

/LVS
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHETHER IS NOT APPLICABLE
(1) REPORTING ✓
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED.
DATE: 15/11/10
SIGNATURE

DATE: 12 November 2010
CASE NO: 35078/06

In the matter between:

LITHOS CORPORATION OF SOUTH AFRICA (PTY) LTD PLAINTIFF

VS

KUMBA RESOURCES LTD DEFENDANT

JUDGMENT

BOTHA J

In this matter the plaintiff, Lithos Corporation of South Africa (Pty) Ltd, applies for an amendment to its particulars of claim. The amendment is opposed by the defendant, Kumba Resources Limited, (Kumba).

The summons was issued in October.

The claim is for damages for breach of contract alternatively for delictual damages.

The particulars of claim as they stand now, can be briefly summarized as follows:

1. On 24 March 1997 the party from whom the plaintiff acquired its rights, Corporation Lithos, concluded a written memorandum of understanding with Miferso, a Senegalese state enterprise, regarding a mining project called the Faleme project.
2. In terms of the memorandum, a joint venture was to be the vehicle of the project. Corporation Lithos would be entitled to acquire an 80% interest in the joint venture.
3. The memorandum came into force on 24 March 1997 and was to remain in force for one year, but reviewable after evaluation.
4. The memorandum was renewed from time to time.
5. On 7 December 2006 the plaintiff and Miferso entered into a written memorandum in which the existence of a joint venture in which the plaintiff would have an 80% interest was confirmed.
6. The plaintiff approached the defendant for the purpose of it joining the project. To this end a confidentiality agreement was concluded on 4 January 2002. Pursuant to that agreement confidential information regarding the project was imparted to the defendant.
7. On 16 March 2002 the plaintiff and defendant entered into written heads of agreement in terms of which the defendant would do certain studies for the Faleme project. In the agreement the plaintiff warranted that it had an 80% interest in the Faleme project.

2. On 22 March 2002 the plaintiff and Miferso entered into a written memorandum of agreement in terms of which the plaintiff undertook to find a strategic partner for the Faleme project. The plaintiff and its partner would have an 80% interest in the project. This agreement, POC12, was to endure for a year, expiring on 21 March 2003.

3. On 14 August 2003 the plaintiff and defendant concluded a written agreement. Clause 7.1 of the agreement, which states that the plaintiff warranted that it had an 80% interest in the Faleme project, did not correctly reflect the agreement. It should read that the plaintiff was entitled to acquire an 80% interest in the Faleme project. In terms of clause 9.1 of the agreement the defendant would acquire 75% of the plaintiff's 80% interest in the Faleme project for an amount of US \$3.48 million. It is alleged that clause 9.1 did not correctly reflect the agreement to the extent that it stated that the plaintiff already had an 80% interest in the Faleme project. Accordingly rectification of clause 9.1 was also asked. It was also agreed in the agreement that the parties would use their best endeavours to conclude an agreement with Miferso within 120 days. In terms of the agreement the defendant undertook not to approach Miferso within that period with a view to concluding a contract in respect of the Faleme project to the exclusion of the plaintiff. It was further agreed that if an agreement with Miferso could not be

concluded within 120 days, the agreement between the parties would lapse and that the defendant should not for 36 months thereafter be entitled to approach Miferso with a view to conclude a contract relating to the Miferso project without involving the plaintiff. It is then alleged that the defendant did so approach Miferso before the expiration of 36 months.

10. It is alleged that the defendant on 31 October 2003 repudiated the agreement dated 14 August 2003, which repudiation the plaintiff accepted.
11. It is alleged that but for the defendant's repudiation the plaintiff, the defendant and Miferso would have concluded an agreement in terms of which the plaintiff would have acquired a 20% interest in the Faleme project.
12. In the alternative the plaintiff alleges that the defendant intentionally or negligently prevented it from entering into an agreement in terms of which it would have acquired at least a 20% interest in the Faleme project.
13. It is then alleged that as a result of breach of contract, alternatively breach of duty or unlawful competition, the plaintiff suffered damages that are estimated to amount to US \$421 million.

In the notice of amendment the plaintiff seeks a number of amendments. I shall only concentrate on those that remained contentious.

In paragraphs 8, 9, 10, 11 and 12 of the notice of amendment the plaintiff seeks to delete the allegations that clauses 7.1 and 9.1 of the contract on 14 August 2003 had to be rectified.

In paragraph 4 of the notice of amendment it seeks to introduce new paragraphs 12E, and 12F.

In the proposed paragraph 12E it is alleged that during or about March 2003 the plaintiff's rights and obligations continued to be of full force and effect including:

- (a) the obligation to find a strategic partner;
- (b) that the construction of a railway and a port would be part of the project;
- (c) that a tripartite agreement would have to be concluded by the plaintiff, defendant and Mifereso. Until then the plaintiff would have an 80% interest in the project.

It is alleged that the plaintiff's rights were tacitly renewed. In this regard the plaintiff relies *inter alia* on the agreement of 22 March 2002 and a meeting held on 22 April 2003.

In the proposed paragraph 12F the plaintiff refers to a meeting held on 22 April 2003 at which the plaintiff and Mefeso agreed to conclude a tripartite agreement and re-affirmed the plaintiff's rights. It is alleged that the parties agreed to structure their involvement by creating two special purpose vehicles

(SPV 1 and SPV 2). Plaintiff would have a 100% interest in SPV1 and an 80% interest in SPV2.

In paragraph 7 of the notice of amendment the plaintiff seeks to substitute new paragraphs 22 to 36 for the paragraphs dealing with the alternative delictual claim.

These prayers give more particulars of defendant's approaches to Miferso, which culminated in an agreement between the defendant and Miferso to the exclusion of the plaintiff on 7 July 2004. In paragraphs 34.20 and 34.21 it is alleged that the defendant in so doing breached certain articles of the Senegalese Code of Civil and Commercial Obligations, and the Senegalese Unfair Competition Act of 1994.

I can now turn to the objections to the proposed amendment:

1. There is an objection against the lateness of the amendment and the absence of an explanation in paragraphs 1 and 2.
2. There is an objection against the proposed paragraph 12E.1 on account of the fact that the relevance of the date March 2003 is not explained and otherwise seems to be in conflict with the agreement of 22 March 2002, which expired on 22 March 2003 (paragraph 3).
3. There is an objection against the proposed paragraph 12E.2 on the basis that it is not clear what the source of the plaintiff's 80% interest in the Miferso project was (paragraph 4).

4. There is an objection against paragraph 12E.3 of the proposed amendment which seems to be based on the use of the words "Plaintiff's Rights) as opposed to "plaintiff's rights". In respect of this objection, as well as in respect of some other ones relating to minor blemishes, the plaintiff undertook to remove the blemishes. The defendant accepted that.
5. There is an objection against paragraph 12E.4 of the proposed amendment on the basis that the allegations are vague or do not justify the conclusions sought to be drawn from them. It is also alleged that the reference to the agreement of 22 March 2002 is confusing in view of the fact that it expired on 21 March 2003 (paragraph 6).
6. There is an objection against paragraph 12F of the proposed amendment on the basis that the allegation of the conclusion of an oral agreement on 22 April 2003 is not *bona fide*, amongst others because the minutes of the meeting on that day do not record it (paragraph 7).
7. There is an objection against the proposed paragraphs 12F.1 – 12F.3 on the basis that no details of the proposed tripartite agreement are given (paragraph 8).
8. There is an objection against the proposed paragraph 12F.4 on the basis that the particulars of how the plaintiff and Miferso would structure their involvement were vague and embarrassing (paragraph 9).

9. There is an objection against the paragraphs in the proposed amendment relying on the Senegalese Code and Unfair Competition Act. It is alleged that they do not comply with Rule 18(4) and that the defendant therefore cannot plead meaningfully to them (paragraph 12).
10. There is an objection to paragraph 34.6 of the proposed amendment on the basis that the allegations of the breach of a contractual duty cannot co-exist with the allegations of the breach of a legal duty.

In the affidavit in support of the application for the amendment the plaintiff's attorney, Mr Ndebele, made the following allegations:

- (a) that the plaintiff seeks to amplify the allegation that the memorandum of March 1997 was renewed from time to time;
- (b) that it seeks to elaborate on the basis of the delictual claim;
- (c) that the defendant does not take issue with the withdrawal of the claim for rectification, but merely requires an explanation.

He referred to the report of the expert report of Dr Thomashaussen on aspects of the Senegalese law.

He contended that the amended particulars should be read in context and that in certain respects the plaintiff's could obtain clarification through a request for further particulars for trial.

In respect of the charge, as he perceived it, that the alleged oral agreement on 22 April 2003 was a recent fabrication, he referred to a letter dated 4 October 2003 addressed by Mr Gyenbie to the Senegalese Minister of Mines and Energy (Mr Gyenbie was the person who represented the plaintiff on 22 March 2002 and on 22 April 2003). In the letter he referred to an agreement in April 2003. He also referred to the minutes of the meeting of 22 April 2003, JN5. It records that the agreement between the plaintiff and Miferso "will expire on 22 March 2003" but ends with the following statement: "The principle chosen by Miferso still remains: Lithos and Kumba 80% Miferso 20% of which 10% is for "carried interest"."

He referred to a letter dated 8 April 2003 by Miferso to Kumba, JN7 which refers to the need to create SPV1 between Kumba and the plaintiff.

He referred to the fact that the plaintiff on 22 February 2010 came into possession of a memorandum to the Senegalese Minister of Energy and Mines. This document led the plaintiff to believe that there was a conspiracy between Kumba and Miferso, thus necessitating an expansion of the delictual claim.

In respect of the allegation that contractual and delictual claims cannot co-exist he contended that Senegalese law, being the *lex loci delicti* would apply.

In respect of the withdrawal of the claim for rectification he pointed out that new senior counsel was engaged when the plaintiff prepared for the trial set down for March 2010. On 22 February 2010 some 900 documents were discovered by the defendant. The consideration of these documents led to the amendment. New counsel was of the view that the facts did not support a claim for rectification.

In an answering affidavit the defendants' attorney, Mr Herholdt, challenged the bona fides of the plaintiff in bringing the amendment at such a late stage. He referred to previous amendments, one of which was withdrawn after an objection.

He contended that it was not proper for the plaintiff to blame the claim for rectification on counsel. It should have explained the situation through its representative, Mr Gyenbie. He also made the point that Mr Gyenbie was the person who should depose about the alleged oral agreement on 22 April 2003. In respect of that agreement he pointed out that it differed from the minute of the meeting, JN5. He referred to the fact that in a previous amendment the plaintiff sought to rely on a partly written, partly oral agreement on 22 April 2003. In respect to Dr Thomashausen, he submitted that his report is not under oath.

The plaintiff's replying affidavit was made by Mr Gyenbie.

He explained that the need for an amendment became apparent during consultation with the plaintiff's new counsel. The reason for the claim for rectification was that he was advised that the written agreement did not record the agreement correctly. It was considered to abandon the claim for rectification when it became apparent, especially from discovered documents, that it was not necessary.

With regard to the meeting of 22 April 2003, he said that the meeting was convened because the defendant wanted to change the proposed structure. He referred to certain correspondence including JN7 and a letter from Miferso dated 20 March 2003, AG4, in which Miferso, with a view to the imminent expiry of the agreement of 22 March 2002, suggested that the plaintiff approach it to negotiate a new form of partnership involving Kumba.

In respect of that meeting he pointed out that the minute re-affirmed the plaintiff's rights. He denied that the allegation of an oral agreement on 22 April 2003 is a recent fabrication.

Mr Burger SC, who with Mr Turner, appeared for the defendant, argued in respect of the withdrawal of the claim for rectification that it cannot be *bona fide*. Although counsel drafts pleadings, he must do so on facts supplied by the client. The facts cannot change.

In respect of the amendment he submitted in general that the plaintiff must prove that the amendment would present the court with a triable issue.

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He cast doubt on the bona fides of the plaintiff and referred in particular to its changes of stance in respect of the meeting on 22 April 2003.

He paid particular attention to the proposed paragraph 12.E. He pointed out that the reference to March 2003 was confusing in view of the expiry of the agreement of 22 March 2002 on 21 March 2003. Then the rights that allegedly existed or continued to exist included some rights that clearly pre-dated the 21st March 2003 whilst others seem to relate to the period after 21 March 2003.

Mnr Naidu SC, who, with Mr Bremridge, appeared for the plaintiff, argued that the proposed amendment introduced triable issues. He conceded that the reference to March 2003 in the proposed paragraph 12.E could be confusing. He argued in general that it was not for the court to anticipate issues that will have to be decided in the trial.

I have not summarized all the objections in the notice of objection. They go into very fine detail. In general I want to say that mostly they display an overfastidious reading of the amendment. In many cases clarification can properly be obtained by means of a request for further particulars for trial. In the case of facts on which the plaintiff wishes to rely in support for its delictual claim, I do not think that they need to be stated with the particularity of contractual terms. The same applies to the terms of the proposed tripartite agreement which, by definition, was not yet in existence.

The explanation for the abandonment of the claim for rectification will not satisfy a purist, but it is plausible. Whatever the case may be, I see no point in forcing the plaintiff to adhere to a claim that it no longer espouses. After all, the defendant cannot complain if the plaintiff is held to the wording of clause 7.1 of the agreement of 14 August 2003.

It is so that having abandoned the claim for rectification the plaintiff can only get round clause 7.1 if it can allege and prove an agreement in terms of which it had an 80% interest in the Faleme project. It is so that to do so it will have to be able to allege and prove that in spite of the expiry of the agreement of 22 March 2002 on 21 March 2001, there was a new agreement to the effect that the 80% interest in the Faleme project would endure or be renewed. That is what it attempts to do by its reliance on an oral agreement concluded on 22 April 2003. It is exactly the plaintiff's agreement that the alleged agreement was an invention, born out of need.

I do not think that I can make such a finding. In the end Mr Gyenbie did make an affidavit. Then, as Mr Naidu, correctly pointed out, there are objective *indicia* that Miferso intended to continue to recognize the plaintiff's right to an 80% interest in the Faleme project after the demise of the March 2002 agreement and did indeed so after 21 March 2003. In this regard I can refer to JH5, JN7 and AG4.

In my view all this supplies a sufficient basis for the court to accept that the reliance on an oral agreement concluded on 22 April 2003 has a basis in fact and that it therefore is a triable issue.

It may be that the alternative delictual claim is incompatible with the contractual claim. My problem is that the alternative claim is there and the defendant has pleaded to it. In the circumstances it makes little sense to disallow an elaboration of the claim on the basis that the claim is excipiable.

The result is that I am of the view that the amendment should be allowed in respect of all the proposed paragraphs except paragraph 12.E. In respect of that paragraph the objection is upheld. I accept that that will have the effect that references to paragraph 12.E.4 elsewhere, such as in paragraph 12F.3, will have to be deleted.

There are minor issues in respect of which, as I have indicated, the plaintiff has accepted that the objections were well founded and where it undertook to rectify the sources of complaint. One such instance is the reference to the applicable sections of the Senegalese Unfair Competition Act. It is not necessary to refer to these matters any further. I accept that the replacement pages will set them right.

The result is that the defendant has had partial success, which is enough to entitle it to its costs. I also accept that the defendant's opposition to the amendment was not frivolous.

The following order is made;

1. Plaintiff's amendment dated March 2010 is allowed except for the proposed paragraph 12.E thereof.
2. Plaintiff must pay defendants costs of opposition which costs shall include the costs of two counsel.



C. BOTHA
JUDGE OF THE HIGH COURT