GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14246/2020

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

(Signed)

24 November 2020 .....

SPILG, J

In the matter between:

KLOPPER N.O, JOHANNES FREDERICK	First Applicant
PIETERS N.O, RYNETTE	Second Applicant
SOUTHERNERA DIAMONDS (PTY) LTD	Third Applicant

And

NAKA DIAMONDS (PTY) LTD	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT MINERAL RESOURCES	Second Respondent

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JUDGMENT

SPILG, J:

24 November 2020

INTRODUCTION

1. The first and second applicants are the duly appointed business rescue practitioners ("*the BRPs*") of the third respondent, SouthernEra Diamonds (Pty) Ltd ("*SE Diamonds*").

2. The BRPs brought the present urgent application in order to declare that a joint venture agreement between SE Diamonds and the first respondent, Naka Diamond Mining (Pty) Ltd ("Naka") had terminated. They also sought an order that any residual obligations that may be owed by SE diamonds to Naka were to be immediately cancelled.

3. Of importance is that the argument, in relation to the agreement, was confined to a particular clause- namely clause 26.3 as read with clause 8.7. It did not cover clause 14.3. which contains the operative provisions for the dissolution of the joint venture on its termination

4. Although Naka disputed that SE Diamonds had validly terminated the joint venture some time previously and in turn SE Diamonds disputed that Naka was entitled to terminate it earlier this year, each party needs to rely on their being a termination under the breach clause of the agreement (namely clause 26) in order to support their respective positions.[1]

5. Naka had however approached the court in December 2019 for a temporary interdict against SE Diamonds, which was not yet under business rescue, to prevent it from mining or otherwise exploiting the rights under the joint venture agreement to the exclusion of Naka pending an order declaring that the joint venture agreement had not been validly cancelled by SE Diamonds.

   Both parties however now accept that by the time of the business rescue proceedings the joint venture agreement had been terminated. I believe the real questions to be asked are how termination arose and whether that could result in a termination under clause 26.3.

[1] In other words, whether cl 26.3 is actually impacted at all if regard is had to the manner of termination.

6. The second leg of the relief sought is intended to deal with Naka's contention that despite the termination of the joint venture, in terms of the agreement between the parties there remains extant a residual obligation which requires SE Diamonds to "*maintain in place and continue its contribution to the joint venture".*

   The effect of this would require SE Diamonds to allow the continuation of mining operations on Rusland until the mining rights expire or the extraction of the minerals to which the mining rights pertain has been exhausted.

   Once again it is important to note that this argument is confined to clause 26.3 of the breach provisions read with clause 8.7, the latter being a funding provision in the joint venture agreement.

7. The BRPs dispute Naka's interpretation of the two clauses. They also have a fallback position if it is found that the residual obligations under clause 8.7 are operative post termination. It is to rely on the provisions of s 1362) (b) of the Companies Act 71 of 2008.[2]

   They contend that this section allows them to cancel any obligation of the company which would otherwise become due during the business rescue proceedings.

   Naka in turn submits that s 136(2)(b) does not apply because the obligations arising from termination did not become due *during* the business rescue

[2] Section 136(2) provides:

> *(2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may—*
> *(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that—*
> *(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and*
> *(ii) would otherwise become due during those proceedings; or*
> *b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).*

proceedings as termination occurred prior to that event. It remains common cause that termination, on whatever basis, occurred prior to the commencement of business rescue.

THE JOINT VENTURE AGREEMENTS

8. It is common cause that a joint venture agreement, identified as the Klipspringer Joint Venture ("*the joint venture"*), had been concluded on 31 July 2001 between the predecessors of SE Diamonds, the predecessors of Naka and De Beers Consolidated Mines Ltd ("*De Beers*"). During the existence of this agreement De Beers was a shareholder in Naka,

   For ease of reference the parties to the agreement will be referred to by their present names.

9. In broad terms the joint venture was established to exploit certain mining rights held on adjacent farms by SE Diamonds and De Beers, although in one instance the mining right was held jointly by SE Diamonds and Naka. SE Diamonds also owned the surface rights in respect of the farm, known as Rusland, to which its mining rights pertained. These rights have been referred to in the papers as the Klipspringer right.

   SE Diamonds had also built a plant and developed an infrastructure on Rusland for mining purposes. While De Beers and SE Diamonds had a significant portfolio of mining rights, and in the case of the latter also plant and some infrastructure, Naka was obliged to contribute an amount of R49.6 million which was the development cost required to "*ramp down and open new production levels"* in respect of the mining rights over Rusland.

10. In terms of clause 11.2 of this agreement, De Beers was entitled to reduce its shareholding in Naka provided it was acquired by a black empowerment partner. It was recorded that any dilution of its shareholding in Naka would not affect De

Beers' rights and obligations under the joint venture agreement unless otherwise agreed to in writing.

11. Subsequently De Beers disposed of its shares in Naka and reached agreement with the other two joint venture partners to terminate its participation in the joint venture. This agreement was identified as the Addendum Agreement of 2004.

12. The Addendum Agreement then regulated the relationship between SE Diamonds and Naka. It did so by retaining the terms of the joint venture agreement save that reference to the rights and obligations of De Beers were removed and one or two additional clauses were introduced, one of which I believe should be key to the resolution of this case; namely clause 8.

13. It is therefore convenient at this stage to identify the main clauses in the joint venture agreement which survived and were carried forward to regulate the relationship between SE Diamonds and Naka under the reconstituted joint venture arrangement.

14. As previously mentioned, the purpose of the joint venture was to exploit the mining rights until the mineral deposits to which they pertained had been exhausted[3]. It also envisaged that the joint venture would acquire more mining rights in the future. Accordingly the joint venture agreement was also an umbrella agreement intended to cover any future acquisitions of mining rights on behalf of the parties.

15. The joint venture agreement can be divided into a number of parts each dealing with a different contingency affecting the relationship between the parties.

16. One of the main concerns which required addressing was funding. Firstly, only SE Diamonds and Naka were required to provide funding. Presumably De Beers was excluded because it would be providing funds through its involvement as a shareholder in Naka. The parties appreciated that continued funding was required for the ongoing development of mining operations. While the parties

[3] Clause 5.1

contemplated obtaining third party funding cl 8.1 imposed an obligation on SE Diamonds and Naka to contribute an equal amount to the extent that there was a shortfall of outside funding.

17. However it was accepted that either one or the other joint venture partner may not be able to find the matching funds required. The parties therefore considered that this should not constitute a breach of the agreement. What would occur in such circumstances would be a pro-rata dilution of the 50:50 profit sharing ratio between SE Diamonds and Naka (identified as the "*participation interest"*) *in* the joint venture agreement. [4]

    Nonetheless if the one party's inability to meet its parity funding obligations resulted in its interest being diluted to 5% or less, then such party was deemed to have "*withdrawn forthwith from the agreement".* A further consequence was that such party's entire share of the net revenue earned by the joint venture would automatically be forfeited to the other party. It will be recalled that only SE Diamonds and Naka had a participation interest in the net revenue earned.

18. The relevant provisions, which identifies Naka by its previous name (Steppon), are to be found in clauses 8.4 through to 8.7 read:

> *8.4 If either Steppon or SouthernEra ("a defaulting party") fails to provide its proportionate share of funding to the Joint Venture, then:*
>
> *8.4.1 the other of them ("the other party") shall be entitled but not obliged to provide the funding which the defaulting party has failed to provide;*
>
> *8.4.2 provided that the non-defaulting party provides its proportionate share of the funding and the defaulting party's proportionate share, the defaulting party's Participation Interest shall forthwith be diluted in accordance with the following formula:*

[4] The "*participation interest"* was defined as SE Diamonds and Naka's "*share (expressed as a percentage) of the net revenue earned by the Joint Venture, according to the provisions of the Agreement"*

The formula determines the share of revenue each party is entitled to, by in effect pro-rating it to their actual respective on going funding contributions.[5]

8.5 Any dispute as to the extent to which the Participation Interest of the defaulting party should be so diluted shall be referred to KPMG for determination. In making any determination referred to in this clause, KPMG shall be deemed to be acting as experts and not as arbitrators, and the Parties shall, in the absence of manifest error, be bound by any such determination.

8.6 The defaulting party whose Participation Interest shall have been reduced in terms of 8.4 shall not thereafter be entitled to increase its Participation Interest and its Participation Rights shall accordingly be limited to the reduced Participation Interest, unless the non-defaulting party thereafter fails to provide its share of funding to the Joint Venture in which case 8.4 shall apply.

8.7. If either Steppon or SouthernEra's Participation Interest is diluted to 5% or less, such party shall be deemed to have withdrawn forthwith from this Agreement and shall relinquish its entire Participation Interest free of any consideration; provided that such withdrawing party shall nevertheless be obliged to maintain in place and continue its contribution to the Joint Venture as set out in 7 (but excluding funding of capex in 7.2.1) and shall be liable for its obligations under this Agreement until termination of this Agreement, save that it shall have no further funding obligations in terms of this clause & such relinquished Participation Interest shall be deemed to have accrued automatically to the other party free of any consideration.

19. It is therefore evident that cl 8.7 ensured that if a party failed to contribute to the funding on a 50:50 basis that would not constitute a breach. And if the amount contributed was less than 5%, then that party would be obliged to relinquish its interest in the revenue to the other and, save for the funding obligation which

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[5] The formula is:

"P = $\frac{(A \times B) = D}{B + C}$

Where:

A = the defaulting party's Participation Interest prior to the relevant call for funding;

B = total funding provided by the Parties to date plus SouthernEra's Deemed Expenditure plus any further funding provided by the Parties, or either of them, after the Effective Date; SouthernEra's Deemed Expenditure shall be equal to the expenditure incurred by Steppon in terms of 7.5 from time to time subject to a maximum of R 49,6 million (Basis Date November 2000);

C = the total amount received by the Joint Venture in respect of the current call for funding;

D = the defaulting party's contribution to the current call for funding; and

P = the defaulting party's Participation Interest after receipt of the current call for funding.

would cease, was obliged to continue to contribute its mining rights and utilisation of plant and infrastructure. This makes perfect commercial sense when regard is had to the high operational costs involved in mining operations of this nature.[6]

20. But all good things must come to an end. Accordingly, provision had to be made for such an eventuality. The eventualities which would have precluded a continuation of mining would be if the parties agreed, or once all viable deposits of precious stones had been exhausted, and of course if there was a land claim which resulted in the restitution of a right in land, which might include the surface rights or the right to mine, arising from an earlier dispossession of people's rights as a consequence of past racially discriminatory laws and practices.

These are indeed the only grounds expressly identified as constituting a basis for termination. They are to be found in the termination provisions of clause 14 which provide:

TERMINATION

14.1 The Parties may terminate the Joint Venture:

14.1.1 in terms of clause 12.3; or

14.1.2 at any time by mutual agreement.

14.2 In addition to the above, the Joint Venture shall terminate 90 (NINETY) days after the Manager shall have delivered to each of the Parties a written notice stating that all viable deposits of precious stones to which the KJV Rights relate have been mined and are exhausted.

14.3 Upon termination of the Joint Venture, the Manger shall take all actions necessary to wind up the activities of the Joint Venture, and all costs and expenses incurred in connection with the termination of the Joint Venture, any accrued expenses and all other continuing obligations hereunder until final settlement of all accounts and for any liability, if it accrues before termination, and if it arises out of activities during the term of this Agreement, shall be expenses chargeable to the Joint Venture.

[6] Nor can the entitlement of a party who has put up 95% of the funding be considered to have expropriated the right of the other. If that party did not have the funds to exploit the right itself or utilise the plant for its intended purpose, then it follows that it should not be entitled to simple walk away and try and peddle the right to someone else. The agreement itself recognises that the non-contributing party is no longer to be called upon to provide any future funding

21. So far the agreement therefore provides for the case where one party is unable to maintain its funding obligations, in which event its participation interest is proportionately reduced so that its net return is commensurate with its actual funding contribution; it being accepted that the capital injection of each of these two joint venture parties comprised the mineral rights contributed and the right to utilise by SE Diamonds on the one hand and (to all intent and purposes) the R46.9 million funding contribution by Naka on the other.

    The agreement also provides for the ending of the joint venture, even in cases where the one party has effectively taken over the participation interest of the other. Where termination arises in terms of cl 14 alone or when the provisions of clause 14 arise in a case where the provisions of clause 8.7 have already been triggered then the dissolution of the joint venture is to be dealt with in terms of cl 14.3.

22. However, the parties also appreciated that despite the good intentions, it may arise that one of them commits an act which justifies a punitive remedy.

    This is to be found under the provisions headed "*Breach*".

    Save in one respect the provisions are carefully worded.

23. Clause 26.1 reads:

    > *The remedial of the Parties under 26.2 shall not be exhaustive and shall be in addition and without prejudice to any other remedies in law which they might have, whether under this Agreement or at common law.*

    The effect is that, while cl 26.2 identifies the remedy of cancellation for a breach cl 26.1 recognises that other remedies are available in law, "*whether under this Agreement or at common law".* It will be necessary to determine what other remedies, aside from cancelation, are available under the agreement itself

24. Clause 26.2 then lists the events which would justify canceling the agreement. They are:

A Party shall be entitled to cancel this Agreement by written notice to the others upon the occurrence of any one or more of the following events:

26.2.1 if the other Party commits a material breach of this Agreement which is incapable of being remedied;

26.2.2 if the other Party commits any other material breach of this Agreement and fails to remedy the breach within a reasonable time (which shall not be less than 30 days) after receiving written notice to do so;

26.2.3 if the other Party commits a breach of the Principal Agreement or this Agreement, which breach is either incapable of remedy or, if capable of remedy, is not remedied within the period allowed for remedy in terms of such agreement;

26.2.4 if any provisional or final order is made or an effective resolution passed for the winding up of the other Party otherwise than for the purposes of its reconstruction of an amalgamation with another company;

26.2.5 if any provisional or final order is made for the judicial management of the other Party;

26.2.6 if any event analogue to any of the events set out in 26.2.4 and 26.2.5 should occur with respect to a Party in any other jurisdiction.

25. Of interest is that an application of cl 26.2 to sub-clauses 4 and 5 would presumably have been intended to include business rescue proceedings in a foreign jurisdiction while in our jurisdiction judicial management was effectively replaced by the present business rescue regime.

26. Clause 26.3 accepts that cancellation would result in termination but then, instead of proceeding to cl 14.3 which is the operative provision dealing with how one goes about terminating, the parties are taken to cl 8.7.

27. In my view the intention is clear as is the entire structuring. If a party has breached the joint venture agreement[7] in one of the respects set out in cl 26.2, each of which is of a material nature, then the other party should not be prejudiced nor should the party who has breached be able to walk away and once again peddle the mineral rights to someone else in the face of the enormous amount of funds which may have already been spent just to keep the mine operational and maintained. Once again I can see a perfectly rational commercial consideration. Whether it will be held to be *contra bonos mores* in its application is another matter; but as it stands it is commercially rational.

28. While the parties argued about the interpretation of cl 26.3 read with cl 8.7. The assumption made by both parties is that cl 8.2 became operative (whatever its meaning might be) because the agreement had been terminated by one or the other party.

    I proceed to consider the matter on the basis of this argument, although there appears to be a more direct resolution because both parties need to rely on the breach provisions under cl 26.3 and this does not appear possible by reason of a term in the subsequent Addendum Agreement.

29. There are two methods by which the joint venture can be ended. The one is by cancellation in terms of cl 26 by reason of a breach and the other is by termination in accordance with cl 14.

    It is to be recalled however that a failure to provide matching funding or any funding beyond the initial capital injection of rights or finance does not entitle a party to cancel, claim repayment of the shortfall, or even claim damages for breach- the agreement continues.

30. It is also evident that the breach clause is intended to give a remedy to the innocent party. It therefore cannot provide a benefit to the guilty party by allowing

[7] It may be that the joint venture is a so called relational contract and intended to be of long duration which is one to which a fiduciary relationship based on good faith applies. It is unnecessary to decide the point or to have regard to clauses which disavow that the parties are to be regarded as partners.

that person to invoke the provisions of cl 8.7 which are clearly intended to enable a parson who has performed but who is frustrated by a material breach or failure to inject capital by the other to carry on exploiting the benefits under the agreement.

31. Both parties accepted that there was a breach but said it was irrelevant who breached as the consequent termination triggered the application of cl 26.3 and by association cl 8.7.

    Clause 23.6 provides:

    > *On termination of this Agreement in terms of 26.2, the provisions of 8.7 shall apply mutatis mutandis.*

32. In my view there is a missing step. Clause 26.3 can only be triggered if a party has proven that the other party has committed a fundamental breach. The mere fact that both accept that the agreement has terminated is not enough to trigger cl 26.3: It must be positively asserted that the party seeking to invoke cl 26.3 is the innocent party who was entitled to cancel the agreement on one of the grounds mentioned in cl 26.2.

33. Both parties disavowed that the *lis* before me included determining whether there had been a breach of cl 26.2 let alone who was entitled to the cl 26.2 remedy of cancelation and therefore be entitled to invoke cl 26.3.

    On my reading of that clause as read with cl 8.7, only the innocent party is entitled to the cl 8.7 remedy. I repeat; if cl 26.3 was simply intended to result in a termination then it would have referred to the straight forward provisions of cl 14. It did not. While this appears to be one of the few lapses in the agreement, it is evident that when considered in light of cl 26.1 and its reference to another available remedy under the agreement itself, the word *"termination* "in cl 26.3 is intended to mean "*on exercising the right to cancel this agreement*". The term "*cancel"* is confined to instances where the relationship between the parties is ended as a result of a breach.[8]

[8] See the wording to the preamble of para 26.2 which is limited to a right to *"cancel"* only in cases of breach.

34. There is however a far more direct resolution of the case: Clause 8 of the 2004 Addendum Agreement appears to pose an insuperable obstacle to the arguments advanced by the parties.

    Clause 8 reads:

    > *8.1 If any of the Parties breaches any material provision of this Agreement and, (if such breach is capable of being remedied) falls to remedy the breach within 14 days after written notice has been given by any Party requiring the breach to be remedied, such Party shall be entitled, without prejudice to their rights to take such action as may be available in law, provided that no Party shall be entitled to cancel this Agreement.*
    >
    > *8.2 The Party in default shall be liable for all costs and expenses (calculated on an attorney and own client scale) incurred as a result of or in connection with the default."*

    In other words, cl 8 has superseded and, in doing so, nullified clause 26 in its entirety. Accordingly the only manner of terminating the agreement is by cl 14. This in turn gives greater justification for invoking cl 8.7 in cases where the one party has fallen so far short of meeting its funding obligations that it has contributed no more than 5% of the total capital requirements while the other party has exceeding its funding commitment by almost double.

35. In my view since the agreement is at an end and since neither party asked me to find that it had lawfully cancelled the agreement under cl 26.2, the agreement by default terminated because the parties, for whatever reason, agree that it has. This scenario would be covered by cl 14 1.2 or by reason of an application of ordinary common law consequences

36. It is common cause that the agreement was terminated prior to the commencement of business rescue proceedings. Accordingly it is unnecessary to consider the interesting arguments presented regarding the proper interpretation of s 136(2)(b) of the Companies Act.

    I am uncomfortable with the wording of the second prayer if cl 14.3 does impose what may be interpreted to be residual obligations (either because the agreement was terminated in circumstances to which cl 14.3 apply or under the common

law[9]). This is so because the parties did not deal with cl 14.3 in the context of whether its terms, or the consequences of its application, would result in any residual obligations being imposed as contemplated by s 136(2)(b) of the Companies Act.

COSTS

37. Both parties were in agreement that the joint venture had terminated.

38. I accept that both parties had made *bona fide* attempts at resolving the matter through mediation. Indeed I was asked to hold back on my judgment until further mediation efforts proved unsuccessful.

39. In my view both parties' arguments were unsuccessful for reasons that I have given. Accordingly each party is to pay its own costs.

ORDER

40. I accordingly order that:

1. It is declared that the joint venture agreement between the third applicant and the first respondent or their predecessors in title dated 31 July 2001, as amended on 6 October 2004, was terminated between them prior to the business rescue proceedings

2. Each party is to bear its own costs

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SPILG, J

Electronically submitted

[9] The effect would be effectively the same

DATE OF JUDGMENT AND ORDER:	24 November 2020
FOR APPLICANTS:	Adv. A Gautschi SC
	Adv. JG Smit
	Van Wyk Van Heerden Inc.
FOR FIRST RESPONDENT	Adv. BM Gilbert
	David Levithan Attorneys