NOT REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/12065

DATE: 22/11/2010

In the matter between:

EDGE DISTRIBUTORS CC	Applicant
and	
MINCO RESOURCES 202 (PTY)	**First Respondent**
VIZIRAMA 148 (PTY) LTD	**Second Respondent**
JM KRUGER T/A DTZ	**Third Respondent**
D. GERBER	**Fourth Respondent**
DC BUTLER	**Fifth Respondent**

J U D G M E N T

LAMONT, J:

[1] The applicant brings an application against the first respondent for payment of commission. During 2007 certain persons concluded a written contract as sellers with the first respondent as purchaser. Under and in terms of that contract the purchase price comprising US $44 million was to be paid

by the purchaser to the seller as to US $ 40 million in respect of the purchase price and US $4 million (in respect of commission due to DTZ and Edge in the proportions separately agreed between them). All payments were to be made into the bank account nominated by the sellers. The parties to the contract were identified to include in amongst others, DTZ and Edge the applicant. References to the agreement were to include the agreement and all annexures to it. The contract contained general provisions as follows:

> "*16.2 No agreement or arrangement between the parties in terms of which:*
>
> 16.2.1 *any of the provisions hereof are cancelled, amended or added to; or*
>
> *16.2.2 this agreement is cancelled in its entirety;*
>
> *shall be binding upon the parties or be of any force or effect unless such agreement or arrangement is reduced to writing and signed by the parties or by their duly authorised agents.*
>
> *16.3 No indulgence … shall under any circumstances be deemed to be a waiver by such party of any of its rights against the others … or to be a novation … or to create a precedent … and such party shall be entitled at any time to demand strict and punctual fulfilment of all the other parties' obligations hereunder …*"

[2] The reference in the contract to DTZ is a reference to the third respondent. This contract is known as the Vizirama contract. The contract did not contain any arrangement between DTZ and the applicant concerning commission. The arrangement between DTZ and the applicant concerning commission is to be found in a document dated 30 October 2007 signed by the applicant, DTZ and one Butler. In terms of that contract commission in respect of the sale of Vizirama and Nuco shares to Minco pursuant to two

sales agreements (the Vizirama contract and the Nuco contract) producing a total amount of commission of US $5 million was to be split in a particular way. The Vizirama contract generated some US $4 million as commission and the Nuco contract generated some US $1 million as commission.

[3] The submission was made that although that document was not portion of the Vizirama contract that it was governed by the terms of the Vizirama contract as it was an annexure thereto. It was not an annexure thereto. The further submission was made that it was part of the Vizirama contract as the commission clause directed that commission be paid to DTZ and the applicant in the proportion separately agreed between them; as the document determined what the proportions were which had been agreed between them it formed part of the contract. So far from forming part of the contract in my view it does not. The Vizirama contract contemplated a payment of an amount of the total commission into the bank account nominated by the sellers. It was of no concern to the buyer what the proportions were which had been agreed between them recipients of the commission. That was a matter which they themselves would deal with. All that was required of the purchaser, first respondent, was that it pay the amount into the bank account nominated. That would constitute a payment to the sellers by way of payment to the sellers account for the credit of applicant and third respondent.

[4] The relevance of this analysis is that it is claimed that the commission recipients identified in the contract signed by them on 30 April 2007 subsequently orally varied the terms of that contract. The applicant's primary

submission was that no evidence could be received of the variation as it was excluded by the provisions of the clause in the Vizirama contract referred to above prohibiting variations otherwise than in writing. By reason of the analysis *supra* this submission must fail. If there was any oral variation such oral variation would be effective.

[5] The secondary submission was that there was a dispute of fact concerning what the terms of the oral variation contract had been. The third respondent claimed that an oral contract had been concluded under and in terms whereof the applicant would receive the whole commission valued at US $1 million from the commission payable under the Nuco contract only. The applicant would receive no monies from the Vizirama contract. The oral contract claimed by the third respondent is set out in an email dated 26 November 2007 which reflects the applicant as receiving only the monies from the Nuco contract as commission. The reasons were set out in an email as follows:

> "*I would prefer and we have agreed that my agency responsibility is only in respect of Vizirama and your agency responsibility is only in respect of Nuco … The commission sharing arrangement between … will therefore be as follows …*"

Later during 2008 the deponent to the applicant's founding affidavit either acting personally having acquired the rights from the applicant or representing the applicant signed a second Nuco contract reflecting that an amount of US $900 000 was payable as commission to Van Zyl as agent for the sellers. This was the whole commission payable under the fresh Nuco contract.

During April/May 2009 a second Vizirama contract was signed reflecting that the whole commission in terms of the second Vizirama contract was some R18,7 million. Payment was to be made to the third respondent by way of paying a non-resident shareholder. The second Nuco and Vizirama contracts replaced the Nuco and Vizirama contracts.

[6] The oral contract between the recipients of commission reflecting that the applicant was not a recipient of commission from the Vizirama contract and would only receive commission of the Nuco contract is evidenced by these contracts. The applicant is not a signatory to the second Vizirama contract.

[7] The commission due under the second Nuco contract was never paid as the contract failed.

[8] Currently the applicant seeks commission under the Vizirama contract without regard to the existence of the alleged oral contract and the written contracts re-adjusting the commission.

[9] The submission was made that at worst for the applicant there was a dispute of fact.

[10] I do not wish to deal in depth with this issue as the applicant may wish to proceed by way of action against the respondents. Suffice it to say that the dispute between the parties which ultimately arose in the application is

material and was well-known to the applicant prior to the launch of the application. The applicant relied for the solution to the dispute of fact on the existence of the non-variation clause which I have found does not assist it. If I refer the matter to trial it is as good as if the matter begins afresh. There is no saving in costs and the respondents are held out of costs which they otherwise would have received. In my view the application should be dismissed with costs.

[11] The order which I make is:

> "*Application dismissed with costs including, the costs of two counsel where they were employed.*"

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C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for Applicant	**:**	**Adv. L.J. Morrison SC**
Attorneys for Applicant	**:**	**Earle Friedman Attorneys**
Counsel for First Respondent	**:**	**Adv. J. Roux**
Attorneys for the First Respondent	**:**	**R. Le Roux Inc**
Counsel for the Third Respondent	**:**	**Adv. K.W. Lüderitz**
Attorneys for the Third Respondent	**:**	**Werksmans Incorporating**
Date of hearing	**:**	**10 November 2010**

Date of Judgment : 22 November 2010