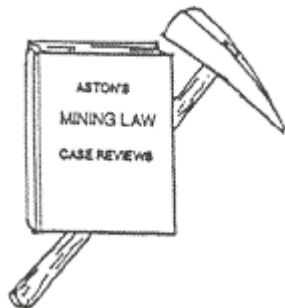


ASTON'S MINING LAW CASE REVIEWS™



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Jurisdiction : South Africa

Transvaal Provincial Div.

PROSPECTING CONTRACT FOR "INDEFINITE PERIOD" QUESTIONED

In a South African suit concerning a prospecting agreement granting the right to prospect for "platinum group metals", and including gold and copper, for "an indefinite period and upon the terms set out", was found by the South African court not void for 'vagueness' and existed in perpetuity unless terminated according to the contractual terms. However, the court held that the contractual agreement was not registrable, and therefore, not enforceable under existing law because it failed to contain real rights as opposed to personal rights.

Background Facts :

The parties in this litigation, *Vansa Vanadium SA Ltd. v Registrar of Deeds, and Others*, [1996] 1 All SA 433 (T), Transvaal Provincial Div., McCreath J., were :

Applicant = Vansa Vanadium SA Ltd., formerly Rhodium Reefs Ltd.

1st Respondent = Registrar of Deeds

2nd Respondent = Rustenburg Platinum Mines Ltd.

3rd Respondent = Marshall Metallic Holdings Ltd., formerly African Exploration Investments Ltd.

4th Respondent = Trojan Platinum Pty Ltd.

By act of registering a Notarial Cession of Rights on 22 July 1981, 3rd Respondent African Exploration Investments Ltd. (hereafter African Exploration), ostensibly became the registered holder of mineral prospecting rights on a farm in the Transvaal known as Winnaarshoek. The rights were obtained from Rhodium Reefs Ltd. (hereafter, Rhodium Reefs), predecessor of the Applicant, Vansa Vanadium SA Ltd. (hereafter, Vansa).

Four months later, on 17 November 1981, African Exploration executed a Notarial Prospecting and Option contract with Rustenburg Platinum Mines Ltd. (hereafter, Rustenburg) assigning their prospecting rights to Rustenburg.

The instrument between African Exploration and Rustenburg was registered in the Deeds Office on 21 December 1981 (K3825/81). In terms of clause 1 of the contract, African Exploration granted to the Rustenburg "for an indefinite period and upon the terms set out hereunder ... the sole and exclusive right to prospect and search for platinum group metals in and upon the properties."

In addition, the agreement stated that in the event of a discovery of valuable precious metals, after written notice to African Exploration, Rustenburg was appointed to act as their "duly authorised attorney and agent" to apply to the Mining Leases Board for a mining title for the right to mine. Under the said mining title, Rustenburg would be permitted to mine for platinum group metals and gold and certain base minerals found in association with platinum group metals. Rustenburg was also given the right to execute and procure the registration of the said mining title and to cede to itself all the right, title and interest of African Exploration therein. It was also granted certain further rights ancillary to the foregoing.

On 13 June 1985, African Exploration executed a Notarial Cession of Mineral Rights with the Applicant's predecessor, Rhodium Reefs, by which African ceded to Rhodium, "*inter alia* (amongst other things), all its right, title and interest in and to the mineral rights on, over or in respect to the Winnaarshoek properties. : This notarial cession was registered in the Deeds Office on 28 June 1985.

In March 1989, African Exploration / Marshall Metallic Holdings Ltd. (hereafter, Marshall) acting through Rand Mines (Mining & Services) as its secretary, purported to terminate its contract with Rustenburg. However, by written reply in March 1989, Rustenburg repudiated African Exploration / Marshall's right to terminate the contract.

In May 1992, the Applicant / Vansa concluded an 'underhand' Prospecting and Option contract with Trojan Platinum Pty. Ltd (hereafter, Trojan). In this contract, Vansa ostensibly granted to Trojan "the sole and exclusive right to prospect and search for all minerals in, on, and under certain properties, including the Winnaarshoek the properties." Trojan was also granted the right during the prospecting period to purchase from Vansa its mineral rights for any of the properties included in the contract at a price of R24 million.

On 4 June 1992, the Vansa-Trojan notarially executed contract was registered by the Registrar of Deeds. It should be noted that at the time of execution of the contract, Trojan was aware of the former contract (K3825/81) and the fact that Rustenburg had disputed the validity of Vansa's attempted cancellation.

Another relative fact that the Court took note of was "the Winnaarshoek properties are situated in Lebowa and that the Mining Rights Act 20 of 1967 continued to apply to that territory until 1 May 1995 when the provisions of the Minerals Act 50 of 1991 were made applicable to Lebowa".

The Court's Analysis of the Case Issues :

Vansa sought an order against the Registrar of Deeds to cancel the registration of contract K3825/81 and any reference made in the subsequent Cession of Mineral Rights contract K1871/85 RM between Rhodium Reefs and African Exploration on the grounds that the former contract (K3825/81) was not legitimately registerable in

terms of the Deeds Registries Act 47 of 1937. Vansa also sought a declaratory order that contract K3825/81 was void *ab initio* (from the beginning) and unenforceable.

Alternatively Vansa sought an order declaring that the mineral rights ceded by the Applicant (Rhodium Reefs) by the registration of the contract K1871/85 RM are not subject to, limited or encumbered by the terms of contract K3825/81, and that the Applicant is not and has never been bound by the terms of the latter contract. In the further alternative the Applicant sought an order that it validly cancelled contract K3825/81, or that the said contract was terminated by operation of law on the grounds that it became impossible to perform in consequence of the coming into operation of the Minerals Act 50 of 1991.

As a final alternative the Applicant seeks an order that, after registration of the Prospecting and Option contract concluded between it and Trojan, and upon the latter exercising the option granted thereunder and upon registration by the Registrar of Deeds of the cession of mineral rights by the Applicant to Trojan, the latter will acquire the mineral rights without being subject to, limited or encumbered by the terms of contract K3825/81 and will not be bound by the terms thereof.

Vansa further sought an order against the Registrar of Deeds that the Prospecting and Option contract entered into between Vansa and Trojan on 15 May 1992, was not legitimately registerable based on the requirements of the Deeds Registries Act, section 3(1)(q).

The Court noted that Rustenburg “opposed the relief sought by the Vansa and had filed a conditional counter-application. Therein it seeks an order that in the event that it be found that contract K3825/81 is not a notarial prospecting contract within the meaning of the Deeds Registries Act 47 of 1937, the right to prospect and search conferred in terms of the said contract is a real right in terms of section 3(1)(r) of the Deeds Registries Act, and that the remaining rights thereunder are complementary or otherwise ancillary thereto within the meaning of section 63 of the said Act.”

Rustenburg sought a further order “declaring that the said contract was correctly registered under the Deeds Registries Act, alternatively directing the Registrar of deeds to register the said contract in terms of section 3(1)(r) read with section 63 of the said Act.” Rustenburg also sought “a declaratory order that Rustenburg has the sole and exclusive right and option on notice in writing to Rhodium Reefs, or its successors in title, as holders of the rights to minerals in respect of the Winnaarshoek properties, to obtain the consent of the applicant or such successors to mine for platinum group metals and gold, chrome, cobalt, nickel and copper found in association with the platinum group metals from the whole of the said properties or such portions thereof as Rustenburg may determine; further, that in the event of the exercise of the aforesaid rights and option by the Rustenburg, Rhodium Reefs, or its successors in title will be obliged to execute all documentation necessary to confer and give effect to such consent including the execution of a notarial mineral lease on the terms set out in a draft Notarial Mineral Lease attached to Rustenburg’s answering affidavit.”

Void for vagueness issue :

As a further argument, Vansa argued that contract K3825/81 was void for vagueness because it is for an indefinite period. In summation of the court's analysis of the phrase "indefinite period", the Court stated, " The expression 'for an indefinite period' in clauses 1 and 3, accordingly mean, in my view, 'without limitation as to time'. The contract is therefore in perpetuity unless terminated by the Rustenburg on three months' notice or cancelled by Rhodium Reefs / Vansa on the grounds of a breach of contract by Rustenburg. In my judgment there is no reason in law why a grant of prospecting rights (together with the accompanying grant of a right to apply for a mining lease) should not be for an unlimited period subject to prior termination or cancellation on defined grounds. Leases of mineral rights in perpetuity are well-known in our law and there is no reason in logic why prospecting contracts should be treated on a different basis. This, in my view, is especially so in view of the fact that a right to prospect is inherent in a mining lease. Moreover, the grant of the prospecting rights is for an agreed consideration and the payment of an agreed royalty is stipulated in consideration of any rights which may be granted in terms of a mining title. Generally speaking, a contract in perpetuity is in accordance with the principles of our law and enforceable.*** therefore, contract K3825/81 is not void for vagueness *** It follows that Rhodium Reefs or Vansa , if bound by the said contract, was not entitled to cancel the agreement as it purported to do on 22 March 1989. " (unless terminated for cause of breach by Rustenburg).

Validity of Registration of the Contract Under Deeds Registries Act 1937 :

Whether contract K3825/81 PC was registerable in terms of the Deeds Registries Act 1937 had to be decided since the contract was registered as a prospecting contract in terms of section 3(1)(q) of the said Act .

The Court stated, " Contract K3825/81 contains no option whereby a right is granted to Rustenburg to purchase the land or any portion thereof or to purchase the right to any mineral or minerals. The contract also does not grant to the second respondent (Rustenburg) the right to lease any right to minerals on the said properties as required in terms of section 102 of Act 47 of 1937.

For those reasons and other findings by the Court that the contract did not meet the qualifications for being registrable, the Court found, "It is therefore apparent that the mining title contemplated in clause 22 of the said contract cannot be regarded as the right to lease any right to any such mineral or minerals as contemplated in the definition of "prospecting contract" in section 102 of the Deeds Registries Act 1937. In consequence hereof the registration of contract K3825/81 was *ultra vires* the provisions of section 3(1)(q) of Act 47 of 1937 and the first respondent (Registrar of Deeds) was not entitled to register the contract under this paragraph of subsection 3(1)."

The Court then turned to the question of "whether the contract is registrable under section 3(1)(r) read with section 63(1) of Act 47 of 1937. Section 3(1)(r) provides that the registrar shall register any real right not specifically referred to in subsection 3(1) and any cession, modification or extinction of any such registered right. In section 102 of the said Act a real right is defined as including any right which becomes a real right upon registration."

Section 63(1) of Act 47 of 1937 provides as follows:

“ No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.”

Rustenburg argued that the right to prospect contained in contract K3825/81 was a real right and that, although the remaining provisions of the said contract were personal conditions, they are complementary to the prospecting right and the contract was, therefore, registrable in terms of section 3(1)(r) of the Act. The Court responded, “In my view the right to prospect does not per se create a real right.”

In support of the Judge’s view, the Court stated, “prior to legislation enabling prospecting contracts which comply with the requirements of section 3(1)(q) of Act 47 of 1937 (or with the requirements of the legislation preceding that Act) to be registered in the Deeds Office, there is authority for the fact that prospecting contracts, including those which contained an option to purchase the mineral rights, were but of a personal nature. Thus, in *Cullinan v Pistorius* [1903] ORC 33, Maasdorp CJ states the following at 37 in respect of an unregistered prospecting contract :

All that Hazebroek was entitled to under his contract was a personal right to go onto the farms for prospecting purposes and to purchase the mineral rights of the said farms in the event of his finding payable minerals.

The Court concluded, “It is therefore apparent that the mining title contemplated in clause 22 of the said contract cannot be regarded as the right to lease any right to any such mineral or minerals as contemplated in the definition of "prospecting contract" in section 102 of the Deeds Registries Act 1937. In consequence hereof, the registration of contract K3825/81 was ultra vires the provisions of section 3(1)(q) of Act 47 of 1937 and the Registrar of Deeds was not entitled to register the contract under this paragraph of subsection 3(1). ... In the result, contract K3825/81 is not registrable under any of the relevant provisions of the Deeds Registries Act 47 of 1937. “

Further Issues Analysed :

Rustenburg argued that even if the contract is not so registrable, the applicant is bound by the terms thereof and was obliged, prior to the coming into operation of the Mineral and Energy Laws Rationalisation Act 47 of 1994, and whilst the provisions

of Act 20 of 1967 were still applicable in the area of Lebowa, to carry out the obligations under the contract previously resting upon African Exploration (now Vansa). Rustenburg contended that the Applicant obtained cession of the mineral rights over the Winnaarshoek properties subject to contract No. K3825/81, that it agreed to the cession subject to the terms and conditions therein contained, that the underlying obligation in the said contract was to ensure that Rustenburg obtained a mining title in respect of the right to mine for platinum group metals, and that commercial morality demands that the applicant should abide by the obligations created under the said contract.

The Court responded that “As to the first of these contentions it must be borne in mind that mere knowledge of the existence of a right which is purely personal in nature does not bind a successor in title. “ [See *Lorentz v Melle and Others* [1978] (3) SA 1044 (T) ; also, *Schwedhelm v Hauman* [1947] (1) SA 127 (E)] .

Continuing, the Court stated, “In my view there is no reason to extend the doctrine of notice to a contract of the present nature. Generally speaking knowledge of rights and obligations of a personal character only, casts no obligation on a purchaser of property or the acquirer of a real right therein to recognise such rights, nor does it render his conduct fraudulent in refusing to do so. This also negates the argument that commercial morality requires that the Applicant should recognise the rights of Rustenburg. In this latter respect it should also be borne in mind that Rustenburg chose to acquire purely personal rights as opposed to an option to purchase the mineral rights in the Winnaarshoek properties and thereby avoided the large capital outlay which the latter option would involve. “

The Court’s Decision :

“In view of the above conclusions it is not necessary to consider the question of impossibility of performance of contract K3825/81 in consequence of the Minerals Act 50 of 1991 being made applicable as from 1 May 1995 to the territory of the erstwhile Lebowa, and the Mining Titles Registration Act 1967 and the Mining Rights Act 1967 being repealed as from that date in so far as the said territory is concerned.

“ In my view therefore the second respondent (Rustenburg) has not made out a case to show that the Applicant (Vansa) is bound by the terms of contract K3825/81 and is not entitled to the relief sought in the counter-application. An order is granted (1) in favour of the Applicant ; (2) the counter-application by Rustenburg is dismissed; and (3) the second respondent (Rustenburg) is ordered to pay the costs of the matter including the costs occasioned by the employment of two counsel.”
