THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Transasia 444 (Pty) Ltd v The Minister of Mineral Resources and Energy and Others (702/2023) & *Transasia Minerals (SA) (Pty) Ltd v The Minister of Mineral Resources and Energy and Others* (707/2023) [2024] ZASCA 145 (23 October 2024)

Today the Supreme Court of Appeal (SCA) upheld both appeals in case no: 702/2023 and 707/2023. In both appeals, the SCA set aside and substituted the order of the Gauteng Division of the High Court, Pretoria (the high court), further ordering Umsobomvu Coal (Pty) Ltd (Umsobomvu), the fourth respondent in both appeals, to pay the appellants' costs of the appeal, including the costs of the application for leave to appeal both in the high court and in the SCA.

The two appeals, which raised substantially similar issues were heard simultaneously, despite not being formally consolidated. The appellant in case number 702/2023 is Transasia 444 (Pty) Ltd (Transasia 444) while, under case number 707/2023, the appellant is Transasia Minerals (SA) (Pty) Ltd (Transasia Minerals). Transasia 444 and Tranasia Minerals are separate entities owned by a common shareholder, Transasia BVI, which was incorporated and registered in the British Virgin Islands.

The two appeals concerned the validity of the order made by Millar J of the high court in an application for rescission of the order made by Judge Mngqibisa-Thusi of the same division on 28 June 2022. The main issue before Millar J was whether Mngqibisa-Thusi J's order should be rescinded. Instead of expressly granting or dismissing the application for rescission, Millar J issued an order which substantially changed the terms of Mngqibisa-Thusi J's order.

The appellants in both matters had been involved in a long-standing dispute with Umsobomvu. The dispute related to the transfer of certain mining rights Umsobomvu had sold to Transasia 1 (Pty) Ltd, (Transasia 1), which the latter subsequently assigned to Transasia 444. Umsobomvu disputed the validity of the sale agreement and cancelled it. Transasia 444 disputed Umsobomvu's right to cancel the agreement and sought to enforce it.

Transasia 444 applied to the Director-General of the Department of Minerals and Energy (Director-General) for ministerial consent in terms of s 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) for the transfer of the mineral rights to it. In support of the application, Transasia 444 submitted, to the Director-General, various documents, some of which were confidential, while others belonged to third parties, including Transasia Minerals. Umsobomvu opposed the application, however, the Minister gave his consent to the transfer of Umsobomvu's mineral rights to

Transasia 444. Aggrieved by that decision, Umsobomvu lodged an appeal in terms of s 96 of the MPRDA. To prosecute the appeal, Umsobomvu was entitled to the record of the decision, subject to disclosure under confidentiality protection.

On 28 June 2022, Umsobomvu sought and obtained an order from the high court (Mngqibisa-Thusi J's order) directing the first respondent (the Minister of Mineral Resources and Energy), the Director-General and the third respondent, (the Regional Manager: KwaZulu-Natal Region), (collectively referred to as the Department) to deliver all the records in respect of the appeal that Umsobomvu had brought in terms of s 96 of the MPRDA. When this application was brought, Transasia Minerals and Transasia 444 were not joined as parties, nor did they receive notice of the application and, in addition, some of the documents which were sought to be disclosed contained material which they claimed to be confidential.

Aggrieved by the order of Mngqibisa-Thusi J, Transasia 444, on 15 July 2022, brought an urgent application in the high court seeking its rescission under rule 42(1)(a) of the Uniform Rules of Court. It simultaneously sought leave to be joined as the respondent in the disclosure application and to be allowed to file its answering affidavit within 15 days from the date of the order. Millar J, who heard the application, dismissed the application and did not provide reasons for his order.

Aggrieved by this decision, Transasia 444 sought leave to appeal against the order of Millar J and sought condonation for the late filing of its application for leave to appeal while, in the same application, Transasia Minerals applied for leave to be joined as an applicant in the application for leave to appeal and the rescission application, alternatively to intervene in the application for leave to appeal and/or application for rescission. Umsobomvu responded by bringing an application to compel compliance with the Mngqibisa-Thusi J's order and to hold the Department and Transasia 444 in contempt for failure to comply with it; alternatively, for an immediate execution of the order in terms of s 18(3) of the Superior Courts Act 10 of 2013. Millar J granted Transasia Minerals leave to intervene as the applicant in the application for leave to appeal and dismissed Transasia 444's application for leave to appeal with no order as to costs. Both Transasia 444 and Transasia Minerals petitioned the SCA which granted leave on 22 June 2023.

The SCA disagreed with the submission by the appellants that Millar J's order was a nullity to the extent that it varied the final order of Mnqgibisa-Thusi J, alternatively, that Millar J erred in refusing rescission. It held that, even though the order was not a model of clarity and was ambiguous, the fact that it lacked clarity did not render it a nullity although Millar J should have furnished his reasons for his order before the hearing of the application for leave to appeal. The SCA, in properly construing Millar J's order, found it to have refused the recission, the effect thereof being that Mngqibisa-Thusi J's order remained extant. On concluding on this point, the SCA held that Millar J should have granted rescission, based on the undisputed evidence that was presented to him which was to the effect that the appellants had not been joined as parties to the main application before Mngqibisa-Thusi J, nor did they receive notice of the application. The SCA found that, when Mngqibisa-Thusi J granted the order in the absence of the appellants, she committed a procedural irregularity as she could not validly grant an order in the main application without the appellants having been joined. Therefore, Millar J was in error to have, in effect, refused the application for rescission of the order of Mngqibisa-Thusi J.

On the issue of whether the matter should have been remitted to the high court for the consideration of the rescission application, the SCA held that, since the entire record had been before it and the matter was fully argued before the Court, it would serve no useful purpose other than to delay the finalisation of the proceedings to uphold the appeal and remit the matter back to the high court for it to consider the rescission application. In the circumstances, it held that it would be in the interest of justice to uphold the appeal, set aside the order of Millar J, rescind the order granted by Mngqibisa-Thusi J and grant both Transasia 444 and Transasia Minerals leave to oppose the disclosure application.

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