

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
Date: 26 March 2024 Signature: [Redacted]	

CASE NO: 14724\2022

In the matter between:

MANGANESE MINERALS (PTY) LTD

APPLICANT

and

ENABLIQ MINING PLANT (PTY) LTD

RESPONDENT

Coram: Dlamini J

Heard: 22 January 2024 (Courtroom 9B)

Delivered: 26 March 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, uploaded to *CaseLines*, and released to SAFLII. The date and time for hand-down is deemed to be 10:30 on 26 March 2024

JUDGMENT

DLAMINI J

INTRODUCTION

- [1] In this application, the applicant seeks a declaratory order that a written agreement to mine minerals is void *ab initio* due to the non-fulfillment of its suspensive conditions.
- [2] The application concerns two companies, the applicant (Manganese Minerals) and the respondent (Enabliq Minerals) that are involved in the mining industry, specifically the mining and selling of manganese, ("the Parties").
- [3] The applicant is a holder of a mining right that was granted to it and executed by the Department of Mineral Resources under reference number NW30/5/2/476MR.
- [4] The respondent was appointed as the contractor to mine for minerals, described in the agreement as the Services.

BACKGROUND FACTS

- [5] The facts underlying this dispute are largely common cause.
- [6] On or about 9 January 2021, the applicant and the respondent entered into an agreement. The purpose of the agreement was the regulation of the respective parties' rights and obligations therein. The material terms of the agreement were the following; -

6.1. The respondent will source funding for the resumption of mining manganese at the applicant mine.

6.2. The applicant appointed the respondent as a sole and exclusive contractor to conduct the mining activities, including adding additional minerals in terms of a Section 102 application if required on the property in the name of the applicant under the mining right.

- [7] The agreement would commence on the Effective Date and would continue until the respondent gave written notification to the applicant of no less than 30 days of cancellation of the agreement.
- [8] On 2 March 2021, the parties entered into a written addendum, novating the provisions of clause 10,4 of the agreement.
- [9] The applicant testified that the respondent was supposed to in terms of clause 21.2, obtain finance for the payments as specified in clause 10 of the agreement within 120 days from the date of signature that is by 9 January 2021. The applicant avers that even on a benevolent interpretation that the date of signature could be extended to March 2021, when the addendum had been signed, would in any event result in the relevant suspensive conditions having to be fulfilled by 2 July 2022, which did not occur.
- [10] Therefore the case made by the applicant is that to date the respondent has not obtained finance for such payments, accordingly, the applicant contends that the agreement is void *ab initio*.
- [11] The respondent denies that the agreement is void *ab initio* on various grounds and opposes this applicant.

ISSUES FOR DETERMINATION

- [12] The question that falls to be determined is whether the respondent has complied with the suspensive condition and in answering the question this court is called upon to decide whether it should take into account the pre-agreement and post-agreements of the parties. Further, whether the non-variation and whole agreement clauses are applicable in this case.
- [13] The applicant submits that the respondent has failed to fulfill the suspensive condition of the contract timeously or at all. Manganese Minerals denies that it had purposely made it impossible for the respondent to comply and fully execute the agreement. The applicant insists that there exists no material dispute of facts in this matter. In sum, the applicant is adamant that the respondent's non-fulfillment of the relevant suspensive condition renders the agreement in law void *ab initio*.
- [14] The high water mark of the respondent's submission is that In interpreting the agreement, Enabliq urges that this court must take into account the so-called factual matrix of the agreement, which consists of the pre-contractual conduct as well as the post-conduct of the parties.
- [15] Enabliq submits that the following definitions in particular provide context to the interpretation of the agreement. For instance, the court should note that the definition of Services encompasses a wide range of activities, those activities include any mining activity or any conduct incidental thereto. The respondent argues therefore that the parties agreed that the Services to be rendered by the respondent are not only confined to the physical mining of manganese but in any conduct in furtherance thereto.
- [16] The reason for the above submissions, insists the respondent is that when Enabliq was appointed as the contractor it says it inherited a derelict non-functioning mine that had to be kickstarted in a period that was undeterminable at the stage when the agreement was concluded. This

therefore means the parties were also unable to determine the finance needed to kickstart the operations.

[17] The respondent submitted that the applicant is unsure when the date for performance is, whether it is 120 days from the signature date or 120 days from the date of the addendum, which would be 2 July 2022. Nor does the applicant indicate what the amount of financing should have been.

[18] A further contention by the respondent is that it has already secured a credit line facility of R30 million and that due regard must be taken into account in the fact that the mine was operational.

[19] The case made by the respondent is that it had procured its own finance and was able to upstart the mine, whereafter the applicant's repeated contractual breaches made it impossible for the respondent to mine further.

[20] The defences raised by the respondents in this regard in essence amount to a variation, alteration, amendment, or suspension of the agreement.

[21] In resolving this dispute, this court is required to interpret the written agreement in accordance with the general principles relating to the interpretation of contracts as laid down in *Endumeni. (Natal Joint Municipal pension Fund v Endumeni Municipality*¹.

[22] The Constitutional Court clarified *Endumeni* with regard to the application of the parol evidence rule while considering contextual evidence in interpreting documents in *University of Johannesburg v Auckland Park Theological Seminary and Another*² as follows at [88]; -

"In KPMG and Swanepoel, the Supreme Court of Appeal held that the parol evidence rule remains part of our law, and is one of the caveats to the

¹ 2012 (4) SA 593 (SCA) at [18]

² 2021 (6) SA 1 (CC)

principle that extrinsic contextual maybe admitted . The essence of the rule was most aptly captured in the case of Vianini Ferro- Concrete Pipes, where it was stated:

"Now this Court has accepted the rule that when a contract has been reduced to writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added, or varied by parol evidence."

[23] Flowing from this Constitutional ruling, it follows therefore that the parole evidence rule remains entrenched in our law, which provides that extrinsic evidence cannot be used to vary the terms of a written agreement unless the parties comply with the requirements of the "Shifren Clause" of the agreement. This standard non-variation clause was recognised decades ago by the SCA in **SA ~Sentrale Ko-op Graanmaatskappy Bpk v Shifren and Others**.³ This entrenchment clause binds parties to the provision that a written contract may only be amended if certain formalities are complied with. Generally. In practice, amendments are permitted and allowed if effected in writing and signed by all the parties to the contract.

[24] It is useful to restate the provisions of the contract in particular clause 21.2 thereof. Relevant to us are the following: -

"The Mining Activities are subject to: -

21.2 the Contractor obtaining finance for payments as specified in clause 10 above within 120 days from Date of Signature."

³ 1964 (4) SA 760

[25] The costs set out in clause 10 relevant hereto are those set out in clauses 10.1 to 10.3 which read as follows; -

10.1 The contractor shall bear all the material equipment, labour, and other costs associated in any way with the carrying out of any provisions of the Services.

10.2 All costs incurred in setting up the necessary plant and equipment to enable the Contractor to perform the Services in terms of this Agreement, as well as the costs incurred in removing or disassembly or contracting such plant and equipment at the termination of this agreement, for whatever reason, shall be at the cost and expense of the Contractor

10.3 The parties agree that the Contractor will pay the Right Holder an amount of R5 million (Five million rand only) after the effective date or at a date as agreed between the parties from time to time. The Parties agree that the amount can be paid in installments as agreed from time to time and as practically possible and afforded by the forward mineral sales agreement or by third-party investors supporting the Contractor

[26] The principle of interpretation of contracts in our law is well established and has been pronounced upon in a number of our court's decisions. In **FirstRand Bank Ltd v KJ Foods**,⁴ the Supreme Court of Appeal held that in interpreting terms of contract or legislation as the case may be; the principles enunciated in **Natal Joint Municipal Pension Fund v Endumeni Municipality**⁵ and **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd**⁶ find application. Furthermore, as was said in Endumeni, *a sensible meaning is to be preferred to that that leads to insensible or unbusinesslike results.*"

⁴ (734/2015) [2015] ZASCA 50(26 April 2017)

⁵ (920/2010) [2012] ZASCA 13(15 March 2012)

⁶ (20229/2014) [2015] ZASCA 111(3 September 20150)

[27] In general, contracting parties possess enough freedom in choosing how they structure their agreements, and it is not the function of the court to protect consenting parties from bad bargains. The established principle of our law of contract is that legal certainty and the notion of *pacta sunt servanda* must always be honored and enforced by our courts.

[28] It is appropriate to revisit the non-variation clause of the loan agreement, as it is relevant in deciding this issue before this Court, Clause 29 provides as follows:-

"No addition to or variation, consensual cancellation or novation of this agreement and no waiver of any rights arising from this Agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by all the parties."

[29] In my view, a businesslike and sensible interpretation of clause 21 is that the respondent was required to secure the funding by 12 March 2021 or at the very least by 21 July 2022 which is the date of amendment. Then in the event of failure by the respondent to secure such funds, the applicant is entitled in terms of clause 21,2 of the contract to cancel the contract as they have done. This therefore means that the respondent's submission of the existence of prior and post-contract agreements is thus defeated. Also, the contention by Enabliq that it had secured funding by way of a credit line of R30 million from its own third party KD Minerals is unhelpful and does not support the respondent case.

This is because this contention does not amount to fulfillment of the suspensive condition. Further, Enabliq's contention is of no moment, the respondent has not attached any documentation for instance a resolution and accompanying statements from the third party showing the liability on the third party's books of this amount.

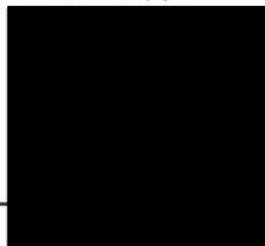
- [30] The respondent's submission that it had secured its own funding and that it has failed to secure funding because of the repeated breaches of the contract by the applicant is meritless. First, this is not a valid defence to the applicant's claim. Second, if there existed any breach of the contract on the part of the applicant, the respondent was and is still entitled to seek its remedies in terms of the contract. Significantly, Enabliq has not filed any action against the applicant nor filed any counterclaim in this application. In any event, the agreement places no obligation and does not require any steps to be taken by the applicant to ensure that the suspensive conditions are fulfilled by the respondent.
- [31] This therefore means that if a suspensive condition is not fulfilled timeously the contract lapses, unless there is provision for it not do so. Once the contract has lapsed it can only be revived and be put to force and effect by the conclusion of a new contract, the operative effect of which is to reinstate the lapsed contract. This happens when the parties agree in a contractually binding manner that they will pursue a contract on the terms of the former contract.
- [32] The test of whether the suspensive condition has been complied with is an objective one. Absent payment by the respondent, in that event the respondent has not complied with the suspensive conditions.
- [33] It should follow therefore that there are no material disputes of fact in this case. The signing of the contract and its amendments are all common and are not in dispute. On the facts and evidence before this court, it's apparent that the respondent has not complied with the relevant suspension conditions of the contract. The respondent's contention that it had complied with the suspensive condition is bald and unsubstantiated. These allegations were simply raised by the respondent to avoid its non-compliance with the suspensive condition and they are thus dismissed. This in my view, must be the end of this matter.

[34] In all the circumstances, I am satisfied that the applicant has discharged the onus that rested on its shoulders and is entitled to the orders that the applicant seeks. There is no reason why the costs should not follow the result.

The following order is made.

ORDER

1. The agreement to mine for minerals, annexed to the founding affidavit as "FA1" is declared void *ab initio*.
2. The respondent is ordered to pay the costs of this application.



DLAMINI J

*Judge of the High Court
Gauteng Division, Johannesburg*

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