MAGNUS DIAMOND MINING SYNDICATE v. MACDONALD AND HAWTHORNE.

1909. *March* 15. MAASDORP, C.J., and FAWKES and WARD, JJ.

Interdict.—Clear right.—Principal and agent.

Where M and H had been in the employ of A Corporation, which ceded its rights to M Syndicate, in the management of a diamond mining property, and, after resignation, had used information obtained in the course of their employment to purchase the property, and did purchase it at a time when A Corporation desired it, but had not the necessary funds, *Held*, that no such clear right had been established as to entitle M Syndicate to an order restraining M and H from disposing of the property pending an action to be instituted.

The parties in this case and the question at issue were the same as in the case *Ex parte Magnus Diamond Mining Syndicate* (*supra*, p. 1). But as a result of the judgment in that case the applicants had obtained a cession of a right of action against the respondents.

The applicants asked for the confirmation of a rule *nisi* obtained on the 26th February, restraining the respondents from disposing of the farm Welgegund, district Winburg, on which is situated the Driekopjes diamond mine, and the machinery, plant and diamonds found thereon, and from fur-ther encumbering the property pending the decision of an action to be instituted by the applicants in which summons had been issued claiming the said property. The history of the case, as it appeared from the petition, was shortly as follows:—

A Mr. Van der Velde purchased the farm from the official liquidators of the New Driekopjes Diamond Mining Co., and under a written agreement the respondents became the managers of the mine in Van der Velde's employ up to the 29th July, 1908. On that date, under agreement with the African Diamonds

Corporation of Johannesburg, Van der Velde ceded the rights acquired by him on certain conditions. At the time of the cession the respondents were directors of the corporation, and agreed to continue to act as joint managers. The petition alleged that they remained in the corporation's employ till the 30th November, 1908, though the date was disputed by the respondents. On the 1st October, 1908, the deed of sale to Van der Velde was declared by the official liquidators of the New Driekopjes Diamond Mining Co. to be cancelled by reason of non-payment of the instalment of the purchase-price, which fell due on the 30th September, though the African Diamonds Corporation maintained that there were no good grounds for cancellation.

The petition alleged that on the 22nd September, 1908, the respondents approached one Rintoul, secretary to the official liquidators, and Mitchell, one of the liquidators, and stated that MacDonald had the necessary money to purchase Welgegund; that on the 2nd October the respondents resigned their positions as directors; that on the 19th October they were charged by the chairman at a meeting of shareholders with unfaithfulness to the corporation, and that MacDonald stated that he had spent enough money on behalf of the corporation, and that if he put any more up it would not be for the corporation. This was alleged to have elicited from several of the shareholders the remark that he wanted the property himself; that on the 7th November Van der Velde offered the liquidators £3000 on behalf of the corporation for the transfer of the property, but his offer was refused; that on the 16th the liquidators sold the property to the respondents for £3000, and that it was their (the petitioners') belief that Van der Velde's offer would have been accepted if the respondents had not entered into negotiations.

Further allegations were that in the early part of November Hawthorne interviewed one Roberts, and tried to get for himself the money that gentleman had promised Van der Velde; that the respondents, while in the employ of the corporation, had circulated false reports as to the property detrimental to the prospects of that body, which resulted in depreciating the

market value of the shares; that they had accentuated this by throwing all the shares they held on the market, and thus prevented the corporation from selling 5000 reserve shares on which they had relied to provide the funds necessary for the balance of the purchase-price.

The African Diamonds Corporation had contended that on the above grounds alleged in the petition, they had a right of action against the respondents to compel them to transfer the property, plant and diamonds they had purchased from the liquidators of the New Driekopjes Diamond Mining Co. On the 24th February, 1909, the liquidators of the African Diamonds Corporation ceded to the petitioners all their assets, including actions at law generally, and in particular a right of action against the respondents.

The petitioners further alleged that the property was transferred to the respondents on the 29th January, 1909, and that they had passed a bond on the property for the full amount of the purchase-price; that they believed that the respondents were trying to obtain a further loan on the property and to negotiate for the flotation of a company to take it over, and that to the best of their knowledge the respondents had no other assets; that they had no remedy against them if they further encumbered the property, and would lose all protection for their claim against them.

Blaine, K.C., for the applicants: We are entitled to an interdict, because the respondents, as agents of the African Diamond Mining Corporation, did not show the utmost good faith required by law. They purchased property they had no right to purchase for themselves, because the information on which they purchased had been obtained in the course of their employment by the corporation. The rule of law which provides that any benefit acquired by an agent in the course of and within the scope of his employment is acquired for his principal, includes the case of property acquired as well as profits made through information obtained by the agent while in such employment. Moreover, the law will not allow an agent to compete with his principal in any matter within the scope of his employment.

Stratford, for the respondents: We object to the granting of an order, on the ground that the case is not one for an interdict, because the acquisition of the property by the respondents was made after the termination of the agency, and therefore the remedies are not such as affect the subject-matter of the contract. So long as the servant is in his master's service, no doubt property he acquires is acquired for his master; but there is no authority for the contention that, when a servant acquires property *ex post facto* he acquires it for his master. The applicants may have had an action for damages on the 30th September, the day before we allege the respondents resigned, but they have no claim to the property. See *Jones* v. *East Rand Extension Co.* ([1903] T.H. at p. 334). In purchasing the property the respondents were not competing with the applicants, because it appears from the latters' affidavits that they had not the necessary funds to purchase.

Blaine, K.C., in reply.

MAASDORP, C.J.: In view of future proceedings that may have to be taken in this case, we think it well not to express an opinion on the details laid before us in the affidavits one way or the other. Generally we may say, in order to entitle the applicants to this order, which would amount in reality to an interdict, they will have to establish a clear right according to the general principles of interdicts. Is this a clear right they have placed before us? Is it so clear that the Court is bound to use this very unusual process to assist them? That is the question, and to decide it it is unnecessary to go into all the different points. One thing the applicants have not succeeded in establishing to our satisfaction, and that is the first statement that Hawthorne and MacDonald had misrepresented the results of their labours to ascertain the payable nature of the property. It may be possible to establish this in the course of future proceedings, but they have not done so yet. There is a great deal to be said for the position assumed by Mr. *Stratford,* that even on the 30th September the corporation was not in a position to fulfil the contract. They could not raise £250, and at the time of the expiration of the contract—*i.e.* on the 31st October—they

were not in a position to raise the £5000 required under the original contract. On these two grounds merely, and not being called upon to say anything as to credibility, we are not satisfied that the applicants have made out a good case, and therefore the rule *nisi* must be discharged with costs.

Applicants' Attorneys: *McIntyre & Watkeys;* Respondents' Attorneys: *Marais & De Villiers.*