REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
18/7/'19 [signature]
DATE SIGNATURE

CASE NO: 2797/18

In the matter between:

SIDERALLOYS INTERNATIONAL SA Applicant

And

RAHIDA INVESTMENT PROPRIETARY LIMITED Respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. This matter has a relatively long history, despite the fact that it first drew breath as an urgent application in February 2018. The application was transferred to the ordinary motion court roll and, after a further postponement there, it eventually came before me as an opposed motion in mid-2018. There was some discussion before me as to whether the issues in dispute could properly be decided on the papers, or whether a referral to oral evidence was necessary. Ultimately, the parties reached agreement that certain issues would be referred to oral evidence.

They prepared a draft order identifying these issues and I made this agreement an order of court (the referral order). The terms of the referral order were formulated by agreement between the parties.

2. I then proceeded to deal with the matter as per the referral order. This involved hearing evidence from a number of witnesses for each party. Unfortunately, the length of time consumed by the hearing meant that the proceedings took place over three further separate sessions during the course of the latter part of 2018 and the first half of 2019. It was only towards the end of May 2019 that all proceedings and submissions by the parties were finalised.

3. The application by Sideralloys International SA (Sideralloys) is for an order placing Rahida Investment Proprietary Limited (Rahida) under supervision and commencing business rescue in terms of section 131(1) of the Companies Act 71 of 2008. In the normal course, an application for business rescue should be dealt with without delay, for obvious reasons. However, because of the nature of the underlying issues in dispute between the parties in this matter, there has been inevitable delay in reaching a resolution.

4. The most pressing and, as matters turned out, time consuming and complex issue between the parties is a matter that in most business rescue applications will not take up much time at all, viz. the question of whether Sideralloys has *locus standi* to bring the application in the first place. The Act requires that an "affected person" may apply for an order placing a company under business rescue. A creditor of that company is included in the category of affected persons. Sideralloys bases its *locus standi* on its status as a creditor of Rahida. It avers that Rahida is indebted to it in an amount of some $2,9 million, together with interest, arising out of an alleged breach of contract committed by Rahida in

December 2017. Rahida, in turn, disputes that it committed the breach, and on this basis, disputes that Sideralloys is an affected person for purposes of instituting an application for business rescue.

5. Consequently, before this court can even consider whether a substantive case has been made out for placing Rahida under supervision and business rescue, it is necessary to make a determination on this contractual dispute between the parties. As is clear from my explanation of the dispute that follows later, the issues involved are complex. Adding to the complexity is the fact that the proceedings were launched urgently, both parties subsequently supplemented their affidavits, and, of course, there was the referral to oral evidence. A further layer of complexity stems from Sideralloys' abandonment, in the referral order, of the grounds of breach it originally relied upon. And, as if all of this was not enough, when it came to the stage of final oral submissions by the parties, it emerged that there was a dispute about the meaning and ambit of the referral order in critical respects, going to the heart of the alleged grounds of breach.

6. I will explain and deal with all of these issues in more detail later. First, it is necessary to give an overview of the background facts.

BACKGROUND

7. Rahida was the holder of an exploration licence, and subsequently became (and remains) the holder of a mining right under the Mineral and Petroleum Resources Development Act (the MPRDA). The mining right permits it to mine mangenese ore on land in the Postmasburg area. From 2016 the parties entered into arrangements for the supply and sale of manganese ore by Rahida to Sideralloys, which would then on-sell the ore to its customers in the international market. Initially there was a verbal agreement between the parties. Sideralloys suffered

losses from this arrangement and the parties negotiated a new, written agreement which was concluded on 19 May 2017. It is this 19 May 2017 agreement (the agreement) that forms the basis of the present dispute.

8. It is not necessary, at this stage, to set out the terms of the agreement in detail. In its founding affidavit, Sideralloys identified its material terms as follows:

8.1. Rahida would make available and sell to Sideralloys handpicked lumpy ore (with a minimum manganese content of 32%), and beneficiated ore with a minimum manganese content of 35%. There is no dispute between the parties on this term.

8.2. The total volume to be sold by Rahaida to Sideralloys was 750 000 dry metric tons of beneficiated ore. However, it is common cause that in order to provide the 35% magnesium content ore, a process of beneficiation had to be undertaken. Until such time as Rahida could begin the beneficiation process, Sideralloys had the right to collect for purchase an estimated 10 000 dry metric tons of handpicked lumpy ore each month. Once the beneficiated ore was available, it was estimated in the agreement that Sideralloys would be able to purchase 15 000 dry metric tons per month, until the 750 000 ton allocation had been exhausted. Once again, there is no real dispute about these terms.

8.3. It is common cause that under the agreement Sideralloys had an exclusive right to take delivery the ore until the 750 000 ton allocation was fulfilled.

8.4. In exchange for this exclusivity, Sideralloys agreed to pay all production and delivery costs, which covered, essentially, Sideralloys assuming responsibility for payment of the overheads of the mining operation.

Sideralloys avers that the financing that it provided under the agreement constituted a prepayment for the manganese ore to which it would have an exclusive allocation. These payments were required to purchase, install and set up the jigging machine (which was essential for the intended beneficiation process) and to cover the general maintenance and operation of the mine.

8.5. Sideralloys also agreed to put up a deposit or bank guarantee of $180 000 required by Rahida to pay for the mining licence. This was recorded in clause 5.4 of the agreement. However, in terms of clause 5.5, Rahida would reimburse Sideralloys within 18 months of the beneficiation process commencing.

8.6. Sideralloys undertook to purchase the jigging machine and supporting equipment at a cost of approximately $220 000. In return for this, Rahida, undertook to "make its best efforts to produce required grade and quantity (sic)."

8.7. In terms of clause 4.2, it was recorded that the quantity of handpicked product to be supplied would be "estimated 10,000 DMT per month until the kick-start of beneficiation process, but no later than 5 months of the start of the operation". The underlining is my own, and the reason for it will become apparent shortly.

8.8. There were also various additional terms covering royalties and marketing fees, which do not require further consideration at this stage. The profits from the on-sale of the ore to Sideralloys' international customers would be shared 50/50 between the parties.

9. Rahida points to what it says is a material term of the agreement for purposes of the present dispute (and for reasons that will become clear later). This is clause 16, which provides as follows: "This offer contains all of the express provisions agreed upon by the Parties with regard to the subject matter of the offer and subsequent agreement to supply the product and the Parties waive the right to rely on any alleged express provision not contained in this contract."

10. At the time that the agreement was concluded, Rahida had not yet secured its mining licence. It is common cause that the licence was executed later, on 27July 2017. The jigging machines were ordered and they were delivered but they needed to be installed and commissioned. The evidence from Sideralloys (which wasn't disputed) is that the concrete platform for the jigging machine was completed in August 2017. Further, that Rahida sent out a Ukranian engineer or technician, apparently with experience of installing jigging machines to oversee this side of things. This was at the end of July 2017.

11. It seems to be common cause that the relationship between the parties was fractious in the months following the conclusion of the agreement, although there is some dispute between them about the reasons for this. Sideralloys was not happy with the progress being made in getting the beneficiation process under way: it wanted access to beneficiated ore, which could be sold to its customers for a higher price. Rahida says that Sideralloys was holding back on payments it was obliged to make to suppliers because it (Sideralloys) wanted to put pressure on Rahida to renegotiate some terms of the agreement placing a greater financial burden on Rahida. Sideralloys denies this. It isn't necessary to make any determination as to which party's version is more probable. In all likelihood, it was a bit of both from each side.

12. It is uncontested that by the time of the alleged breach on 20 December 2017, the jigging machine was not yet operational, and thus that no beneficiated ore had been delivered. On the other hand, there is also evidence of email exchanges between the parties recording Sideralloys' holding back on timeous payments of amounts due to creditors. One email recorded that payment had not been made for salaries that were due, and others recorded that Sideralloys had not made payments for mining equipment to suppliers.

13. In its founding affidavit Sideralloys recorded that it "became increasingly concerned and unhappy with the fact that (Rahida) was not honouring its obligations ... in terms of the (agreement) and various discussions ensued between the two parties regarding potential solutions to these problems." It went on to say that Sideralloys had made a number of oral demands for performance during this time, but none of these remedied Rahida's breaches.

14. The particular breaches referred to by Sideralloys were two-fold: first, Rahida had failed to deliver handpicked ore to Sideralloys and, second, it had failed to meet what Sideralloys said was the deadline for establishing an operational jigging plant, which was necessary for the beneficiated ore Rahida was obliged to deliver to Sideralloys.

15. On Sideralloys' interpretation of the agreement, the reference to "no later than 5 months of the start of the operation" in clause 4.2 obliged Rahida to be in a position to be making beneficiated ore available to Sideralloys by October 2017. This was based on Sideralloys' view, confirmed by its Director, Mr Annunziata in his evidence to court, that the 5-month period commenced from the date of conclusion of the agreement, viz. May 2017.

16. There is evidence in the email exchanges between the parties during October to early December 2017 of some sort of stand-off between them. Sideralloys showed a clear reluctance to make payment on invoices submitted by Rahida for mining overheads while production targets were not being met.

17. Then, on 5 December 2017, the Department of Mineral Resources (the DMR) conducted an inspection of the mine. It issued a report (the inspection report), noting a number of breaches of health and safety requirements on the mine. These included:

17.1. The main entrance road to the offices passed through the crushing and plant areas, and had to be separated from production areas.

17.2. Employees were working at the conveyor belts and plant area with no personal protective equipment (PPE).

17.3. There were no legally appointed persons in place as required by the Mine Health and Safety Act.

17.4. No mine manager had been appointed.

17.5. Damage was noted to various overhead conveyor supports.

17.6. No mandatory Codes of Practice (COPs) had been drafted and implemented and no baseline risk assessment had been conducted.

17.7. None of the employees had undergone the required medical examination prior to commencing work.

17.8. The mining licence had not been produced to the DMR.

17.9. The request to permit explosives deliveries was not to be considered until all mine health and safety requirements had been met.

17.10. There had been no formal training of employees.

18. The instructions contained in the report were to the effect that:

18.1. All employees were to be removed from the mining area with immediate effect.

18.2. The baseline risk assessment was to be conducted.

18.3. The required COPs and SOPs, and training material were to be drafted.

18.4. All employees had to undergo the required medical examinations.

18.5. All responsible persons, as required under the Mine Health and Safety Act were to be appointed.

18.6. Rahida was required to make a formal representation to the Principal Inspector of Mines regarding all the "non-conformances" noted.

18.7. No drilling and blasting activities were to be conducted until of the instructions had been completed. I point out in this regard that it is common cause that no blasting or drilling activities were being carried out on the mine at the time of the DMR inspection.

19. It is common cause that the effect of the inspection report was to suspend mining operations on the mine so that the various non-compliances could be rectified. Rahida informed Sideralloys of this in an email on 5 December. Rahida also advised that it had arranged for the appointment of a Safety Officer, and that once

he was in place Rahida could initiate the process of restarting the operation. It is common cause that the Safety Officer appointed was Mr Human.

20. What followed from then until 19 December, as evidenced by the email exchanges between the parties, was a continuation of the pre-existing stand-off. There was to-ing and fro-ing on 6 to 7 December over late payment for machinery hired from Doosan, with Mr Annunziato implying that there was nothing he could do due to there being no ongoing operational activity on the mine. A flurry of email exchanges took place on 11 December between the parties. Rahida accused Sideralloys of not meeting its payment obligations and said that this was causing it not to meet its targets. In turn, Sideralloys denied this, saying that while it agreed that targets were not being met, this was not due to its lack of financial support. Rahida asked for urgent payment in order to implement the steps required to rectify the non-compliances identified in the inspection report. Mr Bannai (on behalf of Rahida) gave assurances that there was material available on the mine that could be crushed and processed. Sideralloys continued to express its concerns about the production targets, and whether any processing was realistically possible.

21. On 18 December a further request was made for payment from Sideralloys for salaries and for PPE. Mr Annunziata replied that Sideralloys would pay the salaries and that from the following day he would "manage the rest". The following day Mr Bannai requested an urgent proof of payment, and indicating that it was necessary to pay for PPE in order to resume work on the mine. He assured Mr Annunziata that if this was done there was still a chance of producing 100 containers of ore before the Christmas vacation period commenced. Mr Annunziata responded by expressing his disbelief at this assurance. He raised a number of questions with Mr Bannai, and was not happy with Mr Bannai's

response. In his evidence, Mr Annunziata told the court that the responses did not provide him with what he needed to know. I should add at this point that in its presentation of evidence, Sideralloys made much of what it portrayed to be Mr Bannai's misleading representations about the ability of Rahida to produce ore at this time. Despite what can only be described benignly as Mr Bannai's fierce optimism, it seems unlikely that even lumpy ore could have been produced at this stage. This is not only due to the fact that mining operations had been suspended, but also because of the continuing stand-off between the parties about funding, and the fact that the festive season break was immanent.

22. The 19 December emails were the last direct exchanges of communication between the parties. In its founding affidavit, Sideralloys averred that as at 20 December 2017, Rahida was in breach of its obligations under the agreement. It lists the grounds of breach in paragraph 46.2 of the affidavit as follows:

> "46.2.1 it failed to deliver any mangnese ore meeting the specifications contemplated in the (agreement) to the Applicant, including the tons of handpicked lumpy ore that the Respondent was meant to make available for collection even before the beneficiation process had commenced; and
>
> 46.2.2 in breach of its obligations in clauses 4.2 and 6 of the (agreement), it failed to ensure that the jigging machines which the Applicant purchased were operational and able to properly beneficiate the manganese ore which the Respondent was obliged to deliver to the Applicant."

23. On 20 December 2017, Sideralloys' attorneys sent Rahida what I will refer to for simplicity's sake as "the cancellation letter". In the founding affidavit, Sideralloys averred that the letter notified Rahida that it was in breach in the respects set out

in paragraph 46.2, cited above. By virtue of its breaches, it had repudiated the agreement, Sideralloys accepted the repudiation, and cancelled the agreement. Sideralloys also demanded damages, as set out in the cancellation letter.

24. The cancellation letter also noted that: "To make matters worse, we understand that (Rahida) is no longer able to meet its obligations under the ... Agreement following the closure of (Rahida's) mine by the Inspector for Mine, Health and Safety on 5 December 2017." In addition, the letter recorded that "the breaches referred to in this letter are not exhaustive of all the breaches committed by (Rahida) in respect of the (agreement) and (Sideralloys) reserves its right to rely on such other breaches in the future as it may deem necessary."

25. In response, on 27 December 2017, through its attorneys, Rahida denied that it was in breach, instead contending that Sideralloys was in breach for failing to make payment to Rahida as it was obliged to do under the agreement. On 3 January 2018, Rahida's attorneys wrote to Sideralloys stating that in light of its failure to remedy the breaches, Rahida was cancelling the agreement with immediate effect.

26. This set the scene for the litigation that then ensued.

27. In order to complete the background to the matter, it is necessary to record that after the suspension of mining activities by the DMR on 5 December, Rahida took steps towards remedying the non-compliances listed in the inspection report. Mr Human was appointed as the Health and Safety officer, as I have already indicated. In that capacity, he was responsible for doing the required safety risk assessments and drafting the COPs (about which, as I discuss later, there was much debate when evidence was led). Mr Hintermair was appointed as the Mine Manager in mid-December, and the employees underwent the required medical

examinations at this time. Rahida also opened up communications with the DMR, meeting with officials and providing follow-up reports, to which there were various responses.

28. Mining operations on site remained suspended until 23 March 2018, when the Engineer appointed by Rahida signed off on the commissioning of the plant. Again, there was much debate in evidence as to whether he had the necessary authority to do so. For present purposes, however, the facts before me establish that as of this date the mine resumed normal operations. There was also evidence from Mr Human that as a result of their interaction with the DMR, Rahida was permitted during December to remove material from the site so that it could be processed elsewhere. However, it is not disputed that no ore was processed on site until the mine resumed operations on 23 March 2018.

THE APPLICANT'S CAUSE OF ACTION IN RESPECT OF THE ALLEGED BREACH

29. In its founding and subsequent affidavits filed in support of its claim, Sideralloys relied on the two grounds of breach identified in the cancellation letter, viz. the alleged failure by Rahida to deliver manganese ore to Sideralloys; and its alleged failure to ensure that the jigging machine was operational in order to produce and deliver beneficiated ore to Sideralloys. These were the grounds of breach specified in paragraphs 46.2.1 and 46.2.2, cited earlier.

30. However, in heads of argument filed by Sideralloys in anticipation of the hearing of the opposed motion, Sideralloys introduced an alternative ground of cancellation. It submitted that if the court determined that the grounds set out in the cancellations letter were invalid, Sideralloys would contend in the alternative that it was a tacit term of the agreement that Rahida would comply with all statutory and regulatory obligations under the mining licence and related it its mining activities.

Rahida had committed numerous material breaches of its statutory obligations. So much so that the DMR had suspended operations on the mine. This constituted irrefutable proof that Rahida had historically been, and would be unable to discharge its obligations under the agreement. On this basis, Sideralloys submitted that it was entitled to cancel the agreement as a result of the breach of the tacit term. It submitted further that in law it was entitled to rely on a ground of breach not expressly relied on at the time of cancellation, and pointed out further that it had explicitly reserved to itself this right in the cancellation letter.

31. By the time that the parties had agreed and formulated the referral order Sideralloys had formalised its position in terms of the alternative ground of breach raised. The referral order reads as follows, in relevant part:

> "1. The applicant abandons its reliance on the grounds set out in paragraph 46.2 of the founding affidavit for cancellation of the (agreement).
>
> 2. The applicant accepts that the first and second indebtednesses were novated by the conclusion of the (agreement).
>
> 3. The matter is referred for the hearing of oral evidence before Keightley J, at a time to be arranged with the Registrar, on the following issues:
>
> 3.1 Whether it was a tacit or implied term of the (agreement) that the respondent would comply with the terms of the mining right ... and all statutory and regulatory obligations relating to its mining activities.
>
> 3.2 Whether the respondent breached the tacit or implied term in 3.1 above,

3.3 Whether the applicant was entitled to cancel the (agreement) on the grounds that:

3.3.1 the respondent breached the implied or tacit term; or

3.3.2 the DMR ordered the respondent to cease all mining operations on 5 December 2017;

3.3.3 the breach was material.

3.4 The quantum of damages suffered by the applicant, if any. In this regard the parties record that:

3.4.1 it is common cause on the papers that the applicant advanced the sum of USD 2 992 656.73 to the respondent under the (agreement);

3.4.2 the respondent may establish any financial benefits white it alleges should be deducted from the amount in 3.4.1 n respect of any product delivered to the applicant during the tenure of the (agreement). ...."

32. It is clear from the referral order that Sideralloys abandoned any reliance on its original grounds of breach. It is also clear that it elected to rely on the existence of an implied or tacit term to the effect that Rahida would comply with all statutory and regulatory obligations relating to its mining activities as the foundation for its amended cause of action in relation to breach. However, the consensus between the parties stops there.

33. Sideralloys contends that paragraph 3.3.2 of the referral order, identifies an additional ground of breach separate from the alleged breach of the alleged tact

term. It submits that in terms of that paragraph it it is open to it to contend that the closure of the mine *per se* constituted a repudiation by Rahida of its obligations under the agreement, entitling Sideralloys to cancel. On Sideralloys' version, even if it is unable to establish the existence of the tacit term, it can still succeed in its claim if it can show that the closure of the mine constituted a repudiation of the agreement.

34. Rahida disputes this. It submits that the only ground of breach envisaged in the referral order is the breach of the alleged tacit term. Paragraph 3.3.2 does not introduce a second, alternative ground for breach. Instead, it is inextricably linked and subsidiary to, the existence and breach of the tacit term. On Rahida's version, unless Sideralloys is able to establish the existence of the tacit term, its case must fail.

35. The determination of this dispute involves an interpretation of the referral order. I will engage in that exercise later in my judgment. What is plain, however, is that the first issue for determination is whether Sideralloys has established the existence of an implied or tact term binding Rahida to comply with all its obligations under the relevant statutory regime pertaining to mining. It is only if I find that it has failed to establish a term of this nature that I need to embark on an interpretation of the referral order.

36. Before moving on from this discussion, it is necessary to record that despite the change of tactic on the part of Sideralloys, and the ensuing uncertainty as to the grounds of breach recognised in the referral order, Sideralloys expressly pegged the date of breach as being the date of the cancellation letter, viz. 20 December 2017. This has various implications, one of which is the relevance of certain evidence that was led. I will deal with this latter issue at the appropriate time.

THE ORAL EVIDENCE

37. As far as the oral evidence tendered is concerned, I do not intend to provide a detailed summary of the testimony of each witness. Instead, I do no more than describe who gave evidence and, broadly, what their evidence was directed towards.

38. Two witnesses gave evidence for Sideralloys. As I have already indicated, Mr Annunziata was one of them. He is the Director of Sideralloys and the Chief Financial Officer. He works from offices in Switzerland. He was involved in the negotiation and finalisation of the agreement, and his evidence was directed towards providing context to it. He also testified about the events that took place in the lead up to the cancellation of the agreement.

39. According to Mr Annunziata, the supply of beneficiated ore was very important to Sideralloys for purposes of generating a profit. He said the the investment made by Sideralloys through the agreement was a significant one. In his written statement, which he confirmed in court, he stated that both parties recognised that the mine had to be operated in accordance with the mining right and the statutory and regulatory obligations associated with mining. This was because the investment was important to Sideralloys and it could not allow any interruption in the process that would lead to losses.

40. Mr Annunziata testified that under the agreement, Rahida should have produced beneficiated ore within 5 month of the conclusion of the agreement. This was by the end of October 2017. Sideralloys had been concerned about delays with the jigging machine, and that even before the inspection report was issued, he was concerned that the mine was not in a position to produce beneficiated ore.

41. He had no idea that the mine had been operating in a manner that was in breach of health and safety regulations. He thought it was compliant. The inspection report was of concern to him because it was putting Sideralloys' investment in danger. After the last exchange of emails between him and Mr Bannai on 19 December 2017, Sideralloys decided not to supply funding for the PPE as requested, as it understood that the relationship with Rahida "was completely destroyed". In Sideralloys' view, there was no possibility that Rahida could comply with what the DMR required. Mr Hintermair told them on 19 December that due to the situation on the mine, it "would not be able to work for a long time". He confirmed that Rahida had only supplied one shipment of handpicked ore up to the time that Sideralloys cancelled the agreeemnt.

42. Under cross-examination, it was put to Mr Annunziata that Sideralloys' real concern was not with Rahida's compliance with its statutory and regulatory obligations, but rather with whether it could deliver product to Sideralloys as outlined in the agreement. Mr Annunziata was hesitant to make an admission of that sort. However, he did concede that the suspension of activities on the mine was one of the reasons why Sideralloys decided to cancel the contract. It was also concerned that Mr Hintermair had told them that the mine would not be operational in due course. And Sideralloys was concerned that the jigger was not yet operational.

43. The second witness for Sideralloys was Mr Hintermair. He occupied a rather strange position as a witness in that he described himself as having been the *de facto* mine manager of the mine, as a consultant to Rahida, prior to the events of December 2017. He was formally appointed as the mine manager after the DMR's inspection and the requirement that formal appointments be made. He stayed on in this position until January 2018, when he resigned, and immediately

took up a position with Sideralloys as a consultant. He testified that he had given his resignation to Mr Bannai, of Rahida, on 22 January 2018 with immediate effect, but that Mr Bannai had requested him to stay on until 24 January, and that he had agreed to this.

44. What is worth noting is that despite his resignation not yet having been effective, on 22 January 2018, Sideralloys took a formal resolution appointing Mr Hintermair to represent it in the urgent business rescue application. To this end, he was authorised to act as the deponent to all affidavits on behalf of Sideralloys. The founding affidavit was commissioned on 25 January, the day after his resignation took effect. Mr Hintermair testified that he had consulted with Sideralloys' attorneys for purposes of deposing to the affidavit in the days leading up to this. He was extremely critical of the manner in which Rahida (and particularly Mr Bannai) had conducted its mining operations on the mine. He was open about his view that he defected, so to speak (not a term used by him, but it seems to me to be an apt description of his decision), to Sideralloys as he thought that it would better manage the mine in the event of business rescue. I should explain that in its founding affidavit Sideralloys expressed an interest in acquiring the assets or business of Rahida in the business rescue process. Mr Hintermair told the court that he decided to support Sideralloys in its application for business rescue as he expected that he might possibly receive a promotion and be able to continue his work on the mine if Sideralloys was involved in its operations.

45. By highlighting the above I do not mean to suggest that Mr Hintermair tried to mislead the court in his testimony. However, it must be borne in mind that the evidence he gave and the views he expressed in it must, to some extent, have been influenced by his decision, at the critical early stage of the litigation, to switch loyalties from his erstwhile paymaster, Rahida, to Sideralloys.

46. Mr Hintermair's evidence was directed at painting a picture of operations on the mine over the period leading up to, and post, the conclusion of the agreement. He testified as to the various failings, as he saw it, of Mr Bannai's conduct as the decision-maker, including Mr Bannai's failure to head warnings from Mr Hintermair about the need to comply with regulatory obligations on the mine. I should point out that this occurred a number of months before the agreement was concluded. He also testified about delays in the installation of the jigging machine, and what occurred in the immediate aftermath of the mining operations being suspended on 5 December 2017 until his resignation in January 2018.

47. Mr Hintermair is not a qualified expert on mine health and safety, nor on the drafting of COPs relating to mine health and safety. However, he did not see this as an obstacle to criticising the COPs drafted by Mr Human after he had been appointed. Mr Hintermair's knowledge of the process was theoretical, not practical, in this regard, and this also needs to be borne in mind. Mr Hintermair formed the view that the mine would not be operational again in the near future, and he informed Sideralloys of this on 19 December 2017. He accepted under cross-examination that he presumed that Sideralloys' decision to cancel the agreement was prompted by what he told them in this regard.

48. Rahida called three witnesses. Mr Hunt, who is an engineer and has been in the mining industry, focusing primarily on mine health and safety for 40 years. He was appointed by Rahida in February 2018 after the DMR had instructed, in a follow up report, that an engineer should be appointed. The follow up inspection report was dated 7 February 2018. It noted that an engineer had not been appointed, as required. Further, that the COPs and base line risk assessments were not in place. The report noted that the mine was still under care and maintenance at that stage. It gave various instructions about conveyor belt installations, and training of

various machinery operators. It instructed further that Rahida should ensure that all plant structures were compliant and signed off by a competent person, and that "The plant must not be started before a competent person/engineer in terms of regulation 2.13.1/2.13.2 of the MHSA commissions and signs off the plant before it can operate."

49. Mr Hunt testified that his mandate was to sign off the plant and render it operational as the appointed qualified engineer in terms of the follow-up report. He had done this on 21 March 2018, after he was satisfied that there had been sufficient compliance with the DMR's instructions. Mr Hunt was taken to task, under cross-examination on whether his interpretation of the follow-up report was correct, i.e. that he was correct in assuming that he could effectively give the order for the plant to operate, and hence for mining operations to commence. It was put to him that it was clear from all of the DMR reports that there had to be further report back to the DMR before mining could resume. Mr Hunt testified that in his experience it was not unusual for DMR to leave it to the appointed qualified engineer to assess compliance and to give the go-ahead for mining to resume, and that it was on this basis that he had acted on the follow-up report. I do not need to deal with this issue any further, save to record that as a matter of fact, it is clear from Mr Hunt's evidence that the mine resumed operations from 23 March 2018. I have no reason to doubt that in giving the go-ahead for the mine to operate again, Mr Hunt was acting on the basis of his vast experience in the mining industry, and thus that there was nothing untoward about how the mine resumed its operations. There was no evidence to suggest that the DMR took issue with this course of events.

50. Mr Hunt outlined what had been done on the mine under his watch to comply with the DMR's instructions. Much of this was uncontroversial. For example, it took a

day to rectify the instruction regarding traffic on the mine through the simple measure of grading a small gravel berm across one of the roads, and diverting traffic in this manner. Mr Hunt gave estimates about how long it would normally take to rectify the non-compliances in the DMR report. In most respects, Mr Hunt and Mr Hintermair did not disagree in this regard. It is thus common cause that for most of the issues noted by the DMR, rectification was a relatively simple exercise that in practice did not need to take much time to carry out.

51. The one issue that Mr Hunt was taken to task on was his testimony about the COPs that were drafted by Mr Human. These were extensively criticised by Mr Hintermair in his evidence. Mr Hunt testified that he had read the drafts and given input to Mr Human, but had not been responsible for what was finally submitted to the DMR.

52. This aspect of the case was heavily contested by Sideralloys. It made much of Mr Hintermair's estimate that the COPs would take between 3 and 6 months to complete. It also made much of many shortcomings of the COPs that were drafted by Mr Human. In my view, much of the evidence on this aspect of the matter was irrelevant: the COPs were drafted and submitted to the DMR after the date of breach fixed by Sideralloys, viz. 20 December 2017. The relevant fact is that at that stage they were not in existence. How they were drafted and the shortcomings or not in that regard are not material to the issues I must determine: it is not Sideralloys' case that Rahida failed to comply with its statutory obligations after 20 December 2017 by failing to draft compliant COPs. Its case is that there was a failure to comply as at 20 December 2017. To the extent that the quality of the COPs that were drafted might be relevant to the materiality of any breach of the agreement I might find to have taken place, I will deal with this at the appropriate time.

53. Mr Human also gave evidence for Rahida. I have already indicated that he was appointed in December 2017 as the mine health and safety officer by Rahida after the inspection report was issued. He took primary operational responsibility for providing Rahida with a plan of action for rectifying the non-compliances noted, and he took responsibility for drafting the COPs. He wrote a progress report for Rahida on 20 December 2017 describing what had been done and what needed to be done in response to the inspection report. It included a report on a meeting held with the DMR on 13 December and he testified that he had attended that meeting. The DMR had requested an action plan from Rahida, which was forwarded to it on 14 December 2017. Mr Hunt was taken to task under cross-examination on the final two paragraphs in his report in which he stated that:

> "The action plan was drafted and forwarded to the DMR, Mr Harry Sease, he has approved the set implementation dates as per the action plan. Rahida Investment this (*sic*) hereby comply to the relevant MHSA and Inspection report from the DMR and can proceed with normal operation."

54. After much to-ing and fro-ing under cross-examination, Mr Human explained that his choice of wording here was perhaps misleading. He confirmed that what the DMR had given the go-ahead for was for maintenance and compliance work to be conducted on the mine. In other words, for employees to enter the mine for this purpose. Further, that as a result of the meeting with the DMR it had permitted vehicles to access the mine to remove material that was already on the mine for processing elsewhere. The fact of the matter is that the DMR did not give the go-ahead for mining operations to resume by 20 December, and they did not so resume. I accept that Mr Human did not mean to mislead the court in this regard. There was nothing to suggest this from his cross-examination. English is not his

first language. It is also clear from his written reports that (as is the case with many technically-minded professionals) he is not a gifted linguist.

55. Under cross-examination, Mr Human also conceded that the non-compliances were serious (as did Mr Hunt), and that the drafting of the COPs could be time-consuming, possibly involving months of work. This latter concession needs to be seen in context: Mr Human also testified that with the correct funding to employ sufficient personnel, the COPs and risk assessments did not need to take months, but that the funding situation was such that he had to take on all the responsibilities on his own.

56. Both Mr Hunt and Mr Human were employed as professionals by Rahida, and are no longer in Rahida's employ. They had no reason to colour their evidence to favour Rahida's case, and I did not get the impression from their evidence that they made any attempt to do so.

57. Rahida also called Mr Van Wyk as a witness. His background is with mine security, but he was appointed as the mine manager after Mr Hintermair resigned. He is no longer employed by Rahida on the mine. He testified to what steps were taken on the mine to comply with the inspection report. He also gave evidence about the jigging machine. According to him, it was eventually installed and was tested in mid-2018, when they ran it for a month. However, he testified that Rahida had never used the jigger for beneficiation purposes. This was because at about the same time that they were testing the jigger, a new source of ore was found on the mine that was of such quality that it had sufficient manganese content for export purposes without the need to beneficiate. He testified that the manganese content of this new source of ore was between 40% and 43%.

However, as Sideralloys pointed out, there was no independent evidence to back up this statistic.

58. Sideralloys made much of the fact that Mr van Wyk was appointed as the mine manager although his experience was in mine security, and not mine management. This is a fact. However, the gist of his evidence was factual: it went to what was done on the mine following the inspection report. He did not claim to be giving evidence as an expert in mine management and I did not understand his evidence to have been presented as such.

59. Finally, for Rahida, there was Mr Chediya, who was involved in negotiating the agreement. He was adamant that the 5-month time period referred to in paragraph 4.2 of the agreement did not commence from date of conclusion of the contract, as Mr Annunziata had stated. He testified that the 5-month period was only intended to commence from the time that the jigging machine was operational. It had to be purchased and delivered after the conclusion of the agreement, and then it had to be installed. He pointed out that at the time the agreement was concluded, Rahida did not yet have a mining right, and that this was only executed on 27 July 2017. The implication of this evidence is that the parties could not have intended that within 5 months of 19 May 2017 Rahida was obliged to supply Sideralloys with beneficiated ore. Mr Chediya was also adamant that the time frames and monthly quantities of ore stated in the agreement were targets that Rahida would aim to achieve, rather than binding monthly deliverables within set time frames.

60. Mr Chediya was not an impressive witness. In saying so, I take into account the fact that English is not his first or second language. At one point he clearly tried to mislead the court and had to be reminded not to do so. Had Sideralloys stuck with

its original grounds of breach, his questionable credibility on some aspects of his evidence may have been more serious for Rahida, as he and Mr Annunziata were at direct odds on the question of whether the parties intended to bind Rahida to deliver specific amounts of beneficiated ore by a specific date, i.e. by the end of October 2017 as Sideralloys alleged. However, because of the amendment to Sideralloys' grounds of breach, this issue is of less direct relevance to the case.

61. Against this background, I turn to consider the issues before me, starting first with the *locus standi*, and breach issues.

TACIT OR IMPLIED TERM?

62. The first issue I must consider is whether Sideralloys has established that it was an implied or tacit term of the agreement that Rahida would comply with all its statutory and regulatory obligations under its mining right, and pertaining to its mining activities.

63. As far as the law is concerned, it should be noted that the agreement provides that English law is applicable to the agreement. However, the parties were agreed that insofar as the principles underlying implied and tacit terms are concerned, there is no material difference between English and South African law.

64. Implied terms are generally regarded as those imported as a matter of course by law, without reference to any actual intention of the parties. Such terms may be derived from the common law, custom, trade usage or statute.[1] The intention of the parties as regards implied terms is only really relevant to the question of

[1] *Alfred McAlpine A& Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531

whether the parties have exercised their privilege of excluding an implied term that would otherwise apply.[2]

65. Sideralloys contends that it was a term implied by law in the agreement that Rahida would comply with all the terms of its mining right and all statutory and regulatory obligations relating to it. It goes on to list pages of these obligations in its heads of argument. It then concludes that because of this, Rahida was in a "statutory straight jacket" as regards its ability to mine lawfully, and that unless it complied with this multitude of statutory obligations it would not be possible to perform its contractual obligations to produce ore. For this reason, Sideralloys submits that the implied term must be taken to have existed as a material term of the agreement.

66. I have some difficulty with Sideralloys' approach in this regard. There is no doubt that Rahida was under obligations vis-a-vis the State to comply with whatever prescripts the State laid down under the mining right and in the relevant statutes and regulations governing mining. However, in my view, this does not, without more, equate to the existence of an implied contractual term between the parties *inter se* that Rahida would be in breach of the agreement solely because it did not comply with all of those requirements.

67. Sideralloys did not argue that our law currently recognises, as an implied term of a commercial contract for the supply of mineral ore, that the party to the contract that holds the relevant mining right must comply with the obligations imposed by that right and by the statutory scheme within which it operates. The Supreme Court of Appeal has held that:

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[2] Christie and Bradfield Christie's The Law of Contract in South Africa (6ed) pg 167 (hereafter, Christie)

"Although a number of implied terms have evolved in the course of development of our contract law, there is no *numerus clausus* of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith ... It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development."[3] (my emphasis)

68. What Sideralloys is contending for is the wholesale incorporation of all relevant statutory obligations into commercial agreements for the supply of mineral ore. This simply cannot be. It would mean that whenever a contractual relationship between parties is established against the backdrop of statutory regulation, all the obligations created by statute would automatically become contractual obligations. In my view, this is too broad a proposition to find legal purchase. Should parties consider certain statutory obligations to be material to their contractual relationship, they would normally simply express this in the terms of the contract. In my view, there is no pressing need, based on policy considerations of fairness,

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[3] *South African Forestry Company Limited v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 339 E-J

reasonableness and good faith, for courts to go any further and to impose such a wide-ranging implied term between parties in a contract of this nature.

69. What of the contention that it was a tacit term of the agreement that Rahida would comply with all its obligations under the mining right and relevant statutory scheme?

70. Unlike an implied term, a tacit term is:

> "...an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties."[4]

71. Tacit terms have been described as terms that are "so self-evident as to go without saying".[5] They are a matter of inference. A term can only be implied if it is necessary in the business sense to give efficacy to the contract. It must be a term of which it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: what would happen in such a case? they would both have replied: of course such and such will happen: we did not trouble to say that because it is so clear.[6] The court must be satisfied that both parties necessarily would have agreed upon such a term, had it been suggested at the time. It is not necessary to show that the parties actually directed their minds to the question: provided that their common intention was such that a reference to the possible situation would have evoked from them a prompt and unanimous

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[4] *Alfred McAlpine*, above, at 531-2
[5] *Wilkins v Voges* 1994 (3) SA 130 (A) at 136H
[6] *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 605

assertion of the term.[7] Thus, the test is objective, and not subjective. Both the surrounding circumstances and the subsequent conduct of the parties may be relevant in indicating the existence of a tacit term.[8]

72. I have already pointed to Mr Annunziata's evidence to the effect that both parties recognised that it was important for the mine to operate in a manner that was in compliance with its obligations under the mining right and the statutory and regulatory scheme pertaining to mining. Such a statement, made in hindsight, is not sufficient to conclude the existence of a tacit term to this effect. Whether there was a tacit term is a matter of inference to be determined from the surrounding circumstances. To start, one must consider the nature of the agreement. It was an agreement for the production and supply, by Rahida to Sideralloys, of manganese ore of a particular quality (handpicked ore with a target of 32% minimum manganese content, and then beneficiated ore with a target of 35% minimum manganese content) and quantity (a total volume of 750 000 DMT of beneficiated product, with estimated monthly quantities of both hand-picked and beneficiated product).

73. Against Sideralloys financing mining overheads and the jigging plant, it would obtain exclusive access to the ore up to the agreed total. In this sense, Sideralloys may be correct in describing the agreement as not being in the nature of a simple supply and sale of manganese ore. It is also the case that through the provision of the marketing fee, Sideralloys would be compensated for losses it had made in its previous dealings with Rahida, under the verbal agreement, and that ultimately the parties would share the net profits 50/50.

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[7] *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236-7
[8] Christie, above, pg 178

74. Sideralloys submitted that the agreement was in the nature of a joint venture between the two companies. In my experience, the term "joint venture" can be used to describe any number of different scenarios in terms of which companies go into business together. Be that as it may, and whatever term is used to describe it, it is plain to me that the unquestioned heart of the agreement was for the supply of manganese ore by Rahida to Sideralloys. In this sense, it was an agreement for the supply and sale of manganese ore. The parties had a pre-existing commercial relationship in terms of which Sideralloys purchased ore from Rahida, and the agreement was a development of that pre-existing relationship.

75. Significantly, Rahida held the mining right independently of Sideralloys, which had no obligations or rights under it. The agreement itself contains only one provision referring to the mining right. This is under clause 5. It provided that Sideralloys would provide a bank guarantee for the purpose of Rahida acquiring the mining right, but that Rahida would reimburse Sideralloys the value of the guarantee within 18 months after beneficiation commenced. There is no other reference in the agreement to the mining right or to the statutory regime pertaining to mining.

76. Considering the conduct of the parties, which is relevant to the test of whether a tacit term should be inferred, the cancellation letter is significant: it identifies as the primary grounds for breach the failure by Rahida to deliver product in terms of its obligations under the agreement, and its failure to instal and render operational the jigging machine. While reference is made in the cancellation letter to the suspension of activities on the mine, this is referred to in the context of Rahida no longer being able to meet its obligations under the agreement. The cancellation letter shows, in my view, that Sideralloys' primary concern throughout was about the supply of product by Rahida. It was not about whether Rahida was complying with its obligations to the State in terms of its mining right and the regulatory

framework. This is also evidenced in the emails exchanged between the parties at the time: again, Sideralloys' refrain was that Rahida had failed to meet its production targets.

77. Of course, Sideralloys is correct in drawing a link between Rahida's ability to meet its production targets and compliance with its obligations under the mining right and regulatory scheme. In theory, non-compliance with the latter obligations to the State will affect the ability to comply with the former obligation to Sideralloys. However, this does not assist Sideralloys' case. In the first place, despite the non-compliance with its obligations under the mining right and regulatory regime, we know as a fact that Rahida made at least one delivery of product to Sideralloys.

78. More importantly, however, is that from the point of view of the agreement and the contractual relationship between the parties, Rahida's obligations to comply with the mining right and regulatory regime were ever only of secondary importance to the primary purpose of the agreement, which was for the provision of product. This is important because from a contractual point of view Sideralloys had remedies available to it under the agreement if, for any reason, Rahida failed, in the express terms of clause 6, to "make its best efforts to produce required grade and quantity". This remedy was available regardless of whether that failure came about because of Rahida going through a staffing crisis, or a financial crisis, or failing properly to project manage its operations, or whether it was because its failure to comply with its obligations under the mining right and regulatory regime caused a suspension of its mining activities. In fact, if one has regard to Mr Hintermair's testimony, it seems that the delay in getting benefaction off the ground arose largely from what he regarded to be poor management and financial decision-making on the part of Mr Bannai. The suspension of mining activities by

the DMR simply added to what he considered to be an already compromised mining project.

79. Why this is important is because in determining whether a tacit term exists or not, one must ask whether that term was necessary in a business sense to give effect to the contract. One must ask the question: was it necessary to hold Rahida contractually bound to comply with its mining right and regulatory obligations to give effect to the agreement? The answer must be no: the primary purpose of the agreement, and Rahida's primary obligation was for the production and delivery of product. Its failure to comply with this obligation rendered it vulnerable to be held liable for breach under the agreement regardless of the underlying reason for its failure to produce.

80. To put it another way, if one had asked the question of the parties at the time they negotiated the agreement: would Sideralloys be entitled to cancel the contract if Rahida failed to comply with all its obligations under the mining right and under the regulatory regime, it is highly unlikely that both parties unanimously would have answered: "But of course". The most likely answer, at best for Sideralloys, is that the parties would have said: "That depends on a number of factors. Which obligation was not complied with; what was the consequence of the non-compliance; what was the reason for the non-compliance?" The parties may have said: "If it led to Rahida being unable to meet its production obligations, then Sideralloys could cancel." However, the difficulty for Sideralloys here is that this is not the tacit term for which they contended. The tacit term for which they contended was to the effect that <u>any</u> non-compliance with <u>any</u> of the mining right and regulatory obligations would constitute a breach. The second difficulty for Sideralloys in this regard is that, as I have already pointed out, a tacit term of that more nuanced nature was not necessary, as Sideralloys already had contractual

remedies available to it for Rahida's failure to meet its production obligations under the agreement in any event.

81. For all of these reasons, I conclude that Sideralloys has failed to establish that it was a tacit term of the agreement that Rahida would comply with all of its obligations to the state under the mining right and under the regulatory regime associated with it. In other words, Rahida was not in breach of its obligations to Sideralloys under the agreement in this respect. The basis for my finding makes it unnecessary to consider the argument raised by Rahida, based on clause 16 of the agreement, to the effect that this clause excluded the incorporation of any tacit terms.

INTERPRETATION OF THE REFERRAL ORDER AND THE EFFECT OF THE SUSPENSION OF MINING ACTIVITIES

82. I referred earlier to the alternative submission made by Sideralloys in the event that I find that it has not established a tacit term. The alternative argument is that in terms of paragraph 3.3.2 of the referral order it is open to it to contend that the closure of the mine *per se* constituted a repudiation by Rahida of its obligations under the agreement. Sideralloys' contention, and Rahida's rejection of it, led to further written submissions being made by the parties on the interpretation of the referral order, post their oral submissions to me.

83. It needs to be stated that this alternative contention by Sideralloys was introduced only in heads of argument and oral submissions to me. As I understand the contention, it is that the closure of the mine *per se* constituted an act of repudiation on the part of Rahida entitling Sideralloys to cancel the agreement.

84. The contention is, of course, complicated by the fact that I have already found that compliance with Rahida's mining right and regulatory obligations was not a tacit term of the agreement. It is further complicated by the fact that Sideralloys expressly abandoned its original grounds of breach relied upon, which were founded on a failure by Rahida to meet its production and beneficiation obligations. One of the questions that arises is whether the alternative contention propounded by Sideralloys can really be separated from this context, and can properly be viewed as a stand-alone ground of breach in its own right. Of course, the preceding, and perhaps interrelated, question is whether Sideralloys is permitted to raise it at all under the referral order that was formulated and granted by agreement between the parties.

85. Sideralloys' interpretation of the referral order on this issue is premised largely on the wording of clause 3.3, and in particular the use of the word "or" between paragraph 3.3.1 and 3.3.1. The question referred to oral evidence under this paragraph was:

> "Whether the applicant was entitled to cancel the (agreement) on the grounds that:
>
> 3.3.1 the respondent breached the implied or tacit term; or
>
> 3.3.2 the DMR ordered the respondent to cease all mining operations on 5 December 2017;
>
> 3.3.3 the breach was material." (my emphasis)

86. Sideralloys submits that the use of "or" indicates that two unrelated grounds of breach were identified as being before the court for determination in terms of the referral order: the breach of the implied or tacit term, and the alternative ground of

breach based on the continued closure of the mine rendering Rahida incapable of discharging its obligations under the agreement. As regards the latter, Sideralloys submitted that it had always relied on this ground of breach.

87. One of the difficulties with this latter submission is that it is not at all clear from its founding and subsequent affidavits that it relied on anticipatory breach arising out of the suspension of the mining operations *per se*. Sideralloys referred in this regard to paragraph 20.7.8 of its replying affidavit, in which the deponent stated: "The closure of the mine by the DMR constitutes irrefutable proof that the Respondent has historically been, and will be, unable to discharge its contractual obligations under the (agreement). In the circumstances, the Applicant was justified in cancelling the (agreement)."

88. However, this passage was in response to Rahida's averments in its answering affidavit to the effect that it was Sideralloys that was in breach with its contractual obligations because it had failed to make the payments to service providers that it was required to do under the agreement. The averment by Sideralloys in paragraph 20.7.8 was not stated in such terms as to make it apparent that it was relying on a case of anticipatory breach flowing from the closure of mining operations *per se*. It was really only at the stage of oral argument that it became clear to the court that Sideralloys was interpreting the referral order as opening the door to yet another alternative ground of breach on this basis.

89. Sideralloys also submitted that, consonant with paragraph 3.3.2 of the referral order, it had led evidence on the cancellation of the agreement pursuant to the mine remaining closed by DMR. However, if one has regard to the evidence referred to, it was expressly directed at dealing with the materiality of Rahida's breach of the tacit term, not with the issue of anticipatory breach. As Christie

notes, there is often an overlap between repudiation, and the materiality of another form of breach justifying cancellation. However the two are not to be confused.[9]

90. It is so, as Sideralloys submitted, that pleadings are made for the court and not the court for pleadings. The court is not bound by pleadings if the parties themselves enlarge the issues and there has been a full investigation of the matters in question.[10] This might be so, but as Rahida pointed out, had anticipatory breach been properly pleaded, certain other issues would have been canvassed on the papers, or at least in cross-examination: why did Sideralloys not place Rahida *in mora* when mining operations were suspended; if it had done so (and not summarily cancelled the agreement and withheld further funding), what period of time would it have taken to produce product again; would this have destroyed the foundation of the agreement?

91. These issues were not canvassed in evidence with a view to making out or meeting a case of anticipatory breach. Mr Hintermair estimated that it would be at least three months before the suspension could be lifted. As I have indicated, in many respects, he was too close for comfort to Sideralloys for it to be considered to have been an entirely independent and objective assessment. It is so that he ultimately was proved to have been correct: mining operations resumed in March 2018. However, it is important to bear in mind that this was after Sideralloys had cancelled the contract, placing Rahida in the difficult position of having to find alternative sources of funding. That evidence does not address the question of what the situation would have been had Sideralloys clearly placed Rahida *in mora*, rather than cancelling the agreement on 20 December 2017.

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[9] Above, at pg 538
[10] *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (AD)

92. In the affidavits filed in support of its application, Sideralloys did not plead anticipatory breach arising out of the closure of the mine *per se*. In order to open the door for consideration of that issue by the court, it was necessary for the parties to have reached agreement on that score and for the matter to have been referred to as an issue for determination via oral evidence. There is some merit in Rahida's contention that had this been what was intended in the referral order, then paragraph 3.2.2 would have read: "Whether the applicant was entitled to cancel the (agreement) on the ground that ... the respondent will be unable to discharge its obligations under the (agreement)." Absent this formulation, it was not at all clear, that Sideralloys intended to rely on anticipatory breach flowing solely from the closure of the mine, and unrelated to the abandoned grounds set out in paragraphs 46.2 of the founding affidavit.

93. However, even on the assumption that Sideralloys is correct in its interpretation of the referral order, and it was entitled to raise this point at the end of its case, I am not persuaded that this is of assistance to it.

94. It was incumbent on Sideralloys to place sufficient evidence before court to establish the repudiation. As I have already pointed out, it did not produce evidence relevant to this (as opposed to the related, but not equivalent, issue of materiality of the breach of the tacit term). Anticipatory breach or repudiation may be described as the conduct of one contracting party that evinces an intention no longer to be bound. It may include conduct on the part of a party that has the effect of putting it out of her power to perform.[11] The test, as laid down by the

[11] Christie, above, pg 539

Supreme Court of Appeal in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*,[12] is as follows:

> "Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming ... The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation ... is a 'serious matter' ... requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed."

95. Further, the court held that evidence of how the innocent party understood and reacted to the conduct may be relevant, but is not conclusive. This is because the court must superimpose its own assessment of what the innocent party's reaction to the other party's conduct should reasonably have been.[13]

96. It is important to bear in mind in the present case that the repudiation case relied on by Sideralloys arose after its abandonment of its claim that Rahida had breached the agreement because it had failed to deliver the manganese ore within the time frames set out in clause 4.2 of the agreement. As far as the beneficiated ore is concerned, its case was that the jigging machine should have been installed and operational so as to produce beneficiated ore by the end of October 2017.

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[12] 2001 (2) SA 284 (SCA) at 294
[13] At 295C

Sideralloys elected not to proceed on this alleged breach. This means that its case for repudiation must rest solely on the suspension of the mining activities on 5 December as constituting the trigger for justifying its cancellation.

97. It is not disputed that the closure of the mine was a temporary measure. The DMR did not cancel or even threaten to cancel Rahida's mining right. Whatever Mr Hintermair's view of the COPs might have been, it was common cause that none of the other items listed in the inspection report presented insurmountable obstacles to mining activities being capable of being resumed within a reasonable period, particularly bearing in mind that production in any event would have been suspended over the festive season (as noted in some of the emails between the parties). Many of the non-compliances were rectifiable in a day or two. It was plain from the evidence that the Pensfontein mine is not a massive operation. It has approximately 40 employees, with minimal machines and traffic on the mine.

98. Taking all of this into account, in my view the reasonable person would have asked: how long will it take to rectify each of these non-compliances, and when can we expect mining operations to continue? The reasonable person would have taken into account that within 10 days of the inspection report, employees of Rahida met with the DMR to determine a way forward; they had devised an action plan with time frames; and they continued to liaise with DMR. This action commenced before Sideralloys cancelled the agreement.

99. In my view, on the evidence before me, the reasonable person would not have perceived the suspension of mining activities to be an unequivocal indication from Rahida that it did not intend to comply with its obligations under the agreement. What adds grist to this conclusion is that Sideralloys first held back on providing finance to Rahida after 5 December, even though that finance was necessary for

Rahida to begin to rectify the non-compliances and to reopen the mine. It then seems to have done an about-turn on 19 December 2017 by paying for salaries and by Mr Annunziata stating in an email that he would see to the rest of the payments. The next day, it summarily sent the letter of cancellation. If anything, this conduct on the part of Sideralloys is indicative of how equivocal the entire situation was between the parties over the period from 5 to 20 December.

100. It would be very difficult to conclude, in these circumstances, that Rahida unequivocally indicated that it did not intend to comply with its ongoing obligations under the agreement because it allowed the DMR to suspend mining activities through its non-compliance.

101. Ultimately, it seems to me that what persuaded Sideralloys to cancel on 20 December had more to do with its long-standing unhappiness about Rahida's performance in supplying product timeously than on an objective assessment that the suspension of mining activities *per se* constituted a repudiation of the agreement. Although Sideralloys packaged its alternative case for breach as an instance of repudiation, stripped to its core, it is substantively the same case for breach that Sideralloys originally relied on, but elected to abandon when it agreed to the referral order.

102. For these reasons, I am unpersuaded that, even if the referral order is interpreted in a manner favourable to Sideralloys, it has established that Rahida repudiated the agreement because of the closure of mining activities on 5 December 2017.

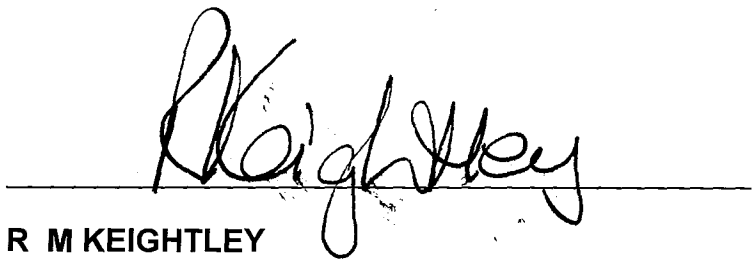
CONCLUSION AND ORDER

103. It follows from the above that I find that Sideralloys has failed to establish that the Rahida was in breach of the agreement. It follows, as a matter of course, that

Sideralloys has failed to establish that Rahida is indebted to it for damages arising from the alleged breach as contended for by Sideralloys. Sideralloys is not a creditor on this basis, and thus not an affected person under section 131(1) of the Act. In the circumstances, it does not have *locus standi* to apply for an order placing Rahida under supervision and business rescue, and it is unnecessary for me to give any further consideration to the application.

104. I make the following order:

"The application is dismissed with costs."



R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard	: 6 February, 11 to 15 March,30 April 2019
Date of Judgment	: 18 July 2019
Counsel for the Applicant	: MM Anthonie (SC)
	: AB Berkowits
Instructed by	: Werksmans Attorneys
Counsel for Respondent	: M Smit
Instructed by	: Cliff Dekker Hofmeyer