REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2011/47482

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

14 JUNE 2012

FHD VAN OOSTEN

In the matter between

MUHANGA MINES (PTY) LTD — **APPLICANT**

and

PHUMELELA MINING (PTY) LTD — **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an application firstly, for a declarator that a document styled Memorandum of Understanding/Term Sheet (the MOU), signed on behalf of the parties to this application on 28 October 2009, constituted a valid and binding agreement between the parties, secondly, for an order for payment of the respondent's alleged share in regard to certain expenses pursuant to the MOU, and thirdly, interdictory relief aimed at preserving the

subject matter of the MOU. The respondent, although admitting that the MOU was signed on behalf of the parties, denies, firstly, that an enforceable agreement came into being, and secondly, in any event, that the applicant has made out a case for either specific performance or the interdicts sought.

[2] For a better understanding of the disputes between the parties it is necessary to refer to the salient background facts. The parties are involved in the mining industry. The applicant conducts business in the prospecting, mining, beneficiating and sale of coal and related products. During October 2009 a joint venture between the parties was envisaged concerning the exploitation of prospecting rights and the mining of coal in regard to certain protions of the farm Bankfontein 375 JS, which is owned by one Van Wyk. The applicant, one the one hand, had both the requisite experience and expertise in the mining of coal, having in its employment mining, technical and financial experts for that purpose, while the respondent, on the other, was the holder of the prospecting rights relating to certain portions of the farm Bankfontein, excluding portion 48 thereof, where an existing mining operation had already been established. The negotiations between the parties commenced when the respondent requested the applicant's assistance in persuading Van Wyk, to grant the respondent access to portions 19 and 47 of the farm for prospecting purposes. As a result of the applicant's intervention, Van Wyk abandoned his unreasonable demands for allowing access and the respondent was granted access on certain conditions. The respondent required the applicant's further assistance in regard to in interacting with other holders of surface rights in respect of Bankfontein. The applicant at the request of the respondent, pursuant to access having been granted, proceeded to perform a pre-evaluation of coal deposits in the relevant areas of the farm which produced positive results. This prompted further discussions between the parties concerning the establishment of a joint venture which eventually culminated in the conclusion of the MOU on 28 October 2009.

[3] This brings me to the terms of the MOU. The respondent is referred to in the MOU as the "JV (*ie* joint venture) partner". The introductory paragraph, having set out the nomenclature of the parties, records that they "have agreed to the following with respect to their working relationship and activities associated with prospecting activities on and development of the following projects: Bankfontein 375 JS (All portions excluding

portion 48 where an existing mining operation is established". The pre-evaluation by the applicant of the relevant areas in order to determine whether geological exploration and prospecting is warranted and required, based on past experience and existing information available in the coal mining industry, is confirmed in clause 3, which is then followed by the following clauses:

'4. That Muhanga will establish a Joint Venture company with the JV partner prior to the commencement of prospecting and exploration work.

5. That the JV partner will own a 49 % share in the Joint Venture and Muhanga 51 %.

6.That Muhanga will fund the prospecting, exploration and project costs associated with the projects, that are required in the opinion of Muhanga in order to do a feasibility assessment of the projects.

7. That the JV partner will not contribute any finds for prospecting and exploration of the mentioned farms and area.

8. That Muhanga will decide over the type and amount of additional prospecting work to be conducted.

9. That the additional prospecting, exploration and project work will be conducted and a final decision taken by Muhanga with respect to the feasibility of the projects and Muhanga's involvement with the projects within a period of 6 months from the commencement of the prospecting and exploration work.

10. That Muhanga may at any point in time during the conducting of the additional exploration work decide to withdraw from this agreement without any compensation payable or liability towards the JV partner. This withdrawal will be done in writing.

11. That, in order to do a feasibility of the project, a geological model will be developed, using the existing information as well as the additional information obtained through geological drilling and other work.

12. That should Muhanga determine that the development of the property as a mining operation is feasible, Muhanga will notify the JV partner in writing.

13. That upon receipt of the notification contemplated under point 12, the parties shall, within 30 business days, calculated from the date of receipt of the notification, prepare an application for a mining right in the name of the JV in accordance with the provisions of Section 23 of the MPRD Act and the Regulations.

14. That the JV will fund all the costs associated with the Mining Right application and the development of the mine and each of the JV partners shall contribute its share of the capital required for this purpose.

15. That all costs incurred by each of the JV partners in applying for rights and prospecting for coal on the farms on behalf of the JV, be recorded as loan accounts on behalf of each of the contributors.'

[4] It is common cause that the proposed joint venture company never came into being which, I should mention at the outset, is the genesis of the problems that eventually arose. The applicant alleges that a joint decision was taken by the parties not to incorporate the joint venture company in view of the fact that a transfer of the respondent's prospecting right to such company would have taken too long regard being had to the expiry date thereof in early November 2010. The joint decision is denied by the respondent. The non-existence of the proposed joint venture company moreover constitutes the main ground in support of the respondent's contention that no contract came into being. In further support of the contention counsel for the respondent pointed to the conduct of the parties subsequent to the conclusion of the MOU which he submitted substantially diverted from its terms resulting in, at best, an agreement in principle and not a binding agreement having been concluded. The absence of a joint venture company also compelled the applicant to shift the goalposts. In the notice of motion a declarator is sought that the MOU constituted the "written alternatively tacit" agreement between the parties. I argument, when the difficulties arising from the consequences of the absence of the joint venture company were brought to the fore, counsel for the applicant sought an amendment to the declarator on the basis of the parties having concluded a tacit agreement on substantially the terms contained in the MOU. The proposed amendment does not cure all the difficulties arising: for one, what were the exact terms of the agreement relied upon by the applicant? Counsel for the applicant was driven to concede that this aspect is not capable of resolution on the papers as they stand. This is the more so in view of the several factual disputes that have arisen between the parties. Counsel then sought an order for the referral of the matter for trial on the basis that the applicant has shown that the conduct of the parties from subsequent to the conclusion of the MOU until June 2011 is consistent only with a joint venture. The respondent opposed the request for a referral on the basis that the applicant has failed to show that any agreement between the parties was concluded. The argument, in essence, accordingly proceeded on this aspect only.

[5] In the view I take of this matter it is not necessary to further consider the amendment sought to the applicant's notice of motion. The real issue concerns the conduct of the parties subsequent to the conclusion of the MOU, in the light thereof, and then to determine whether an agreement, on whatever terms, had come into being. A finding that the MOU did in fact create a legal *vinculum iuris* between the parties would in my view justify the referral of this matter for trial. It would then be for the applicant to properly plead the terms of such agreement, for the respondent to plead thereto and finally, for the trial court to decide the issue after the hearing of oral evidence.

[6] As a starting point it is necessary to remark that the terms of the MOU cannot simply be ignored because the proposed joint venture company did not materialise. The parties in signing the MOU clearly bound themselves to the terms thereof (*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) 897). The employment of the word "agree" in the introductory paragraph of the MOU constitutes clear proof thereof. Counsel for the respondent submitted that the terms of the MOU in themselves as well as the absence of material provisions regarding *inter alia* a deadlock-mechanism all serve to point to an agreement to agree. The further conduct of the parties, the respondent submitted, merely shows that the applicant in certain instances acted as the agent for and on behalf of the respondent. I am unable to agree. The MOU, although not comprehensively providing for all eventualities, in my view, does create a legal and binding relationship between the parties. I am moreover unable to conclude that the wording of the MOU goes no further than showing a provisional non-binding arrangement or that only a further fuller agreement would have bound them (see *Premier Free State and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35).

[7] It is necessary to consider the conduct of the parties subsequent to the conclusion of the MOU. The conduct to be subjected to scrutiny involves the renewal of the respondent's prospecting rights, correspondence exchanged in the relevant period, the response or the absence thereof by or on behalf of the parties in regard to such correspondence, the applicants' dealings in regard to the Ligthelm property and the payment and incurring of expenses by the parties relating to these aspects. On all these aspects material disputes of fact exist. I am unable at this stage to pronounce on the

acceptability of either version. Suffice to say the trial court will be best suited to decide those issues as they by then would have crystallised on the pleadings. The referral would furthermore provide the respondent with the opportunity to plead to the terms of the agreement alleged by the applicant and to introduce other terms it may contend exist, or, to ascribe a different classification to those terms, as was proposed in argument. For all these reasons I am satisfied that sufficient reason exists for referring the matter for trial.

[8] It remains to deal with prayer 2 of the notice of motion in which the applicant seeks and order for the respondent to pay to it the sum of R116 533,36 together with interest thereon "being the respondent's 49% share of the joint venture's costs contemplated in clause 14 of the memorandum of the agreement". Counsel for the respondent convincingly and correctly submitted that the applicant, on the case it has made out, is not entitled to reimbursement of costs in view of the provisions of the MOU providing for such costs to be recorded as loan accounts on behalf of each of the contributors in the proposed joint venture company.

[9] I merely need to add that the interdicts sought in prayers 3 and 4 of the notice of motion, in my view, must follow upon an order referring the matter for trial.

[10] In the result the following order is made:

1. The matter is referred to trial.
2. The applicant's founding affidavit is to stand as the plaintiff's simple summons in the action.
3. The respondent's notice of intention to oppose is to stand as the defendant's notice of intention to defend the action.
4. The applicant must file a declaration within 20 days of the date of this order whereafter the Rules of Court will apply as for further pleadings and time limits.
5. Pending the finalisation of the action the respondent is interdicted and restrained from:

    5.1 disposing of, alienating, encumbering or in any other way dealing with the prospecting rights forming the subject-matter of the

Memorandum of Agreement, or

5.2 pursuing or processing or in any way dealing with any application for a mining right in relation to the farm Bankfontein 375 JS (excluding portion 48), other than as contemplated in the Memorandum of Agreement.

6. Prayer 2 of the notice of motion is dismissed.
7. The costs of this application shall be costs in the action.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV C WHITCUTT SC*** ***ADV B MALAN***
APPLICANT'S ATTORNEYS	***MALAN SCHOLES INC***
COUNSEL FOR RESPONDENT	***ADV IAM SEMENYA SC*** ***ADV A PLATT***
RESPONDENT'S ATTORNEYS	***TSHISEVHE GWINA RATSHIMBILANI***
DATE OF HEARING	***6 JUNE 2012***
DATE OF JUDGMENT	***14 JUNE 2012***