(*Not important*) CASE NO.: A 36/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MALAKIA JOSES AMAKUTUWA APPLICANT

and

METALS NAMIBIA (PTY) LTD FIRST RESPONDENT
THE MINISTER OF MINES AND ENERGY, NAMIBIA SECOND RESPONDENT
METALS AUSTRALIA LIMITED THIRD RESPONDENT
BRIAN MOORE FOURTH RESPONDENT

CORAM**:** MANYARARA, A J

Heard on: 26 - 29 May 2009; 9 June 2009
Delivered: 30 July 2009

JUDGMENT

MANYARARA, AJ: [1] This is an application for an order in the following terms:

1. Declaring certain agreements entered into by and between the parties named therein relating to exclusive prospecting licences 3306 and 3308 as null and void *ab initio* and of no force and effect. (The alternative relief declaring such

agreements to have been procured by fraudulent means and setting them aside has been abandoned).

2. Directing the second respondent to transfer back into the name of applicant the said exclusive prospecting licences upon the same terms and conditions that attached to such licences upon the date of the original granting thereof to applicant, alternatively on such terms and conditions as may be imposed by second respondent in accordance with the provisions of the Minerals Act;

3. Directing first respondent to pay the costs of this application on the scale as between attorney and client; and

4. Granting to applicant such further and/or alternative relief as the Court may deem fit.

The parties are –

1. Applicant who is a metallurgist and plies his trade for part of the time “on land” and part “at sea” (sic).

2. First respondent (hereinafter referred to as “Metals Namibia”) is a Namibian registered company with its offices in Windhoek.

3. Second respondent is the Minister of Mines and Energy against who no costs order is sought in these proceedings.

4. Third respondent (hereinafter referred to as “Metals Australia”) is an Australian registered company with its offices in Perth, Australia; and

5. Fourth respondent (hereinafter referred to as “Moore”) is a businessman with his offices also in Perth, Australia.

[2] The applicant is represented by Mr Barnard and Ms Vivier represents the first and third respondents. No one represents the fourth respondent and it will be assumed that he abides the decision of the Court.

[3] The founding affidavit is a lengthy and inelegantly phrased document which does not make for easy reading but the relevant averments extracted from the document may be summarized as follows:

1. During 2005 applicant applied for and obtained exclusive prospecting licences 3306 and 3308 to explore for uranium in the Erongo Region. His intention was to form a joint venture with a technical partner to conduct the exploration activities permitted by the Licences and the technical partner would also fund the project.

2. The applicant commenced negotiating with Moore, to whom he had been referred by an acquaintance called Udo Froese (“Froese”) as a person capable of filling the role desired by applicant. However, when applicant informed Moore of the joint venture, Moore said that he would find someone else to fill the role. Applicant agreed to the offer although Moore had “previously presented himself as the “investor” required by applicant.

3. However, Moore subsequently advised applicant that an Australian registered company called Australian United Gold Limited ("AUL") was interested in the proposed joint venture. He suggested that applicant was to take up some shares in one of his (Moore's) Australian registered companies, Omegacorp,

which would be the "technical party" holding an 80% interest in the joint venture and that Moore and applicant could jointly have a 20% interest in the joint venture apart from controlling it. But when Matthew Yates, a director of Omegacorp, was approached to finalise the deal he said that he was no longer interested in the project "and we must seek a new partner."

4. It was at this stage that Moore informed applicant that AUL "did not have cash" (sic) after all to invest in the joint venture as a substantial payment upfront for the 80% share it wished to hold in the joint venture but AUL could, instead, pay the company that would hold the 20% interest in the joint venture an amount of US$30 000.00 and transfer to such a company 5 million shares in AUL. Applicant was not satisfied with the proposal and instructed Moore to tell AUL that he required a minimum of 8 million shares plus the US$30 000.00 offered by AUL.

[4] Applicant then sets out at inordinate length his vision for the joint venture he had in mind. This would have involved forming a close corporation with the name Reliance Investment Agency CC ("RIA") in which Moore, Froese and applicant were to be "directors and shareholders" with each of them holding 33.3% of the shareholding. The EPLs held by applicant would then be transferred to RIA and AUL

would pay the amount of US$30 000.00 and transfer to RIA 8 million shares in AUL as consideration for the entitlement to obtain an 80% interest in the joint venture. A new company was then to be formed or purchased to which RIA would transfer the EPLs and take up 20% of the shareholding while AUL took up 80% of the shares in the new company. The new company thus formed was New Mining Company, in

respect of which Moore addressed a letter to the Mining Commissioner (Annexure "M14") in the following terms:

> *"Re: Application for the transfer of EPLS 3306 and 3308 from Malakia Joses Amakutuwa to New Mining Company (Pty) Ltd.*
>
> *My partner Malakia Joses Amakutuwa and I would like to transfer 100% of our interest in EPL's 3306 and 3308 to the above company which is a fully owned subsidiary of Australia United Gold (AUL), an Australian public company listed on the Australian Stock Exchange.*
>
> *AUL will commence exploratory work as soon as the licences have been transferred. Their geologist, Anthony Gates, is highly experienced in uranium projects. He is on standby to travel to Namibia."*

[5] The Mining Commissioner approved the transfer with effect from 14 March 2006 as appears from his endorsement on the EPLs bearing his official stamp dated 7 September 2006.

[6] During the course of the period from July 2005 to October 2005 negotiations continued between Moore, the applicant and representatives of AUL for the purpose of giving content to the joint venture contemplated by applicant. According to applicant, a copy of the draft heads of agreement between AUL, RIA and himself (Annexure "M5" to the founding affidavit) was dispatched to him on an unspecified

date during October/November 2005 and he signed the document as "Authorized Person" representing RIA after making notes on the document of the amendments he wished to be made to the agreement. Applicant's signature is the only signature appearing on "M5". The document is not dated nor did applicant put a date to his signature.

[7] The founding affidavit continues as follows:

> *"Unbeknown to me, copy of the draft heads of agreement* ***without*** *my notes on it, but apparently still bearing my signatures (sic), was used by AUL as a purported final agreement upon the basis of which it addressed an announcement to the Australian Stock Exchange on 7 November 2005, stating that AUL 'will acquire a 100% interest in the two prospecting licences from Reliance Investment Agencies CC, a Namibian registered company" (sic).*

[8] Applicant avers that the document on which the respondents rely (Annexure "M 11") was furnished to his legal representative, Mr Kasuto, "during or about April 2008" (sic) and it was then that he "viewed it for the first time" and noticed that the document bore his signature. The document is dated 7 November 2005 and the implication is that applicant's signature was forged.

[9] This averment is disputed by the respondents. They contend that a copy of Annexure "M 11" was dispatched to all the parties and applicant signed and returned to AUL the copy sent to him in terms of Clause 7 of the heads of agreement which provides that –

> *"This agreement and any amendments may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement."*

[10] Applicant contends that Annexure "M11" is null and void *ab initio* for several reasons which all converge on the contention that as RIA was never registered either as close corporation or as a company (which is common cause), it could not be a party to the alleged agreement.

[11] Mr Barnard then embarked on a lengthy dissertation on the passing or not passing of ownership of the EPLs to first respondent. In my view, the relevant point made is that the agreement is a nullity because at the time it was made it was impossible of performance. See A.J. Kerr: The Principles of the Law of Contract 6th Ed p261 and the cases cites therein.
There is merit in the submission.

[12] Firstly, RIA is cited in the agreement as "Reliance Investment Company CC a company incorporated pursuant to the laws of Namibia" and it is not disputed that RIA never was nor has it since been registered as a company in accordance with the laws of Namibia, while the capacity in which applicant becomes a party to the agreement is not defined.

[13] Secondly, Annexure "M14" by which Moore purportedly applied for transfer of 100% of his and applicant's shareholding in RIA is a nullity by reason of the fact that the EPLs belonged to applicant and never passed to RIA (as implied by Moore's letter to the Mining Commissioner) because such an entity was never created and Moore had no interest in the EPLs to pass to New Mining Company. In the circumstances, the description of RIA as "the sole beneficial owner ….. entitled to be the registered

owner of the Licences" and of applicant as "the current registered owner of the Licences and holds the beneficial interest in the Licences on trust for RIA (which) has full right, power and authority to sell, assign and alienate the Licences" are meaningless and may be safely disregarded. The same goes for the provisions relating to the payment purportedly to be made by AUL to RIA for a stake in the EPLs

and for applicant's signature as "Director/Authorised person for and on behalf of Reliance Investment Agencies CC", a non-existent entity, and Moore's co-signature also as "Director/Authorised Person" of that entity.

[14] On 2 February 2007 first respondent, a wholly owned subsidiary of AUL, caused applicant and Moore to execute on behalf of (non- existent) RIA and themselves a Deed of Amendment and Release (Annexure "M21") relating to the heads of agreement in the following terms:

> *"RECITAL:*
>
> *A. Metals, Reliance and Malakia are parties to a Heads of Agreement (sic) dated the 7th day of November 2005 in respect of Licences 3306 and 3308 in Namibia. ("Heads")*
>
> *B. Licences 3306 and 3308 ("the Prospecting Licences") have been transferred into the name of New Mining Company (Pty) Ltd which is a subsidiary of Metals.*
>
> *C. 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."*

And further -

> *"2. The parties hereby agree that the Heads be amended such that no Consideration (as defined in the Heads) is payable by Metals to Reliance.*

5. Moore and Malakia jointly and severally warrant that they have the authority to execute this Deed on behalf of Reliance."

[15] As already mentioned, it is common cause that one of the parties to the heads of agreement as well as "M21" was cited as "Reliance Investment Agencies CC a company incorporated pursuant to the laws of Namibia" whereas, in truth, such an

entity was never registered. Accordingly, so Mr Barnard submitted, no one was authorized to sign in the name of the non-existent entity as such a signature would be a nullity.

I agree. As Lord Denning has said,

"You cannot put something on nothing and expect it to stick. It will collapse."

See *McFoy v United Africa Co Ltd* [1961] 3 All E.R. 1169 at 1172l.

[16] It is on the same principle that RIA's purported ownership of the Licences and applicant's purported trusteeship thereof as well as RIA's alleged powers to alienate the licences also collapse.

[17] To my mind, Mr Barnard's submissions are unassailable and they effectively dispose of the case. However, a special costs order is not warranted.

[18] In the result there will be an order in the following terms:

1. Declaring the agreements dated 7 November 2005 and 2 February 2007, Annexures "M11" and "M21" to the founding affidavit respectively, as null and void *ab initio* and of no force and effect.

2. Directing the second respondent to transfer back into the name of the applicant the Exclusive Prospecting Licences 3306 and 3308, originally granted to the applicant and thereafter purportedly transferred to New Mining Company (Pty) Ltd and subsequently to its successor or successors in title, upon the same terms and conditions as attached to such Exclusive Prospecting Licences upon the original granting thereof to applicant, alternatively on such terms and conditions

   as may be imposed by the second respondent in accordance with the provisions of the Minerals Act.

3. The costs of the proceedings, including the costs of one instructed counsel, shall be paid by the first and third respondents on the party and party scale, the one paying the other to be absolved.

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MANYARARA, J.

ON BEHALF OF THE APPLICANT	Adv. T Barnard,
	assisted by Adv. E Kasuto
Instructed by:	E.K. Kasuto Legal Practitioners
ON BEHALF OF THE 1ST AND 3RD RESPONDENTS	Adv. S Vivier
Instructed by:	LorentzAngula Inc.