REPUBLIC OF SOUTH AFRICA

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

Case No: 45971/2018

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

24/02/2020

SIGNATURE DATE

In the matter between:

NAKA DIAMOND MINING PROPRIETARY LIMITED	Applicant
and	
SOUTHERNERA DIAMONDS INC (INCORPORATED IN CANADA)	First Respondent
SOUTHERNERA DIAMONDS PROPRIETARY LIMITED	Second Respondent
THE MINISTER OF MINERAL RESOURCES	Third Respondent
DIRECTOR-GENERAL FOR THE DEPARTMENT OF MINERAL RESOURCES	Fourth Respondent
THE REGIONAL MANAGER, LIMPOPO REGION OF THE DEPARTMENT OF MINERAL RESOURCES	Fifth Respondent

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] The applicant, as part of a diamond mining joint venture, seeks interim relief preserving its interest in the joint venture pending a determination whether the joint venture remains extant. The applicant seeks interim interdictory relief restraining the first and second respondents (who are in fact the same corporate entity)[1] ("*SouthernEra*") from mining and otherwise generally exploiting any precious stones (diamonds) of the Farm Rusland in Northern Province to its benefit and to the exclusion of the joint venture and accordingly the applicant.

[2] SouthernEra contends that the joint venture did not come about between it and the applicant because of non-fulfilment of conditions precedent and if the joint venture did come about, it is no longer extant, for a variety of reasons.

[3] SouthernEra accordingly contends that the applicant has not demonstrated any *prima facie* right to the interim relief and that it has not satisfied the remaining requirements for interim interdictory relief.

HISTORY OF THE JOINT VENTURE

[4] A written joint venture agreement was concluded between the applicant, SouthernEra and De Beers Consolidated Mines Ltd ("*De Beers*") on 31 July 2001 and accordingly gave rise to the Klipspringer Joint Venture ("*the joint venture*").

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[1] The first respondent "domesticated" in terms of section 13(5) to (11) of the Companies Act, 2008 and became the second respondent.

[5] The Joint Venture Agreement ("*JV Agreement*") concluded in 2001 in Sandton regulates the joint venture and provided for the joint venture to exploit certain old order mining rights for the benefit of the parties. Clause 5.3 of the JV Agreement provides for the joint venture to continue for an indefinite period for as long as the diamonds are produced from the properties falling within the ambit of the joint venture. The relevant property in the present matter is the Farm Rusland in the Northern Province.

[6] The JV Agreement also provides for each of the applicant and SouthernEra as the joint venture members to receive a percentage of the nett revenue of the joint venture, which commenced on an equal basis,[2] but which was subject to dilution should any particular party fail to contribute its share of funding to the operations of the joint venture.

[7] Included in the joint venture were any diamonds recovered from any tailings and residues on the property, as is apparent from clause 6 of the JV Agreement.

[8] In terms of the JV Agreement, the parties would make various contributions to the joint venture including by way of various old order mining rights and funding.[3] One of the old order mining rights contributed to the joint venture was that of SouthernEra to mine diamonds on the farm Rusland. It is exploitation of this right that is the subject matter of these proceedings.[4]

[9] In addition, in terms of the JV Agreement, SouthernEra would contribute the use of its plant and infrastructure on the farm Rusland[5] whilst the applicant would

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[2] Clause 5.3.

[3] The contributions are set out in clause 7 of the JV Agreement.

[4] A mining licence was issued in perpetuity to SouthernEra on 19 September 2000.

[5] Clause 7.2, read with annexure G.

contribute development costs up to a maximum of R49.6 million to open up new production levels for underground mining in respect of the Klipspringer right.[6]

[10] The applicant *inter alia*, then known as Steppon Investments (Pty) Limited, pursuant to the JV Agreement contributed the amount of R49.6 million to ramp up new underground mining production levels.

[11] In July 2004 De Beers resolved to dispose of its interest in the joint venture to the applicant's shareholders and so exit. This was done pursuant to an addendum to the JV Agreement, concluded on 6 October 2004.

[12] As part of the exit of De Beers from the joint venture, De Beers was to transfer certain mineral rights ("*the De Beers rights*") to the applicant who in turn was to transfer those rights to the joint venture.[7]

[13] The applicant did not do so and the De Beers' rights, which were old order mining rights, accordingly lapsed in terms of the Mineral and Petroleum Resources Development Act, 2002 ("*MPRDA*") upon the failure of De Beers and/or the applicant to lodge applications for conversion of the old order De Beers' rights into new order mining rights.

[14] Notwithstanding this failure by the applicant to contribute the De Beers rights, the joint venture nonetheless continued.

[15] In April 2009 SouthernEra applied to the relevant body in terms of schedule 2 of the MPRDA to convert the old order Klipspringer right that it had contributed to the joint venture into a new order mining right. This conversion would ultimately prove successful, the Minister on 22 February 2013 converting the old order Klipspringer right into a new order right.

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[6] Clause 7.5.

[7] Clauses 3.3 and 3.4 of the addendum.

[16] By that stage, inclement weather had resulted in the flooding of the underground mining operations, which ceased in December 2010.

[17] It is common cause that the underground mining operations have not resumed.

[18] The joint venture nonetheless continued to process the tailings and residue deposits on farm Rusland.

[19] In around 2013, a London-based mining company, ASA Resource Group plc ("*ASA*") acquired the shareholding in SouthernEra. SouthernEra, for the joint venture and under the control of ASA continued, until at least 2017, to mine the tailings and residue deposits, including through a mine contractor agreement with Greenhurst Mining Exploration (Pty) Limited ("*Greenhurst*"), recognising the joint venture.

[20] During December 2016 or February 2017 SouthernEra for the joint venture under the control of ASA ceased processing the fine tailings through Greenhurst and started the treatment of coarse tailings. This would continue until April 2017.

[21] Throughout this period, 2013 to 2017, SouthernEra recognised the joint venture and the applicant's interest therein and the applicant continued to seek to engage with *inter alia* ASA in relation to its interest in the joint venture, including to addressing the Department of Mineral Resources's ("*DMR*") BEE requirements.

[22] ASA then suffered financial and reputational setbacks and during the course of 2017 was *inter alia* placed under administration in London and sought to dispose of its interest in SouthernEra, firstly in July 2017 to Greenhurst (who itself was liquidated) and then in September/October 2017 to SLA Capital under Mr Johan Buys, the deponent to the answering affidavit ("*Mr Buys*").

[23] Before acquiring SouthernEra, Mr Buys for SLA Capital undertook a due diligence and became aware of the JV Agreement. SLA Capital proceeded with the

acquisition of SouthernEra notwithstanding this knowledge, apparently relying on representations by the sellers (presumably a reference to ASA) that the applicant had no involvement in the mine.

[24] During this period, in July 2017, the applicant, including through its attorney David Levithan Attorneys sought to engage with ASA in relation to its intended disposal, and forewarning of the applicant's interest in the joint venture (although at that stage the transaction and the details thereof were not known to the applicant). ASA's local attorneys Fluxmans responded that they were awaiting instructions. But ASA did not revert.

[25] After conducting its due diligence, SLA Capital acquired SouthernEra in September 2017 and took control of the operations of the Klipspringer Mine during October 2017.

[26] At some point, unknown to the applicant, SouthernEra recommenced mining the tailings, under the control of SLA Capital and Mr Buys, for its exclusive benefit and to the exclusion of the joint venture.

[27] The applicant through its attorney was able to make contact with Mr Buys in August 2018 and called upon SouthernEra to produce information, and to attend an urgent meeting to discuss the parties' respective interests in the joint venture. The applicant also sought an undertaking that mining would cease at Klipspringer.

[28] What would then follow were various attempts by the applicant to extract undertakings from SouthernEra that it would not continue to exploit the diamonds on Rusland for its exclusive benefit and pending the outcome of mediation proceedings.

[29] SouthernEra on 7 August 2018 contended that the JV Agreement had lapsed, alternatively that it was terminating the JV Agreement.

[30] As there was now a dispute between the parties, the applicant called upon SouthernEra to participate in the mediation proceedings provided for in the JV Agreement and to provide undertakings in the interim that mining and other activities at Klipspringer cease. But SouthernEra declined both to participate in mediation or furnish any undertakings.

[31] This resulted in the applicant launching these proceedings on 10 December 2018.

[32] Due to suppressed diamond prices, it appears that SouthernEra ceased processing the tailings and residue deposits on Klipspringer in September 2019.

[33] Supplemenatry affidavits filed shows that, at this stage, there is no active exploitation of the diamonds on the farm Rusland and the mining operations are "under care and maintenance" although should the diamond prices improve, it is the stated intention of SouthernEra to again recommence treatment of the tailings and indeed to recommence underground mining operations.

[34] Further SouthernEra through SLA Capital has engaged and continues to engage with Botswana Diamonds in a potential transaction to exploit the Klipspringer right.

COMMON CAUSE FACTS WHY THE JOINT VENTURE AGREEMENT REMAINS EXTANT

[35] SouthernEra now contends that:

35.1. the initial JV Agreement concluded in July 2001 lapsed because of a non-fulfilment of a condition precedent;

35.2. the addendum to the JV Agreement also did not come about as De Beers did not exit the joint venture;

35.3. for a variety of reasons, the joint venture lapsed, either because of the failure of the applicant to contribute the De Beers' rights to the joint venture and/or a failure to contribute the initial development funding of R49.6 million and/or the failure of the applicant to remain a 100% black owned company and therefore fulfil the DMR's BEE requirements and that this afforded a basis, if not for the joint venture to have lapsed by the operation of law, for it to have been terminated by SouthernEra by reason of breach by the applicant of the JV Agreement.

[36] When SouthernEra applied to the DMR for the conversion of its old order Klipspringer right on 20 April 2009, it in its covering letter to the conversion application to the DMR specifically pointed out that the old order mining right for Rusland was being operated by "*the Klipspringer joint venture*" and relied upon that joint venture for purposes of its undertaking to the DMR in terms of section 2(d) of the MPRDA in relation to its commitment to the BEE requirements of the DMR.

[37] The De Beers' rights lapsed in May 2009 because of the failure of the applicant to apply for the conversion of those old order rights.

[38] The Minister granted the conversion of the Klipspringer right into a new order mining right on 22 February 2013 but before executing the new order mining right required submission of BEE information in order to give effect to section 2(d) of the MPRDA.

[39] What then followed, notwithstanding that the applicant had not contributed the De Beers' rights to the joint venture, were extensive interactions over a number of years, from 2013 to 2017, between the applicant and SouthernEra's various

representatives, including attorneys to address the DMR's BEE requirements. At no stage did SouthernEra seek to resile from the joint venture or rely on the non-contribution of the De Beers rights as a basis to cancel the JV Agreement.

[40] On 15 July 2013 SouthernEra's then attorney Routledge Modise corresponded and engaged with the applicant and the applicant's attorney David Levithan regarding satisfying the DMR's BEE requirements.

[41] Also, with full knowledge that the De Beer's rights had lapsed, SouthernEra:

41.1. on 26 August 2011 invited David Levithan for the applicant to a mine inspection to meet the management and staff and to discuss the impact which the flooding had had on the mine and what steps could be taken to bring the mine back into production;

41.2. continued to send to the applicant copies of broker notes in respect of diamond sales and the diamond register;

41.3. on 27 July 2014 addressed an email to David Levithan for the applicant in which again it is apparent that SouthernEra recognised and expressly confirmed that the parties to the joint venture were the applicant and SouthernEra;

41.4. during October 2015, now under the control of ASA, engaged with the applicant relating to continued participation in the joint venture, particularly in attempting to address the DMR's BEE requirements.

[42] What is also apparent from the SouthernEra financial statements for the years 2015, 2016 and 2017 is that those annual financial statements expressly recognise the continued existence of the joint venture and the applicant's continued interest therein (albeit on a diluted basis, which dilution the applicant disputes).

[43] Even during the course of the disposal of ASA's interests in SouthernEra, albeit without the knowledge of the applicant, neither SouthernEra nor ASA made any attempt to dispute the continued existence of the joint venture. This is so notwithstanding that during the course of the disposal in July 2017 attorney David Levithan for the applicant sought to engage with ASA relating to the disposal (of which the applicant then did not have any details).

[44] Although Fluxmans Attorneys responded for ASA on 8 August 2017 promising to revert, there is no indication in that letter that the joint venture had been terminated or had otherwise come to an end.

[45] Even, nearly a year later, in May 2018, ASA's administrator Mr Duff and Mr Phelps in a letter responding to David Levithan's inquiries, did not mention any termination of the joint venture.

[46] Not only did SouthernEra by its conduct elect not to terminate or otherwise contend for the termination or lapsing of the joint venture whether by way of non-fulfilment of conditions precedent or a failure of the applicant to contribute the De Beers' rights to the joint venture or some other breach of the JV Agreement, SouthernEra's own representative until his resignation in 2015, Mr Tooth, confirmed under oath that SouthernEra had elected not to cancel the joint venture as it was not in SouthernEra's interests to do so.

[47] The first time that any indication is given that the joint venture is no longer in place is in Mr Buys' email to David Levithan on 7 August 2018, in response to David Levithan's demands for undertakings the previous day, contending for a lapsing of the JV Agreement, alternatively seeking to cancel the JV Agreement.

NATURE OF RELIEF SOUGHT

[48] SouthernEra contended that what the applicant seeks to interdict is precisely that which the JV agreement authorises SouthernEra to do. In this regard it relied on the judgment of *Erasmus v Afrikander Proprietary Mines Ltd* [8] where it was held by Trengove J that the reservation of mineral rights entitles the holders of the mineral rights to go upon the property to prospect for minerals and if they find them to sever them and take them away. Thus there could be no question of any joint ownership of minerals unless or until those minerals had actually been severed from the soil. A co-holder of an undivided share in mineral rights, it was argued, should not be restrained from exercising his rights on the mere ground that his other co-holders have not consented or given their authority thereto. A co-owner of mineral rights in respect of coal had applied for an interdict restraining the other co-owner from commencing and carrying on mining operations for such minerals on the property. It was held by Trengove J that the respondent had the right to mine its proportionate share of the coal deposits provided it did so without prejudice to the applicant's rights; on the facts, it had not been shown that such mining operations would detrimentally affect the applicant's rights; and the applicant had another remedy available to him, viz., an action for damages and the application was accordingly dismissed.

[49] Mr Gilbert representing the applicant argued that the terms of the JV Agreement distinguishes this case from the *Erasmus* –case. I agree.

[50] Clause 5.2 of the JV Agreement provides:

'The object of the Joint Venture is to prospect, search for, mine, market, sell and generally exploit precious stones, in particular diamonds, in respect of the KJV Rights, and all matters incidental thereto.'

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[8] 1976 (1) SA 950 (W)

[51] Clause 5.3 (the first 5.3) provides that the joint venture shall continue for an indefinite period (subject to the provisions in the JV Agreement).

[52] Clause 5.3 (the second 5.3) provides:

'Subject to 8, Steppon (the applicant) and SouthernEra shall each be entitiled to receive 50% of the net revenue of the Joint Venture, with effect from the Amendment Date.'

[53] Clearly this means that it is the joint venture that does the mining and that the applicant and SouthernEra thereafter, and subject to clause 8, share in the net revenue of the joint venture. The *Erasmus*-case related to co-owners who were suing one another contending they were entitled to half of the coal in the ground. The court said that they could take their half. The facts under consideration are different. It is the joint venture which is entitled to 100% of the diamonds in the ground and the applicant and SouthernEra are each entitled to 50% of the net revenue.

[54] Clause 9 of the JV Agreement provides for the establishment of a Management Committee which will determine how the joint venture is run. All parties are represented and the applicant is entitled, if the JV Agreement is found to be extant, to participate in the Management Committee.

[55] Clause 10 provides that SouthernEra shall be the manager of the joint venture and '*shall....be subject to such lawful directions as may be given from time to time by the Management Committee and shall not act outside such directions...*'[9]

[56] The right the applicant seeks to protect is the right to participate in the Management Committee and to have a say in how the mine is run, not the right to 50% in the diamonds, not the right simply to 50% of the revenue but the right to participate in the joint venture as contemplated in the JV agreement.

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[9] Clause 10.2.1 paginated p 97

WHICH TEST TO APPLY

[57] The order I am requested to make is not definitive of the parties' legal rights. The order does not determine finally, whether the JV Agreement is in place. As such, the relief is not final as it does not have any final effect on the underlying, but disputed right, of SouthernEra to contest whether the JV Agreement is in place.[10] That being so, all the applicant need show is a *prima facie* right, though open to some doubt ie the *Webster v Mitchell* [11] test as opposed to the *Plascon-Evans*[12] test.

THE PRIMA FACIE RIGHT

[58] SouthernEra contends that there is no proof of fulfilment of the condition precedent in the JV Agreement requiring approval in terms of the Competition Act, 1998.

[59] The applicant demonstrates in its replying affidavit that the condition precedent had been fulfilled.

[60] SouthernEra also contends that the exit of De Beers from the joint venture pursuant to the addendum signed in 2004 was conditional and that such exit did not come about as there is no evidence that the conditionality was satisfied – and so De Beers did not exit the joint venture. That conditionality was that a sale agreement between De Beers and the applicant pursuant to which De Beers sold its shares in the applicant to the remaining shareholders in the applicant itself become unconditional.[13]

[61] De Beers, factually, did exit in 2004 and has not been present since.

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[10] See the unreported decision of Keightley J of *Andalusite Resources (Pty) Ltd v Investec Bank Ltd & 1 other*, dated 19 June 2019, case no: 18167/2019 at paras [20] & [21]

[11] 1948 (1) SA 1186 (W)

[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A) at 634E – 635D

[13] Clause 3.1 of the addendum read with clause 1.1.9.

[62] The applicant further demonstrates from the available evidence that De Beers did cede its interest in the joint venture to the applicant, and so exit the joint venture. Accordingly the condition precedents to the sale agreement must have been fulfilled, and if not, they were certainly waived.

[63] Notably, SouthernEra does not have any positive evidence to suggest that the conditions precedent to the sale agreement were not fulfilled and so cannot gainsay what is said by the applicant as to their fulfilment. What SouthernEra contends is that it is not open to the applicant to make averments regarding the fulfilment of the conditions precedent in its replying affidavit and that accordingly the application falls to be dismissed because of the failure of the applicant to allege fulfilment of the conditions precedent in the founding affidavit.

[64] The applicant explains in its replying affidavit why the deponent to its founding affidavit did not reasonably anticipate in preparing the founding affidavit that the respondent would seek to challenge the efficacy of the JV Agreement and the addendum thereto in circumstances where the parties have recognised the continued existence of the joint venture since 2001 and that De Beers had exited from that joint venture in 2004.

[65] The applicant's deponent also explains the extensive search of records that it had to undertake upon receipt of SouthernEra's answering affidavit raising a possible non-fulfilment of the conditions precedent of agreements dating back to 2001 and 2004 in order to adduce proof of their fulfilment, in circumstances where the applicant did not reasonably anticipate it would need to do so.

[66] In my view, the applicant has advanced circumstances why this court in its discretion should permit the allegations relating to the fulfilment of the conditions

precedent to feature in the replying affidavit. This is particularly so where there was no basis for the respondent to contest their non-fulfilment in the first instance.[14]

[67] SouthernEra contends that as there is no evidence that the applicant contributed its initial development funding of R49.6 million as required in terms of clause 7.5 of the JV Agreement, the applicant has not performed its "*antecedent and reciprocal obligations*" and that it therefore cannot assert an interest in the joint venture.

[68] The applicant did contribute that funding of R49.6 million.

[69] SouthernEra also contends that because the applicant did not contribute the De Beers' rights to the joint venture, as required in terms of the addendum, that this constitutes a reciprocal obligation required for the applicant to participate in the joint venture.

[70] SouthernEra also contends that this breach of the amended JV Agreement also gives a basis for it to cancel the JV Agreement, as it contends it did on 7 August 2018.

[71] The De Beers' rights lapsed in May 2009 and SouthernEra nonetheless with the full knowledge of that lapsing persisted with the joint venture, took no steps to cancel the joint venture, whether for breach or otherwise. Rather, as appears from the evidence of Mr Tooth, the then representative of SouthernEra, SouthernEra made the deliberate decision not to terminate the JV Agreement.

[72] It is not now open for SouthernEra to contend that the failure of the applicant to contribute the De Beers' rights resulted in the JV Agreement lapsing and

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[14] As to the exercise of the court's discretion, see *Markus v Universale Produkte (Pty) Limited* 1962 (3) SA 242 (W) where the court pointed out that the rule against including material in a replying affidavit that should perhaps have been in a founding affidavit is not a hard and fast rule and that a court has a discretion to allow such material.

disentitling the applicant to participate therein. Even less is SouthernEra now entitled, nearly a decade later on 7 August 2018, to rely on that contended for breach to terminate the JV Agreement.

[73] Clause 8.1 of the addendum in any event precludes cancellation for breach of the obligations in the addendum, including the obligation of the applicant to contribute the De Beers' rights to the joint venture.[15]

[74] SouthernEra also contends that the joint venture terminated by law because of some or other impossibility of performance, whether through the inability of the applicant to contribute the De Beers' rights or to fulfil the DMR's BEE requirements.

[75] The fact that the parties continued to implement the joint venture demonstrates that there was no such impossibility, or at least not the type of impossibility that amounted to complete impossibility that precluded the continued existence of the joint venture.[16] The joint venture has continued to be implemented for nearly a decade after the De Beers' rights had lapsed in 2009. Insofar as the DMR's BEE requirements are concerned, there is no evidence that even now the DMR's BEE requirements cannot be satisfied through constructive engagement between the parties and the DMR. And to the extent that there was some or other impossibility of performance by the applicant, which is disputed by the applicant, SouthernEra nonetheless elected to abide the JV Agreement.

[76] Notably, the addendum to the JV Agreement in clause 3.3 concluded during October 2004 contemplates that it may not be possible for De Beers to transfer its rights to the applicant and accordingly for the applicant to contribute the De Beers' rights to the joint venture, particularly with the MPRDA having just become effective

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[15] Clause 8.1.

[16] A distinction exists in our law between complete impossibility, and partial impossibility where the performances under the agreement are divisible: see, for example, *Joubert v Bester* 1977 (4) SA 560 (T) at 567E to 568F.

on 1 May 2004. As the parties contracted on the basis that there may be such an impossibility to transfer the De Beers' rights and foresaw that impossibility, SouthernEra cannot seek to escape the joint venture because of that impossibility if it arises.[17]

[77] In any event, SouthernEra's reliance on impossibility of performance as bringing an end to the joint venture by "the operation of law" is incorrect. The JV Agreement would only come to an end by the operation of law (in contrast to at the election of a contracting party) because of supervening and complete impossibility of performance (assuming that objectively there is such impossibility of performance) where that impossibility is not caused by one of the parties. But SouthernEra's case is that applicant caused the impossibility of performance, whether by failing to contribute the De Beers rights or diluting its BEE shareholding. That would simply constitute a form of breach entitling SouthernEra to its usual contractual remedies for breach but it does not automatically terminate the JV Agreement.

[78] SouthernEra also contends that the applicant has failed to contribute its share of the funding with the result that its participation and interest may have dropped below 5%. The contractual prerequisite necessary for such a funding obligation to arise on the part of the applicant did not come about and in the circumstances there was no obligation on the applicant to make any funding available and accordingly there was no prospect of it being diluted, let alone diluted to below 5%.

[79] Indeed, SouthernEra in its most recent annual financial statements as furnished to the applicant, for the financial year ended 31 March 2017 recognises the continued existence of the joint venture.[18] The preceding annual financial years

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[17] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1206G to 1207I.

[18] Annual financial statements for 2017.

2014, 2015 and 2016 show a participation interest of the applicant in the joint venture of 30.23%, 29.53% and 28.96%. Although the applicant contests that this dilution in its initial participation interest from 50% is justified as the provisions of the JV Agreement triggering a funding requirement and a subsequent dilution have not been fulfilled, what these financial statements do demonstrate is that even on SouthernEra's own version there is no prospect that the applicant's participation interests was reduced to below 5% resulting in an exit of it from the joint venture in terms of clause 8.7 of the JV Agreement.

[80] The applicant also persuasively demonstrates in its replying affidavit how Mr Buys's calculation for SouthernEra of the dilution is incorrect.

[81] SouthernEra further contends that the failure to make a further contribution to funding, assuming such an obligation to have arisen, gives a basis for the agreement to be terminated or at the very least an obligation on the part of the applicant to first provide such funding failing which it cannot participate in the joint venture. But this does not appear in the JV Agreement, the penalty for a party not funding its *pro rata* share of any funding being a dilution of its participation interest in the joint venture.

QUALITY OF THE EVIDENCE ADDUCED IN OPPOSITION

[82] Perhaps one of the most damning features of SouthernEra's opposition is the following: the deponent to its answering affidavit, Mr Buys, has no personal knowledge of any of the relevant facts. Mr Buys is a recent purchaser of SouthernEra, he only became a director on 10 October 2017, and so has no personal knowledge dating back to the relevant period to which SouthernEra's defences relate.

[83] Mr Buys cannot gainsay this evidence by Mr Tooth (the mine manager) and so attempts to challenge this evidence on the basis that it constitutes inadmissible hearsay. But this challenge to the evidence of Mr Tooth as inadmissible hearsay is unsustainable because clearly Mr Tooth had personal knowledge of what had transpired within SouthernEra and there is no reason on the papers as to why he would not have had the personal knowledge that he contends for. For example, he as the general manager for SouthernEra is the signatory to the letter of 24 July 2014 confirming the continued existence of the joint venture.

[84] The deponent to the applicant's founding affidavit Mr Vusimuzi Nkosi, has been involved in the joint venture almost from inception and in addition is supported by the evidence of SouthernEra's previous representative in the joint venture, until 2015, Mr Tooth plus a whole host of contemporaneous supporting documents.

[85] The veracity of the evidence of the applicant as contrasted to the evidence of SouthernEra in assessing whether the applicant has established a *prima facie* right although open to some doubt, in the joint venture, does not weigh insignificantly.

THE REMAINING REQUIREMENTS FOR INTERDICTORY RELIEF

[86] There is no real dispute that there is a reasonable apprehension of irreparable harm. SouthernEra, under SLA Capital and Mr Buys, has refused to furnish any undertakings that when diamond prices improve, that it will not recommence exploiting the diamonds reserves on the Rusland farm, whether in the tailings or underground. Further, neither SouthernEra nor Botswana Diamonds dispute that they are in negotiations for the disposal of SouthernEra's interest in the Klipspringer mining right or at the very least a transaction to the prejudice of the applicant's interest in the joint venture to exploit that right.

[87] The applicant does not have another satisfactory remedy. Although the respondent contends that the applicant has an alternative remedy in that it can in due course effectively claim its share of any profits according to whatever participation interest it may have had in the joint venture, this presupposes the recognition of the JV Agreement and the joint venture remaining extant. Once the Klipspringer right is alienated, if interim relief is not granted, there will be no prospect of the applicant being able to seek specific performance of the JV Agreement, including the various accounting mechanisms therein that SouthernEra contends can be used to quantify such a claim. What in reality SouthernEra is asserting is that the applicant has a claim in damages, based upon on what profit, if any, was realised and in which the applicant would have shared by way of its participation interest.

[88] But SouthernEra is both commercially and factually insolvent and would be unable to satisfy any claim that the applicant may have against it. This is apparent from SouthernEra's own financial information as annexed to its answering affidavit.[19] Although SouthernEra contends that it has immovable property that is sufficient to settle any monetary claim apparently worth at least R11.6 million, the valuation annexed by SouthernEra in support thereof, suggests that the property may be owned by someone else, is incomplete in various respects and is expressly qualified so as to virtually denude it of any evidential value.

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[19] This is based upon its most recent annual financial statements made available for 2017 and its profit and loss schedule for the period 1 April 2017 to 7 August 2018.

[89] In any event, the applicant is entitled to the benefit of its bargain and to specific performance of the JV Agreement and is not obliged to accept a substitute by way of a monetary claim, whether for damages or otherwise.[20]

[90] SouthernEra's suggested alternative remedy is also only backward looking, at a recovery by the applicant of what profit it would have earned in the event it can prove that the joint venture persisted. But the applicant is entitled to benefit from the exploitation of the Klipspringer right prospectively, and if SouthernEra is permitted to dispose of that mining right, it will not be in a position to make available any information relating to the continued exploitation of the mining right in the hands of a third party.

[91] SouthernEra contended that the applicant has an alternative remedy in that clause 8.5 provides that any dispute relating to the participation interest shall be referred to KPMG for determination. As Mr Gilbert correctly argued, that relief is premised on a finding or acknowledgement that the JV Agreement is extant which is being disputed and has been since August 2018.

[92] The balance of convenience favours the granting of the relief as the prejudice that the applicant will suffer if the interim relief is not granted far outweighs the prejudice that SouthernEra will suffer if interim relief is granted. Since September 2019 no mining has taken place on the Rusland farm, including any mining of tailings or residue stockpiles. The mine was put under care and maintenance from November 2018 until May 2019 and again during September 2019 to date. Although SouthernEra seeks to make out a case that if the interdict is granted it will have to incur costs of mothballing the mine and retrenching some thirty-four employees, the

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[20] This was reiterated by the Supreme Court of Appeal in *V&A Waterfront Properties (Pty) Limited v Helicopter and Marine Services (Pty) Limited* 2006 (1) SA 252 (SCA), where the court in paragraph 23 found that a contracting party is entitled to enforce its bargain and need not be content with damages as an alternative remedy.

mine has not operated and produced any diamonds in any event since September 2019 and is on "care and maintenance", which their financials show, costs them less than running the mine. Accordingly, the grant of the interim relief will not disrupt the *status quo* that has prevailed since September 2019. The interdict will not stop an operational mine.

[93] Further, Mr Buys for SLA Capital, conducted a due diligence before purchasing the interest in SouthernEra, was aware of the existence of the JV Agreement and nonetheless went ahead with the transaction. SouthernEra under SLA Capital and Mr Buys can hardly now complain when the risk that they took that the applicant may seek to insist upon the continuance of the joint venture materialises.

[94] Also, SouthernEra had the opportunity to curtail the duration of the interim interdict by participating in the mediation process provided for in the JV Agreement, but did not do so nor did it engage in any alternate dispute resolution process that would have curtailed prolonged litigation.

[95] The applicant in its replying affidavit again indicated that it was prepared to agree to a mechanism to expedite the appointment of a mediator but still SouthernEra failed to co-operate.

[96] Finally, SouthernEra contended that the applicant had no involvement in the mining operations in the day-to-day activities at the mine for in excess of 10 years. For it to contend that the mining operations cannot continue without its imprimatur, is, so the argument ran, not only misconceived but, its unreasonable delay is a ground for refusing the relief that it seeks on its its own.[21]

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[21] An interlocutory interdict may be refused if the applicant has delayed unduly before applying. An application for an interdict *pendente lite* from its very nature requires the maximum expedition from an applicant, who may forfeit his right to temporary relief if he delays unduly in bringing the interim

[97] Although factually correct ie that applicant had not been involved in the day-to-day running of the mine, the existence of the joint venture was never disputed. It was only on 7 August 2018 that this occurred and the application was launched in December 2018. I do not consider 4 months, in the context of this case, to constitute an undue delay.

CONCLUSION & ORDER

[98] The applicant has demonstrated the requirements for interim interdictory relief.

[99] I accordingly grant the following order:

99.1. Pending the final determination, by way of mediation or an action to be instituted by no later than 1 June 2020, of the dispute/s between the applicant and the first respondent and/or second respondent, whether the joint agreement, as amended, between them (which is annexed to the founding affidavit as 'FA8' and 'FA 9' ["the JV Agreement"]) and/or the joint venture arising pursuant thereto remains extant, and any related disputes:

99.1.1. Interdicting and restraining the first and second respondent and any person acting by, through or under them from prospecting, searching for, mining, marketing, selling and generally exploiting any precious stones on the Farm Rusland, No. 93, Registration Division KS, Magisterial

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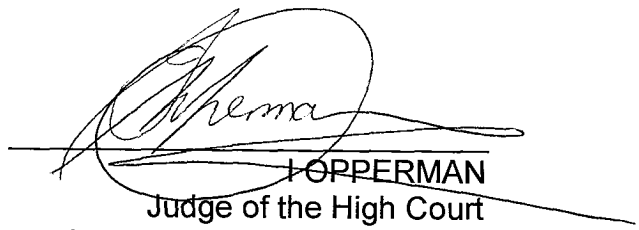
proceedings to finality, see *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C).

District of Mokopane, Northern Province, measuring 1168,7664 in extent ["the Property"];

99.1.2. Interdicting and restraining the first and second respondent from disposing of its interest in the joint venture established in terms of the JV Agreement or of any interest in the mining right in respect of diamonds on the Property;

99.1.3. Directing the first and second respondents to upon forty-eight (48) hours notice afford access to the applicant's representatives to the mining operations on the Property.

99.2. The costs of this application are reserved for the mediation or the action to be instituted.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant: Adv BM Gilbert
Instructed by: David Levithan Attorneys
Counsel for the 1st and 2nd respondents: Adv A Botha SC and Adv C Gibson
Instructed by: Meise Nkaiseng Inc
Date of hearing: 4 December 2019
Date of Judgment: 24 February 2020