutuwa to establish that the appellants have behaved improperly. The evidence merely shows that investigations by the appellants established, after conclusion of the second agreement, that there are valuable uranium deposits in the area of the Mile 72 EPL. The evidence does not establish that at the time the second agreement was signed, the appellants were aware of the value of Mile 72. Nor does it suggest that the appellants acted in any way improperly. When taken with the other evidence on the record in these proceedings, it shows that the appellants thought the EPLs to have little or no value after they received the report from their independent metallurgiist referred to in paragraph 6 above, but that subsequent investigations contradicted that at least in relation to the Mile 72 EPL. The evidence tendered is also consistent with the conduct of the appellants, who upon learning that the two EPLs were not in the areas they had been led to believe they were, tendered the return of the EPLs against compensation for the expenses they had incurred in acquiring them. It is unlikely that they would have done so if they believed the EPLS to contain substantial mineral deposits.

[19] The tendered evidence is thus neither material nor weighty even in relation to the argument going to impropriety. In the circumstances, a case has not been made out for the admission of this evidence on appeal and the application to tender the rule 49(11) affidavits must therefore be dismissed with costs.

Issues in this Court

[20] The question the Court has to decide therefore is whether the agreements were void *ab initio*. It will be useful to start with the second agreement, because if the second agreement is a self-standing agreement and not void, then the issue of the validity of the first agreement will not arise. It is only if the second agreement is void, that the question of the validity of the first agreement will arise. I turn first therefore to the validity of the second agreement.

Validity of the second agreement

[21] The appellants argue before this Court that the second agreement constituted a *transactio* or compromise. A compromise is a form of agreement the purpose of which is to put an end to existing litigation or to avoid litigation that is pending or might arise because of a state of uncertainty between the parties.[5] Ordinarily,[6] the validity of an agreement of compromise does not depend on the validity of a prior agreement.[7] An agreement of compromise may follow upon a disputed contractual claim but it may also follow upon any form of disputed right and "may be entered into to avoid even clearly a spurious claim".[8] The effect of

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[5]See *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) at 921 B – C.

[6]There is a narrow class of exceptions to this rule. Where the terms of the compromise are tainted by the same public policy considerations which rendered the initial obligation unenforceable the compromise will also be unenforceable. An example of this would be the purported compromise of a gambling debt. See *Georgias v Standard Chartered Finance Zimbabwe Ltd*, 2000 (1) SA 126 (ZS) at 140A – B. This exception has no bearing on the facts of this case.

[7]See *Hamilton v Van Zyl* 1983 (4) SA 379 (E) at 383 D – E citing Wessels *The Law of Contract in South Africa* 2nd ed Vol II para 2458.

[8]*Hamilton v Van Zyl,* id, at 383 E – F.

an agreement is that it bars the bringing of proceedings on the original cause of action.[9]

[22] The argument that the second agreement constituted a compromise was not raised in the High Court and the respondent argued in this Court that the appellants were not permitted to raise it here. Where a new legal point is raised on appeal, two questions arise: is the point covered by the pleadings and would there be any unfairness to the other party were it to be raised on appeal.[10] If the legal point is covered by the pleadings, and no unfairness to the other party would arise, then "the Court is bound to deal with it".[11]

[23] The parties squarely raise the nature and legal effect of the second agreement in the affidavits. The parties have placed before the court all the evidence relevant to the conclusion of the second agreement and respondent's counsel did not suggest otherwise. Moreover, appellants' argument relating to compromise was set out in their heads of argument and respondent's counsel had an opportunity to deal with it in his written and oral argument. In the circumstances, the legal argument relating to compromise is one this court should decide.

[24] Whether the second agreement is indeed an agreement of compromise is a matter of contractual interpretation. It is plain from the recitals to the agreement

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[9] *Mothle v Mathole* 1951 (1) SA 785 (T); *Jonathan v Haggie Rand Wire Ltd and Another* 1978 (2) SA 34 (N); *Hamilton v Van Zyl,* id, at para 383 G – H.

[10] See *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A)

[11] *Cole v Union Government* 1910 AD 263 at 272 (per Innes JA). See also *Naude and Another v Fraser* 1998 (4) SA 539 (A) at 558.

that the agreement is being entered into because the EPLs do not contain the orebodies that the parties mistakenly thought they did. The core provisions of the second agreement are that (a) there will be no payment to Reliance for the transfer of the EPLs (as had been agreed in the first agreement); (b) the "unencumbered legal and beneficial interest" in the EPLs shall remain vested in the second appellant; and (c) the appellants release Mr Amakutuwa and the other parties from all claims the appellants may have against them but for the existence of the second agreement.

[25] It is clear from the third of these provisions that there is a possibility of litigation against Mr Amakutuwa (amongst others) arising out of the events surrounding his relationship with the appellants and that the appellants are expressly abandoning any claims they may have against him. The possibility of litigation arose because of the appellants' allegation that Mr Amakutuwa had misrepresented the areas of the EPLs prior to the first agreement being signed, and also misrepresented, on their version, the extent of the established ore bodies within the areas of the EPLs. The purpose of the agreement is thus clear. It is to put an end to any possibility of litigation between the appellants and Mr Amakutuwa arising out of their prior relationship and to clarify that the appellants have no obligation to pay Mr Amakutuwa for the transfer of the EPLs and that the appellants will retain the EPLs. This purpose determines that the agreement is an agreement of compromise.

[26] Counsel for the first respondent argued that because the heading of the second agreement described the agreement as a "Deed of Amendment and

Release", the second agreement was an amendment of the first agreement and not a compromise. The words "amendment and release" are not inconsistent with a contract of compromise, suggesting as they do that a prior agreement is being varied, and that some party is being released from an obligation or obligations. Be that as it may, the title of the agreement is not determinative of the nature of the contract which must of course be read as a whole. It is clear from the agreement as a whole that the purpose of the second agreement is primariiy to put an end to the possibility of litigation between the parties by redefining their respective rights and obligations and as such, properly construed, the second agreement is a compromise. That it is not called an agreement of compromise does not alter this conclusion. For the character of a contract depends on its terms and a contract of compromise, even if called something else, remains a compromise if on its terms it is a contract of compromise. The argument of counsel that the agreement properly construed is merely an amendment of the first agreement and not a compromise cannot be accepted.

[27] The validity of an agreement of compromise does not generally depend on the validity of any contract it replaces. Nevertheless for it to be a binding contract, the compromise agreement must have been properly concluded. The respondent argues that because Reliance does not exist and it is a party to the second agreement, the contract must be void. This argument will only be correct if it can be shown that the agreement of compromise could not stand without the existence of Reliance. If the aspects of the agreement that relate to Reliance can be severed without affecting the obligations between the appellants and Mr Amakutuwa, the agreement will not be invalid. The non-existence of Reliance may

result in the invalidity and severance of those portions of the agreement that affect Reliance.

[28] There are three aspects of the second agreement that relate to Reliance: the first is the provision that Reliance is no longer entitled to claim compensation for the transfer of the EPLs; the second is that Reliance agrees that the EPLs shall remain the unencumbered property of the second appellant; and the third is that Reliance will not be sued by the appellants in respect of any claim arising. If these three aspects of the second agreement are severed from the second agreement, the following is clear: Mr Amakutuwa (and Mr Moore) may not be sued by the appellants in respect of any claim arising. This aspect of the contract can stand freely on its own even when the provisions relating to Reliance have been severed. The respondent's argument that the non-existence of Reliance automatically renders the second agreement void cannot therefore be sustained.

[29] The only other argument raised by the respondent to assert the invalidity of the second agreement was based on duress. Counsel argued that as the first respondent had been pressured by threat of litigation to enter into the compromise agreement, the agreement was tainted by duress. A compromise agreement will most often be concluded in circumstances where uncertain legal relationships between the parties give rise to a risk or threat of litigation. Merely threatening to institute proceedings for contractual or delictual damages does not constitute "duress" that will vitiate an agreement of compromise. The threat of litigation is part and parcel of commercial life and will not on its own be the basis for concluding that an otherwise properly concluded contract is void. To the extent that

the first respondent suggested that the duress arose from conduct other than a mere threat of litigation, the appellants strenuously denied in their answering affidavits having behaved improperly. To the extent that the allegation of duress goes beyond a mere threat of litigation, there is a dispute of fact between the first respondent and the appellants that, on the ordinary rule, must be decided in favour of the appellants. The argument that the second agreement was vitiated by duress must therefore be rejected.

[30] Similarly the broad and somewhat vague assertion by counsel for the first respondent that the second agreement should be found to be vitiated because of the "moral turpitude" of the appellants was refuted by the appellants both in their answering affidavits and in argument. As these were motion proceedings *a quo*, the appellants' denials must be accepted and the first respondent's argument of moral turpitude rejected.

[31] I conclude therefore that the second agreement is a valid agreement of compromise, intended to replace a previous agreement between the parties, whether valid or not, and intended to avoid litigation between them. Given the validity of the second agreement, it is clear that there is no contractual basis upon which Mr Amakutuwa can challenge the title of the second appellant to the EPLs. The consequence of this conclusion is that it is not necessary to determine whether the first agreement was void or not. Nor is it necessary to determine the arguments relating to section 46 of the Minerals Act or any of the other grounds advanced by the respective litigants. The appeal must succeed and the order of the High Court must be set aside.

[32] The appellants are entitled to their costs in this court and in the High Court, and those costs should, as the parties agreed, include the costs of the abandoned rule 49(11) application.

[33] The following order is made:

1. The first respondent's application to admit further evidence on appeal is dismissed.

2. The appeal is upheld.

3. The order of the High Court is set aside and replaced with the following order: "The application is dismissed with costs, such costs to include the costs of one instructed counsel".

4. The respondent is to pay the costs of the appellants in this Court, including the costs of the application for leave to adduce further evidence, as well as the appellants' costs in relation to the abandoned rule 49(11) application in the High Court.
5. The costs in this court shall include the costs of two instructed and one instructing counsel.

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O'REGAN, A.J.A.

I concur

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MARITZ, J.A.

I concur

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CHOMBA, A.J.A.

Counsel on behalf of the Appellants:	Mr. J. Gauntlett SC
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