

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 8475/2017

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
	31. 01. 2025
	DATE
	SIGNATURE

In the matter between:

IDWALA INDUSTRIAL HOLDINGS LIMITED

Plaintiff

and

AMSERVE EQUIPMENT (PTY) LIMITED

Defendant

Summary: Contractual claims and counterclaims arising from the conclusion, execution and termination of an Initial Manufacturing Agreement between Plaintiff and Defendant for the pelletization by the Defendant of the Plaintiff's raw materials of limestone and gypsum for sale and use in agriculture - Contractual interpretation of the written agreement - Whether a party is entitled to contractual restitution of advance payments without having received product from the other party in respect of which advance payments were made in circumstances where the contract was terminated by effluxion of time on a date agreed by the parties.

Held: On a proper interpretation of clause 4.1.1, the parties intended that the Defendant had undertaken to have a production capacity of 5000MT per month by 1 February 2016. Having failed to comply with this undertaking, the Plaintiff was not obliged to comply with its undertaking in clause 4.1.2 of the agreement and did not order 60 000MT of pelletized product on a take or pay basis at a rate of 5000MT per month and clause 4.1.3 of the agreement did not apply. In the circumstances, the Plaintiff had not breached any take or pay undertaking and the Defendant's counterclaims are dismissed.

Held: The Plaintiff was entitled to claim contractual restitution of advance payments it had made to the Defendant for which it had not received the concomitant pelletized product by the date of the termination of agreement by effluxion of time on 31 January 2017, but only in respect of advance payments made post the date of the conclusion of the agreement on 1 December 2015.

The Plaintiff's claim alternative claim 1 and claim 3 were granted with mora interest from date of demand.

The Plaintiff's claim 2 was absolved from the instance.

The Defendant was ordered to pay the Plaintiff's costs of action and the costs of defending the Defendant's counterclaims on scale C of Rule 67A read with Rule 69 of the High Court Rules.

JUDGMENT

KAIRINOS AJ:

1. This matter arises from a commercial dispute between the Plaintiff and Defendant pursuant to the conclusion, partial execution and eventual termination of a written agreement concluded between them, called the "Initial Manufacturing Agreement" (the "IMA"), which was concluded on 1 December 2015.

2. The IMA provided for the manufacture by the Defendant for the Plaintiff of Pelletized Product ("the product") from raw material (limestone and gypsum) ("the raw material") supplied by the Plaintiff at an agreed fee. The product to be manufactured under the IMA was a solid pellet-like product known as 'prills' which is used in the agricultural sector to provide a controlled slow release of nutrition to plants. The prills are sown by farmers onto their lands and when it becomes wet – either from rainwater or irrigation - it dissolves and releases nutrients into the

ground. The benefit and advantage of this over sowing powder limestone products onto the lands, is that due the solid form and weight of the prill, it not blown away by winds before water is introduced.

3. The IMA was either cancelled by the Defendant in January 2017 or it expired by the effluxion of time (despite the Plaintiff purporting to cancel the agreement in February 2017 based on an alleged repudiation thereof by the Defendant in purporting to cancel it in January 2017).
4. Both parties seek to hold the other liable for breaches of the IMA.
5. The Plaintiff instituted three claims:
 - 5.1. Claim 1 – payment of the sum of R1 604 150, alternatively R1 334 254, being repayment of advance payments made by the Plaintiff to the Defendant for the pelletizing of the raw materials, in respect of which product was not delivered by the Defendant.
 - 5.2. Claim 2 - payment of the sum of R945 181, being the value of raw material supplied by the Plaintiff, which was used by the Defendant, but which resulted in 1 279 MT of oversized pellets which were incapable of being reworked or resold and rendered waste.
 - 5.3. Claim 3 - payment of the sum of R83 488, being the amount outstanding in respect of bags supplied by the Plaintiff to the Defendant for which the Defendant undertook to pay, but failed to do so.

6. The Defendant defended the Plaintiff's action and in turn instituted a counterclaim for payment of the sum of R17 885 400 based upon the following alternative causes of action:
 - 6.1. specific performance of the Defendant's "take or pay" rights under the IMA;
 - 6.2. alternatively, contractual damages suffered by the Defendant as a result of the Plaintiff's breach of the IMA.
7. The following issues are common cause between the parties on the pleadings or became common cause during the course of the trial:
 - 7.1. Prior to the conclusion of the IMA and 23 July 2015, the parties concluded an agreement ("the prior agreement") for the pelletization of 24 000 MT of limestone raw material by the Defendant for the Plaintiff, which agreement was recorded in writing and which resulted in the placement of an order by the Plaintiff on the Defendant for 24 000 MT of pelletized limestone product (gypsum was not part of the prior agreement).
 - 7.2. On 1 December 2015, the parties entered into the IMA on the written terms thereof.
 - 7.3. On 1 February 2016, the Defendant did not have production capacity of at least 5000 MT per month.
 - 7.4. The Defendant's new plant was only commissioned during May 2016 and began production from 1 June 2016.

- 7.5. The Plaintiff made advance payments to the Defendant in the sum of R1 604 150 for product which was not delivered to it by the Defendant made up as follows:
- 7.5.1. 571 tons of limestone granules;
- 7.5.2. 961 tons of gypsum granules.
- 7.6. The Defendant did not produce 60 000 MT of product during the twelve-month production period of the IMA, being 1 February 2016 until 31 January 2017.
- 7.7. The Defendant produced product in smaller quantities than 5000 MT per month.
- 7.8. The Plaintiff delivered some raw materials to the Defendant from time to time.
- 7.9. There were bags unaccounted for by the Defendant upon a reconciliation of the number of bags allegedly supplied on behalf of the Plaintiff to the Defendant, which resulted in an oral agreement between the parties that the Defendant would compensate the Plaintiff for the cost of the missing bags in the total sum of R125 232,59 by way of three monthly payments of R41 744,20.
- 7.10. The Plaintiff recovered one payment of R41 774,20 by way of set-off.

8. The list of issues in dispute on the pleadings was extensive but ultimately crystallized into the following main issues in dispute (although each had a number of potential sub-issues):
 - 8.1. Whether the Plaintiff had correctly pleaded and/or proved a case entitling it to repayment of the advance payments and what the correct cause of action for such repayment would be if the IMA had expired by effluxion of time;
 - 8.2. The factual correctness of the calculations on annexure "POC2" of advance payments made in respect of limestone and gypsum respectively for which no finished product was received from the Defendant under the IMA.
 - 8.3. Whether the Plaintiff supplied sufficient raw materials for the manufacture of the product related to the advance payments by the Plaintiff.
 - 8.4. Whether a portion of the advance payments were made in respect of the prior agreement and whether such advance payments were claimable as contractual restitution pursuant to the cancellation or termination of the IMA.
 - 8.5. Whether on a proper interpretation of clause 4.1.1 of the IMA, the Defendant had undertaken to have a production capacity of at least 5000MT of product per month by 1 February 2016, or whether it by 1 February 2016 merely had to have taken the necessary steps to have a production capacity of at least 5000 MT of product per month (even if it did not have such production capacity available by 1 February 2016);
 - 8.6. In the event that the Plaintiff had undertaken to order 60 000MT of product per annum on a take or pay basis at the rate of 5000MT per month during

the production period as per clause 4.1.2 and the Defendant had failed to produce material at the rate of 5000 MT per month, whether the Defendant was entitled to “catch-up” its production in the amount of a total of 60 000MT per annum prior to the termination of the IMA on 31 January 2017;

- 8.7. Whether the Defendant was entitled to enforce its "take or pay" rights upon termination of the IMA.
- 8.8. Whether the Defendant's claim for payment, alternatively damages, amounts to R17 885 400.00.
- 8.9. The fate of the prior agreement upon the conclusion of the IMA on 1 December i.e. whether the prior agreement of July 2015 was repudiated by the Defendant or whether the IMA superseded the earlier agreement or whether the separate agreement ceased to exist on the conclusion of the IMA.
- 8.10. Whether the quantities of product to be purchased on a take or pay basis would be subject to pro-rating if the Defendant was only able to have a production capacity of at least 5000 MT of product per month from some time after 1 February 2016.
- 8.11. Whether the Plaintiff proved its case in respect of the quantum of the non-specification product by the Defendant as per annexure "POC3" of the Plaintiff's Particulars of Claim; the value of the lost and wasted product and raw material in terms of the Plaintiff's second claim and whether the Plaintiff had or was compelled to comply with the prescribed procedure for rejection of non-complying products set out in the IMA.

- 8.12. Whether the Plaintiff breached the IMA by failing to supply the Defendant with sufficient raw materials.
9. It is immediately apparent from the list of disputed issues that many are in fact interrelated. However, it is also immediately apparent from the pleadings and the issues in dispute that the determination of the issues is largely predicated on a proper interpretation of the material terms of the IMA.
10. Ultimately and as it transpired, the main issue in the matter became whether clause 4.1.1. on its proper interpretation, meant that the Defendant had to take the necessary steps to establish a production capacity of at least 5000 MT of product by 1 February 2016, i.e. whether the Defendant had to have such production capacity by 1 February 2016 as contended by the Plaintiff; or whether the Defendant merely had to have taken the necessary steps by 1 February 2016 to establish the said production capacity, i.e. whether the mere taking of the necessary steps by 1 February 2016 was sufficient to have fulfilled its undertaking in clause 4.1.1, even if the production capacity had not *de facto* been established by 1 February 2016, as contended by the Defendant. The proper interpretation of clause 4.1.1 therefore became determinative of most of the remaining issues in the matter.
11. The evidence of the following witnesses was led during the trial:
- 11.1. For the Plaintiff:
- 11.1.1. Mr Bertus Wessels ("Wessels"), the Plaintiff's business development manager at the relevant time;

11.1.2. Mr Jaco Vorster, the Plaintiff's Chief Financial Officer and during the relevant period, the Plaintiff's Head of Acquisitions and Integration;

11.1.3. Mr Robert Behrens, who at the relevant time was employed with the Plaintiff as a financial accountant;

11.1.4. Mr Robert Ziemerink, who was employed during the relevant period by the Plaintiff as a despatch field supervisor.

11.2. For the Defendant:

11.2.1. Mr Andrew Wilmot, the managing director of the Defendant;

11.2.2. Mr Louis Klue, the Defendant's operational manager,

11.3. Mr Troy Colin Momberg, the Defendant's expert.

12. The evidence led by the respective parties related largely to the contextual background of the IMA and the circumstances which led to the dispute between the parties. Much of the evidence related to the Defendant's counterclaim and its quantification.

13. It is therefore to the proper interpretation of clause 4.1 that I now turn since this was the burning issue upon which most if not all the disputed issues are to be determined.

14. In relation to the proper interpretation of the agreement, it is accepted law that the proper interpretation of an agreement must take place in its context as set out in the leading case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA) at paras [18] and [25] – [26], where the Supreme Court of Appeal held as follows in this regard:

“[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

...

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract,

divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”

15. The Constitutional Court has cited with approval the aforementioned principles in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) where this Court held as follows at paragraphs [29] and [30]:

“[29] There is no dispute about the principles of interpretation. The correct approach to the interpretation of documents was summarised by the Supreme Court of Appeal in Endumeni Municipality

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more

than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' [27] [Footnotes omitted.]

[30] I begin then with the 'inevitable starting point', the language of the settlement agreement itself."

16. However, in *Tshwane City of v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA), the Supreme Court of Appeal held that negotiations are nevertheless inadmissible as evidence in the contextual setting and held as follows at paragraphs [76] and [77]:

“[76] Insofar as the admissibility of evidence in relation to negotiations is concerned, this court has recently, in Van Aardt v Galway 2012 (2) SA 312 (SCA), para 9, with reference to Van Wyk NO v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) at 991, reaffirmed that evidence of the intention of the parties of their prior negotiations is inadmissible. In Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 454 the court excluded, as a general rule, reference to 'actual' negotiations and 'similar statements'. It is true that at 455A – C there is a suggestion that 'conceivably', in contractual cases where, after regard is had to surrounding circumstances, the ambiguity in a written text persisted, one could have regard to what passed between the parties. It must be understood that this statement followed on what was understood to be admissible in relation to testamentary documents. It is also true that in Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 (A) ([1995] 2 All SA 635; [1995] ZASCA 64) at 768D – E, the passage from Delmas at 455A – C is Navsa ADP and Mothle AJA (Swain JA, Dambuza JA and Mokgohloa AJA concurring) cited as support for the view that evidence of negotiations could, in the face of enduring ambiguity, be admitted.

[77] In our view, Van Aardt and Van Wyk should be followed. It would be in line with the parol evidence rule which we imported and have maintained and it is consonant with the modern approach to interpretation of contracts in English law, the development of which mirrors developments in our law. Allowing evidence in relation to negotiations will see further extensive evidence being led and will have the effect of minimising the words the parties have chosen to employ. Endumeni rightly emphasises the significance of the words the parties have chosen to record their agreement, though not above context. Permitting evidence of negotiations will lead to further uncertainty. The words, as an objective measure, are elevated above the partisan positions of parties in negotiations and litigation.”

17. The Supreme Court of Appeal in *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA), held as follows at paragraphs [51]:

“[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.”

18. The subsequent conduct of the parties and how they implemented the contract, is also important in determining their intention as part of the factual context. In this regard, it was held as follows in *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) at para [21]:

*“All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term — see eg *Rane Investments Trust v Commissioner, South African Revenue Service* 2003 (6) SA 332 (SCA) (2003 (8) JTLR 216; 65 SATC 333; [2003] 3 All SA 39) para 27. As is stated in *Christie & Bradfield Christie's The Law of Contract in South Africa* 6 ed (2011) at 117, relying upon *Breed v Van den Berg and Others* 1932 AD 283 at 292 – 293,*

this is because the parties' subsequent conduct 'may be probative of their common intention at the time they made the contract'."

19. Interpretation is accordingly a so-called 'unitary endeavour'.¹ Moreover the interpretation of a contract is a matter for the court, not witnesses.²
20. Before dealing with the salient terms of the IMA and the proper construction thereof, it is therefore necessary to place the IMA in its proper context. Fortunately, the parties were largely *ad idem* as to how the IMA arose, its contextual background and its purpose.
21. The factual background to the dispute (including the context in which the IMA was concluded), is that during or about March 2015 the Plaintiff and another firm, Advanced Agri, decided to jointly introduce an ultra-fine limestone product into the agricultural fertiliser market in South Africa with the Plaintiff being responsible for its production and Advanced Agri being responsible for sales thereof. Advanced Agri introduced the Plaintiff to the Defendant as the possible manufacturer of the product. By "manufacture" is mean the pelletization of the powder raw materials into pellets or "prills".
22. The relationship between the Plaintiff and the Defendant commenced with a presentation made by Klue on behalf of the Defendant on 8 May 2015. At that time the Defendant had as single production plant with a capacity of approximately 1 500 tons of granulated product per month. The Defendant agreed to upgrade the old plant to a capacity of 2 000 MT per month and following a test order placed by the

¹ *MEC, Department of Public Works and Others v Ikamva Architects and Others* 2022 (6) 275 (ECB) at par [41]. See also *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC)

² *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA)

Plaintiff on 22 May 2015, the Plaintiff placed an order for 24 000 MT of pelletized limestone on 23 July 2015, to be produced at volumes of 2 000 MT per month for 12 months starting in August 2015. An agreement was reached that should the Defendant not be able to produce 2000 MT within a specific month, the shortfall would be made up in the following month. This was the prior agreement referred to above. There is a dispute whether this prior agreement ceased to exist or was subsequently replaced by the IMA and this issue also turns on the proper interpretation of the IMA. Production on the 24 000-ton order started on or about 6 August 2015.

23. The Plaintiff then required additional and more reliable production of product and negotiations took place between the Plaintiff and the Defendant during October and November 2015 for an order of 5 000 MT per month of products (being limestone and gypsum) for an initial period of 12 months from 1 February 2016 to 31 January 2017, to be manufactured by a new modular pelletization plant (sometimes referred to during the trial as “a granulation plant”) to be built and commissioned by the Defendant.
24. On 1 December 2015, the parties concluded the IMA. During January 2016, the Defendant obtained finance from Standard Bank for the construction of the new plant and during the period December 2015 to May 2016, the new plant was built, commissioned and production started on 1 June 2016. This despite the IMA providing for the “production period” to be a twelve-month period from the date on which the new plant was commissioned or 1 February 2016, whichever date was the earlier.

25. During October 2016, a dispute arose between the Plaintiff and the Defendant as the latter was of the view that there was not a sufficient volume of raw materials being supplied by the Plaintiff to the Defendant for it to achieve 5000 MT per month.
26. On 28 November 2016, the Defendant again complained of shortfalls in limestone deliveries by the Plaintiff (it being common cause that the Defendant would supply the gypsum raw material and not the Plaintiff), contending that the arrears amounted to more than 18 000 MT over the preceding six months and by 3 650 MT in November 2016 alone. The Defendant asserted that, in addition to the 50 000 MT of limestone granulation agreed to in the IMA, there was also the additional prior order for 24 000 tons of limestone granules of July 2015. It was contended by the Defendant that the continued raw material delivery shortfalls were having a devastating effect on the Defendant's daily production and cost recoveries. The Defendant contended that it required sufficient buffer stocks of raw material (i.e. 1000 MT) to be able to run the plant continuously since continuous stop-start would affect the variable costs of the plant since it required huge loads of electricity to fire up the furnace if it had cooled down.
27. On 30 November 2016, Mr Behrens, on behalf of the Plaintiff, indicated to the Defendant that the original order number for the 24 000 MT was completed and that the Defendant should use another order number from that date.
28. On 13 December 2016, the Defendant again complained of the Plaintiff's inability to deliver limestone raw material. It is at this juncture important to record that all the Defendant's complaints to the Plaintiff about insufficient raw materials being supplied related to buffer stock that was required to run the plant efficiently to reduce the variable costs and not specifically to an agreed 5000 MT per month. It

was only during the latter part of 2016 that the Defendant began to refer to 5000 MT per month and the take or pay referred to in the IMA.

29. On 20 December 2016, the Plaintiff proposed an addendum to the IMA with effect from 1 December 2016, which provided for the parties to agree that any production amounts and/or Pelletized Product required to be manufactured by the Defendant and/or purchased by the Plaintiff in terms of the IMA would be terminated and be replaced in their entirety by a required production of 10 000 MT of Pelletized Product in terms of the addendum. The addendum was not accepted by the Defendant.
30. On 18 January 2017, the Defendant purported to cancel the IMA. The IMA would in any event have lapsed by effluxion of time, on 31 January 2017.
31. On 14 February 2017, the Plaintiff informed the Defendant that it regarded the Defendant' purported cancellation of the IMA as a repudiation of the agreement, which repudiation the Plaintiff accepted, and it made demand for payment by the Defendant.
32. Having regard to all the evidence in the trial, the purpose of the IMA, in general terms, was to establish a contractual relationship between the Plaintiff and the Defendant in terms of which the Defendant would use its production plant to pelletize the raw material supplied to it by the Plaintiff at an agreed price. The "purpose" is of course different to the "how". The details of the "how" are to be found in the terms of the IMA.
33. Having placed the IMA in its proper context, one must then turn to the "inevitable starting point" being the language of the IMA itself. I refer below to the

uncontentious clauses of the IMA because the contentious clause must be interpreted in the context of the remaining clauses of the IMA so as to ascertain what the parties probably intended.

34. In terms of uncontentious clauses of the IMA, the Plaintiff's main obligations were the following:

34.1. To place all orders and instructions on the Defendant in terms of the IMA.³

34.2. To ensure that it delivers the raw material as advised by the Defendant from time to time.⁴

34.3. To supply gypsum within a specification agreed between the parties from time to time.⁵

34.4. To pay the Defendant at the rate of R570 per MT of product produced with limestone and R600 per MT of product produced with gypsum.⁶

34.5. To make such payment, for the initial 3 000 MT of product, in respect of each 1 000 MT to be produced, prior to production and on receipt of a valid tax invoice from the Defendant.⁷

34.6. To make payment thereafter on completion of each 15 days of production of product and on receipt of a valid tax invoice from the Defendant.

35. The Defendant's main obligations under the IMA were:

³ Clause 3.1.1.1.

⁴ Clause 3.1.1.2. (The term "Raw Material" is defined as ultrafine limestone or similar material used to manufacture the Pelletized Product, which may include gypsum powder").

⁵ Clause 3.1.1.4.

⁶ Clause 3.1.1.3.

⁷ Clause 3.1.1.3.1.

- 35.1. To take receipt of the raw materials and to warehouse same under suitable conditions, as advised by the Plaintiff, to ensure the integrity and longevity of the raw materials.⁸
- 35.2. To manufacture the required mass of the product within the required timeframe, as specified and ordered by the Plaintiff from time to time. Upon manufacture, the ownership of the product, on making full payment to the Defendant, would immediately vest in the Plaintiff.⁹
- 35.3. The Defendant would not be held responsible for "production shrinkage" which the parties agreed, in the case of limestone, would not be more than 3% but may, in the case of gypsum, be as high as 30%.¹⁰
- 35.4. To produce product to the specification as set out in annexure "B" to the IMA.
- 35.5. To bag the product as required for immediate transportation or for storage, to warehouse the product under suitable conditions, as advised by the Plaintiff and to ensure the integrity and longevity of the product until such time that the necessary logistical arrangements for uplifting the product were confirmed by the Plaintiff.¹¹
- 35.6. To keep stock of all raw materials, product and bags supplied under the terms of the IMA, as advised by the Plaintiff.¹²

⁸ Clauses 3.2.1.1 and 3.2.1.2.

⁹ Clause 3.2.1.4.

¹⁰ Clauses 3.2.1.4.

¹¹ Clauses 3.2.1.6 and 3.2.1.7.

¹² Clause 3.2.1.9.

- 35.7. To undertake a monthly stocktake, with representatives of the Plaintiff, to ensure that all raw materials and product was accounted for.¹³
- 35.8. To comply with all applicable safety, health and environmental laws and regulations.¹⁴
- 35.9. To comply with the agreed quality requirements with regard to the specification and other related qualities.¹⁵
- 35.10. The Defendant would not release any product for shipment that did not conform to the specification, without the prior written approval of the Plaintiff.¹⁶
- 35.11. The Plaintiff could advise of any non-complying product by providing notice of rejection to the Defendant within ten days following receipt by the Plaintiff of any shipment of such product.¹⁷
- 35.12. In addition to any other rights or remedies available to the other parties under the IMA, the Defendant would replace rejected product as soon as practicable at no additional charge to the Plaintiff, and the Defendant would reimburse the Plaintiff for any raw materials or other product used to manufacture any such non-complying product.¹⁸
- 35.13. Notwithstanding anything to the contrary, the Plaintiff would be solely responsible for all costs and expenses incurred in connection with and non-complying product to the extent any raw material resulted in such product

¹³ Clause 3.2.1.10.

¹⁴ Clause 3.2.2.

¹⁵ Clause 3.2.3.

¹⁶ Clause 3.2.3.8.

¹⁷ Clause 3.2.3.9.

¹⁸ Clause 3.2.3.10.

being non-compliant, and would reimburse the Defendant for its costs and expenses incurred in connection with the manufacture of such non-complying product.¹⁹

35.14. All non-complying product and product rejected pursuant to the IMA would be removed and either re-processed or disposed of by the Defendant in accordance with all applicable laws.²⁰

36. As alluded to in clause 4.1 and the proviso to clause 4.1.2, as quoted below, the initial manufacturing arrangement in terms of the IMA was part of a long-term plan of the Plaintiff to set up its own production plant. This is common cause and further borne out by:

36.1. The obligation of the Defendant to provide additional support services to the Plaintiff, subject to a further written agreement, to:²¹

36.1.1. assist the Plaintiff in commissioning a new production plant in South Africa and/or Africa;

36.1.2. advise the Plaintiff with regard to the optimal binders to use in production;

36.1.3. train the Plaintiff's operational staff;

36.1.4. advise the Plaintiff in commercialising any pelletizing ventures.

36.2. The terms of clause 4.2 which read as follows:

¹⁹ Clause 3.2.3.12.

²⁰ Clause 3.2.3.14.

²¹ Clause 3.3.

"At least 90 days prior to Idwala commissioning its production plant and/or the expiry of the Production Period, the Parties undertake to enter into good faith negotiations regarding the continuation of the Project. In terms of negotiations, the Parties shall negotiate, inter alia, the product to be pelletized, price and the duration."

- 36.3. In terms of clause 8, the IMA would be effective from the signature date and would remain in effect until the expiry of the Production Period or, if applicable, the expiry of the period agreed in terms of clause 4.2, whichever was the later date.
37. The "Production Period meant a period of twelve months, which would commence on the earlier of (i) the date when the Defendant had commissioned the necessary plant to manufacture at least 5 000 MT of product per month or (ii) 1 February 2016, as set out in further detail in clause 4.1.1."²²
38. Clause 7 of the IMA granted exclusivity to the Plaintiff:
- "Amserve agrees that it shall exclusively supply and not compete with Idwala in the sale of any micro-fine, ultra-fine and/or micronized calcitic or dolomitic limestone product or similar produced with the Raw Materials, for the duration of this Agreement and subject to Idwala exercising the option in clause 9.4, for twenty-four months after the termination or expiry of the Agreement."*
39. Clause 15.1 of the IMA contained a restraint / non-solicitation provision:
- "Amserve agrees that during the term of this Agreement and for twelve months after its termination, Aserve shall not, directly or indirectly, solicit or attempt to solicit any micro-fine granule business (which uses the Raw Materials to make products of similar application to the Pelletized Product) from any of Idwala's customers, prospective customers, or vendors, whether such parties are directly or indirectly engaged with Idwala."*

40. In terms of clause 9.3, the termination of the IMA, for whatever reason, would not affect the rights of any of the parties which may have accrued as at the date of termination and would further not affect any rights which specifically or by their nature survived the termination of the IMA.
41. In terms of clause 9.4, if the IMA was terminated for any reason whatsoever, then upon termination:
- 41.1. The Plaintiff would retake possession of all or the raw materials then in the possession of the Defendant.
- 41.2. The Plaintiff would take possession of all paid for product then in the possession of the Defendant.
42. The Defendant would grant the Plaintiff an option to purchase all of the Defendant's production facility and plant used in the manufacture of the product (whether commissioned at the signature date or later) at a price calculated in accordance with clause 9.4.3.3 of the IMA.
43. The contentious clause of the IMA and on which the whole matter turns, is clause 4.1, which reads as follows:
- "4.1 *In respect [of] the arrangements set out in clause 3 and in order to advance the Project, the Parties agree that until such time that Idwala has the necessary production plant:*
- 4.1.1 *Amserve undertakes to take all necessary steps (which shall include expanding its production plant) to produce at least 5000 MT of Pelletized Product per month by 1 February 2016, which shall be determined by the availability of Limestone and gypsum and the market requirements; and*

4.1.2. *provided Amserve satisfies the undertaking in clause 4.1.1 by 1 February 2016, Idwala undertakes to purchase at least 60 000 MT of Pelletized Product per annum on a "take or pay" basis, with a minimum of 5 000 MT per month, for the Production Period which shall comprise of at least:*

4.1.2.1 *50 000 MT of Pelletized Product produced using Limestone per annum; and*

4.1.2.2 *10 000 MT of Pelletized Product produced using gypsum;*

provided that such amounts shall be pro-rated in the year that Idwala's production plant is commissioned, if such date occurs after the expiry of the Production Period.

4.1.3 *For the sake of clarity, should Amserve fail to produce a minimum of 5 000 MT of Pelletized Product per month from 1 February 2016, Idwala shall only be obliged to take the annual volumes as produced to 31 January 2017. Any shortfall in the volume shall not be carried over to the next year."*

44. Taking into account the IMA as a whole and the relevant factual contextual background in which it was concluded, the parties clearly intended that the Defendant would be able to pelletize 60 000 MT raw material, divided between 50 000 MT of limestone product and 10 000 MT of gypsum for the Plaintiff, initially for the production period as defined in clause 2.1.11, and then possibly for a further agreed period, until the Plaintiff had either erected and commissioned its own pelletization plant at some point in the future or had purchased the Defendant's new pelletization plant. For this purpose, the Defendant agreed to build a new pelletization plant capable of producing at least 5000 MT per month.

45. As set out above, the production period is defined as a period of twelve months which would commence on the earlier of (i) the date when the Defendant had

commissioned the necessary plant to manufacture at least 5000 MT of Pelletized Product per month or (ii) 1 February 2016 as set out in further detail in clause 4.1.1. It is common cause that the new plant was not commissioned by 1 February 2016 and therefore the production period of twelve months commenced on 1 February 2016 to 31 January 2017. What is important in this definition of the production period is that it was agreed that the “necessary plant” is one which could manufacture at least 5000 MT of product per month. The need was clearly for a new plant which could manufacture at least this volume of product.

46. In clause 4.1.1, the Defendant undertook to take all necessary steps (including expanding its current production plant) to produce “at least” 5000 MT of product per month by 1 February 2016. However, it is further stated that this volume would be determined by the availability of limestone and gypsum and the market requirements.
47. The Defendant contends that taking into account the contextual evidence that the new plant could not be finally commissioned by 1 February 2016, because the Defendant was still finalising the acquisition of the necessary finance from Standard Bank and some major components with long lead manufacture times had not yet been ordered and the subsequent conduct of the parties, clause 4.1.1 must be interpreted as meaning that the Defendant did not have to establish a production capacity of 5000 MT per month by 1 February 2016, but rather that it merely had to have taken the necessary steps to do so by 1 February 2016. The Defendant contends that as long as it had taken all the necessary steps (such as ordering the components, contracting with the necessary contractors etc.), it had complied with its undertaking in clause 4.1.1 and therefore the Plaintiff had undertaken to order at least 60 000MT

of product per annum on a take or pay basis, at a rate of at least 5000MT per month for the duration of the production period – being 1 February 2016 to 31 January 2017.

48. Furthermore, the Defendant contends that no businessman in their right mind would commit to the expense of a new plant and to sign finance agreements with a bank where the company had to repay more than a million rand per month, without the “guarantee” of the take or pay arrangement for 60 000MT per annum, otherwise, says the Defendant, it would be at the mercy of the Plaintiff who would not have any obligation to place any orders at all. This says the Defendant is reinforced by the fact that the IMA had an exclusivity clause therein in terms of which the Defendant could not use the plant for any other customer other than the Plaintiff.
49. The Defendant contends therefore that the only commercially sensible interpretation of clause 4.1.1 and what it was undertaking therein, was not to having a production capacity of 5000 MT per month by 1 February 2016 but rather merely having taken the necessary steps by 1 February 2016 to acquire such production capacity.
50. There are however a number of problems with the Defendant’s contentions in this regard. The Defendant’s interpretation of clause 4.1.1 militates against the definition of “production period”, which the parties agreed would be from the date the plant was commissioned or 1 February 2016, whichever was the earlier. This means the parties clearly contemplated the production period commencing by no later than 1 February 2016. There would be no point in agreeing to such a production period even if the plant was unable to produce the required 5000MT per month by 1 February 2016.

51. Furthermore, it was also clear from the evidence that both the parties believed that the sales of the product would be high and the Plaintiff's research had predicted they would need approximately 5000MT per month during the production period. This means that the Defendant's Mr Wilmot, whilst possibly realising that the Defendant may not be able to comply with clause 4.1.1 by having a production capacity of 5000MT by 1 February 2016, was not overly concerned since he was of the view that the Defendant had in any event landed a massive customer with huge orders and the Defendant would be making sufficient revenue to repay the bank loan, irrespective of whether the Plaintiff had agreed to the take or pay commitment.
52. Furthermore, it is not clear that the Defendant would be unable to commission the plant by 1 February 2016 and it also not clear that the Plaintiff was aware that the plant could not be commissioned by that date. This is important since the proper interpretation to be accorded to a term is what the parties' common intention probably was and not only what one party may have been aware of, but rather what both were definitely aware of. There is also evidence which shows that even Mr Wilmot may have harboured the hope that the plant could have the necessary production capacity by 1 February 2016, since on 1 December he wrote to Standard Bank and indicated that he expected the plant to be finally commissioned by end of January 2016. Counsel for the Defendant contended that this letter merely served to put pressure on Standard Bank to finalise the loan (which by 1 December 2015) had not yet been finalised. However, if that was so it would mean that Mr Wilmot was making a material and intentional misrepresentation to Standard Bank. In my view the more plausible explanation is that Mr Wilmot genuinely and *bona fide* believed that it was indeed possible to have the plant commissioned by end of January 2016, as stated in his letter. If that is so, it means that the Defendant when the IMA was

signed, was of the belief that the plant could possibly have a production capacity of 5000MT per month by 1 February 2016 and the Defendant took the chance of signing the IMA and trying to comply with clause 4.1.1 by commissioning the new plant by 1 February 2016 and even if it could not do so, it was worth the risk since it anticipated large orders from the Plaintiff irrespective of the Plaintiff had committed to the take or pay order in clause 4.1.2.

53. Lastly, the Defendant made much of the subsequent conduct of Mr Vorster, contending that he wrote a letter to the Defendant on 30 November 2016, in which he indicated the Plaintiff was unable to fulfil its contractual obligations to the Defendant. The Defendant contends that the only contractual obligations that Mr Vorster could have been referring to was the take or pay obligation for 60 000 MT of product per annum as envisaged in clause 4.1.2. The Defendant contends that this subsequent conduct when taken into account as part of the contextual evidence supports its interpretation of clause 4.1.1 and that therefore it had complied with taking the necessary steps by 1 February 2016 to establish a plant with a capacity of at least 5000 MT per month and therefore the Plaintiff had undertaken the take or pay order envisaged in clause 4.1.2. However, a perusal of that letter does not reveal whether Mr Vorster was referring specifically to an obligation in terms of an enforceable take or pay order or to the Plaintiff's obligations generally in terms of the IMA. After all, irrespective of a take or pay order, the Plaintiff nevertheless had an obligation to use the Defendant exclusively to pelletize its raw materials. What the letter appears to be telling the Defendant is that the Plaintiff was unable to deliver raw material because of a problem at its quarries and not specifically that it was unable to comply with an obligation to deliver sufficient raw material to enable

the Defendant to produce at least 5000 MT of product per month. In as much as this letter is not clear, it does not assist the Defendant's interpretation of clause 4.1.1.

54. The Plaintiff in turn contends that taking into account the contextual evidence that the Plaintiff needed to build up reserves of product stock in anticipation of the planting season (which was from approximately November 2016 to February or 2017), the need to arrange logistics and transport of the raw material and the product and storage thereof, that the production period would commence by latest 1 February 2016 and the remaining clauses of the IMA (most importantly clauses 4.1.2 and 4.1.3), clause 4.1.1 must be interpreted as meaning that the Plaintiff would only commit to the take or pay order in clause 4.1.2, whereby it was committing to paying for at least 60 000 MT of product (at a rate of at least 5000 MT per month) irrespective of whether it took such product or not, if the Defendant had in fact established a production capacity of 5000 MT per month by the beginning of the production period *in casu* being 1 February 2016. This was so that the Defendant could in fact produce 5000MT per month, for which volume the logistics was manageable and which would allow it to build up a reserve of product stock to facilitate the planting season when demand was anticipated to be high and the stock had to be readily available in the Plaintiff's warehouses for shipping to farmers as and when necessary.

55. Taking the aforesaid contextual evidence into account, the proper interpretation of clauses 4.1.1 is that the parties agreed that the Defendant would take all necessary (note – the wording is “necessary” and not “reasonable”) steps to be able to pelletize at least 5000 MT of product by 1 February 2016. Whilst this clause does specifically not refer to the building of a plant in order to do so, if this clause is read in

conjunction with the definition of “Production Period” in clause 2.1.11, it is clear that the parties intended that a plant be constructed and commissioned capable of a production capacity of at least 5000 MT per month by 1 February 2016. But the requirement in clause 4.1.1 (read with the definition of “Production Period”) envisages that the Defendant had to ensure that it had the capacity to pelletize at least 5000 MT of product per month from 1 February 2016, since that is when the production period would commence.

56. In my view, there would be no point in agreeing to a production period commencing on 1 February 2016, if the production plant did not have to be ready to produce at least 5000MT by 1 February 2016 and an interpretation that the production plant would not have to be commissioned and able to produce 5000MT per month by 1 February 2016 is not a commercially sensible interpretation in the circumstances of the agreement and having regard to its purpose.
57. What is more difficult to determine is what was meant by the words “which shall be determined by availability of limestone and gypsum and market requirements”. Both parties were *ad idem* that this can only mean that the requirement that the plant can produce at least 5000MT per month means that the actual requirements every month may be more and would be determined by limestone and gypsum available to do so and/or if the market required more than 5000 MT per month. Ultimately, the Defendant must by 1 February 2016 and thereafter have had in place the capacity to produce at least 5000 MT per month, Clause 4.1.1 does not refer to actual production by 1 February 2016 but rather to the capacity to do so. The actual production thereafter would be determined by the availability of limestone and gypsum and the market requirements.

58. The addition of those words in clause 4.1.1 reinforces the interpretation that the Defendant had to have commissioned a plant capable of producing at least 5000MT per month by 1 February 2016 and not merely have taken the necessary steps to do. If it merely had to have taken the necessary steps to do so, it would not have been necessary to add the words “which shall be determined by availability of limestone and gypsum and market requirements” since there would in any event not necessarily be any production capacity by 1 February 2016 on the Defendant’s interpretation and therefore no need to qualify the necessary production capacity by the inclusion of those words in clause 4.1.1.
59. It is noteworthy that those words were included in clause 4.1.1. and not in clause 4.1.2 which refers to the take or pay and where such words would have made more sense once a production capacity had been established. This also reinforces the interpretation of clause 4.1.1. that the Defendant had undertaken to establish a production capacity by 1 February 2016 and not merely the taking of the necessary steps by 1 February 2016 to do so.
60. Clause 4.1.2 then provides that “provided” the Defendant had satisfied the undertaking in clause 4.1.1 by 1 February 2016 (as explained above), the Plaintiff undertook to purchase at least 60 000 MT of Pelletized Product per annum on a “take or pay” basis, with a minimum of 5000 MT per month, for the production period, which would comprise of at least 50 000 MT of limestone pelletized product and 10 000 MT of gypsum pelletized product. This clause is material to the Defendant’s counterclaim because its entire counterclaim is predicated on the Plaintiff having committed to an order of 60 000MT per annum on a take or pay basis.

61. The Defendant contends that clause 4.1.2 means that the Plaintiff was obliged to take 5000 MT of product (which include limestone or gypsum or both making up 5000 MT per month) and pay for it, failing which the Plaintiff would in any event have to pay for the equivalent of 5000 MT of product. This calls into question two issues: firstly, whether that obligation arose at all if the Defendant failed to comply with its undertaking in clause 4.1.1 and secondly, what was meant by “take or pay” and how it was to be applied practically, particularly since it did not specify whether the payment for 5000 MT of product would be for limestone or gypsum or in what proportion of whether it would be pro-rata the amount of 50 000 limestone product per annum and 10 000 gypsum product per annum, for the purpose of calculating the monthly payment amount. This itself calls into question whether the “take” option was for 50 0000 MT of limestone per annum divided by 12 months and 10 000 MT of gypsum product per annum divided by 12 months i.e. whether the Plaintiff obliged to take or pay for 4166 MT of limestone product per month and 833 MT of gypsum product per month. Fortunately, on the proper interpretation of clause 4.1.1 and since the take or pay undertaking did not come into effect as explained below, it is not necessary to determine the correct interpretation of the take or pay clause.
62. However, it is necessary to determine whether the take or pay came into effect and bound the Plaintiff at all. In order to determine this, it is necessary to interpret the words “provided Amserve satisfies the undertaking in clause 4.1.1 by 1 February 2016, Idwala undertakes to purchase ...”. The Defendant was constrained to concede (correctly so) that it would have had to comply with its undertaking in clause 4.1.1 (as properly interpreted) before the Plaintiff was obliged to commit to the undertaking in clause 4.1.2 to place such order on a take or pay basis. This is clear from the words “provided Amserve satisfies the undertaking in clause 4.1.1 by 1

February 2016, Idwala undertakes to purchase ...” (my emphasis) and there can be no other commercially sensible meaning to this word “provided” in this clause.

63. As set out above, the Plaintiff contends that clause 4.1.1 imposes an absolute obligation upon the Defendant to have its production plant ready to produce at least 5 000 MT of product per month by 1 February 2016, failing which the Plaintiff is permanently relieved of the obligation in terms of clause 4.1.2 to purchase at least 60 000 MT of product per annum on a take or pay basis, with a minimum of 5 000 MT per month. In other words, if the deadline of 1 February 2016 is missed, it becomes discretionary for the Plaintiff to place orders for the production of product on the Defendant and the Plaintiff is not bound by the take or pay basis.
64. But for the conditional undertaking in clause 4.1.2, the IMA was merely an agreement in terms of which the Defendant would pelletize the tonnages of raw material supplied to it by the Plaintiff from time to time, without any obligation on the Plaintiff to order any minimum tonnage per month or per annum. The only obligation on the Plaintiff to order a specific minimum tonnage of product per annum with an agreed minimum, is found in clause 4.1.2 – but that undertaking which gives rise to the obligation to do so is itself subject to the proviso that the Defendant had complied with its own undertaking in clause 4.1.1.
65. The Defendant contends, correctly, that clause 4.1.1 does not constitute a guarantee or warranty that the plant would have 5000 MT per month capacity by 1 February 2016. However, what this contention ignores is that the failure to do so had consequences in respect of whether the Plaintiff was obliged to comply with its own undertaking in clause 4.1.2.

66. The Defendant is also correct in its contention that it is clearly envisaged in the definition of "Production Period" that the necessary plant to manufacture at least 5 000 MT of Pelletized Product per month may only be commissioned at a date later than 1 February 2016. But similarly, whilst it is so that the pelletization plant could indeed be commissioned on a date later than 1 February 2016, this too had consequences as set out above. The main consequence would be that the Plaintiff was relieved of the obligation to take or pay for 60 000 MT of product per annum, with a minimum of 5000 MT per month.
67. The Defendant further contention in this regard is that clause 4.1.3 clearly caters for the situation where the Defendant fails to produce a minimum of 5 000 MT of product per month from 1 February 2016. In such a case, the Plaintiff is only obliged to take so much of the annual volumes (60 000 MT) as produced up to 31 January 2017 and any shortfall in the annual volume is not be carried over to the following year. The Defendant contends further that this implies by necessity that any shortfall in the monthly volume produced may be carried over to the following months subject to the 31 January 2017 cut-off i.e. that it can make up the low production.
68. On a proper interpretation of clause 4.1.3, it was not intended to apply in the absence of an obligation by the Plaintiff in terms of clause 4.1.2. In other words, should the Defendant comply with its obligation in clause 4.1.1, and clause 4.1.2 did not become operative then clause 4.1.3 also did not become operative. Clause 4.1.3 merely made it clear that if the Plaintiff had committed to the take or pay in clause 4.1.2, the Plaintiff was however not entitled to take or pay what the Defendant has not produced and was only obliged to take (and pay) the volumes actually produced by the Defendant every month up to 31 January 2017.

69. Clause 4.1.3 then also made it clear that any shortfall in the volume (i.e. 60 000 MT) could not be carried over into the next year (the word “year” in the last sentence of clause 4.1.3 can only sensibly be interpreted as referring to the next “production period” i.e. if a further agreement is concluded for another production period).
70. But ultimately, clause 4.1.3 was only applicable if the Plaintiff had the obligation to take or pay 60 000 MT per annum, with a minimum of 5000 MT per month and this in turn only became enforceable if the Defendant has a production capacity of at least 5000 MT per month by 1 February 2016. It is common cause that it did not, since it is common cause that the new production plant was only commissioned in June 2016 – some five months after 1 February 2016. This means that it is not necessary to determine whether on a proper interpretation of clause 4.1.3, the Defendant had a right to catch-up production by the end of the production period on 31 January 2017, in the event that it could not produce 5000MT per month during the production period since this alleged right would only have been relevant if the Plaintiff had undertaken the take or pay order in terms of clause 4.1.2 – which it did not.
71. Ultimately the Defendant’s interpretation of clause 4.1.1 and its reliance on subsequent conduct of the parties, is “unmoored in the text and its structure” and particularly if one has regard to the text in the context of clauses 4.1.2 and 4.1.3.
72. Having found that the Plaintiff did not have an obligation to purchase at least 60 000 MT per annum, with a minimum of 5000 MT per month, on a take or pay basis, there appears no reason to determine what exactly is meant by the concept take or pay. Nevertheless, it seems that “take or pay” in the context of the IMA simply means that if the Defendant was making its production capacity exclusively available to the

Plaintiff for 60 000 MT per annum, with a minimum of 5000 MT per month, the Plaintiff was then obliged to take supply sufficient material to produce at least 5000 MT of granulated product per month and the Plaintiff had to then take delivery of (and pay) for such product and furthermore would be liable to make payment of the equivalent of 5000 MT of product, even if it had not delivered sufficient raw material to the Defendant. In other words, the Plaintiff would pay the Defendant the equivalent of 5000 MT of product per month essentially for reserving the Defendant's production capacity for that month. The Plaintiff then either delivered sufficient raw material and took it or it did not deliver sufficient raw material and paid the equivalent for 5000 MT as if the Defendant had in fact produced it.

73. Of course, the clause is silent on what happens if the Plaintiff delivered sufficient raw material, but the Defendant did not produce 5000 MT of product. In such a case the only commercially sensible interpretation would be that the Plaintiff was not obliged to make payment for product that the Defendant did not produce despite being in a position to do so and the take or pay would not apply. However, since I have held that clause 4.1.2 and 4.1.3 did not become applicable to the parties, I need not make a definitive finding in this regard.
74. I therefore find that on a proper interpretation of clause 4.1.1, the Plaintiff was not obliged to purchase at least 60 000MT per annum of granulated product, on a take or pay basis, with a minimum of 5000MT per month. That being so, the fundamental premise for the Defendant's first counterclaim predicated on the enforceability of the take or pay, must fail.
75. Based on the aforesaid interpretation of the IMA, the Plaintiff cannot be said to have breached the IMA since it was not obliged to deliver any minimum amount of raw

material to the Defendant. In terms of the IMA and since clauses 4.1.2 and 4.1.3 were not applicable or enforceable, the Plaintiff was only obliged to make payment for the raw material in fact pelletized and made available to the Plaintiff by the Defendant. There is no suggestion that the Plaintiff failed to make payment to the Defendant for product pelletized for it by the Defendant – whether in terms of the initial agreement or the IMA.

76. Based on the aforesaid finding, it is not then necessary to deal with the remaining issues raised in respect of the Defendant's counterclaims, such as *inter alia* whether the Plaintiff had failed to supply the raw material necessary to produce 5000 MT of granulated product per month, the reasons for the stoppages in the production and the quantification of the Defendant's counterclaim, including the issues of its variable costs, whether the plant had included a large granulation pan from the outset and many other ancillary issues and I decline to do so.
77. In the circumstances, the Defendant's counterclaims are dismissed.
78. This brings me to the Plaintiff's claims for (1) payment of the sum of R1 604 150, alternatively R1 334 254 being repayment of advance payments made by the Plaintiff to the Defendant for the pelletizing of limestone and gypsum but in respect of which advance payments, product was not delivered by the Defendant; (2) payment of the sum of R945 181, being the value of raw material supplied by the Plaintiff which was used by the Defendant, but which resulted in 1 279 MT of oversized pellets which were incapable of being reworked or resold and rendered wasted and (3) payment of the sum of R83 488 being the amount outstanding in respect of bags supplied by the Plaintiff to the Defendant for which the Defendant undertook to pay, but failed to do so.

79. In respect of the first claim, whether the Plaintiff is entitled to repayment of R1 604 150, alternatively R1 334 254 (the Plaintiff's calculations being set out in annexure "POC2" and "POC2.1" to its Particulars of Claim), the alternative amounts claimed are dependent on whether the prior agreement was replaced and/or subsumed by the IMA as contended by the Plaintiff, or whether it remained a separate agreement to the IMA as contended by the Defendant and therefore whether certain of the advance payments were in fulfilment of the IMA (which took over the prior agreement) or whether they were in fulfilment of only the prior agreement separately from the IMA – in which event the Plaintiff would only be entitled to repayment of the lesser amount of R1 334 254.

80. The Plaintiff of course relies on clause 19.5 of the IMA which states as follows:

“[T]his agreement constitutes the entire Agreement among the Parties with regards to the subject matter in this Agreement and any previous Agreements, understandings and negotiations on that subject matter cease to have any effect.”

81. Whether the initial agreement ceased to have any effect and was effectively replaced by the IMA is dependent on whether the “subject matter” of the respective agreements is the same. The subject matter of the prior agreement was the pelletization by the Defendant of the Plaintiff's limestone raw material into prills. The subject matter of the IMA was similarly the pelletization by the Defendant of the Plaintiff's limestone and gypsum raw material into prills. The subject matter is therefore exactly the same (with the addition of gypsum), albeit that the volumes and sizes of the prills may have differed. Therefore, the prior agreement ceased to have effect on the conclusion of the IMA on 1 December 2015 and that is the correct interpretation of clause 19 of the IMA. Any product produced by the Defendant after

1 December 2015 on behalf of the IMA could only have been in terms of the IMA and not the prior agreement. The Plaintiff is not therefore entitled to repayment of any advance payments it made prior to 1 December 2015 since its claim was exclusively based on the IMA and not any prior agreements.

82. What then does one make of the fact that the Plaintiff kept open the purchase order for 24000MT placed pursuant to the prior agreement? It merely means that the remainder of the purchase order was regulated by the terms of the IMA and became an order in terms of the IMA for the remainder of that purchase order. The evidence was clear that the purchase order number was maintained only because it was easier in the system to maintain that order number rather than create a whole new order for the balance of the tonnage not delivered as at 1 December 2016. It was therefore merely an internal accounting issue.
83. Lastly in regard to the Plaintiff's first claim it is necessary to deal with the Defendant's contention that there is no provision in the IMA for repayment of advance payments made in respect of which no product was produced and made available to the Plaintiff. The Defendant contends that the Plaintiff is not entitled *per se* to a repayment of advance payments for which it did not receive product. The Defendant contends that if the Plaintiff's cause of action is contractual, there is no express term in the IMA providing for such a repayment and that to the extent that the Plaintiff relies on an implied or tacit term, the Plaintiff has failed to plead such a term and has further failed to lead evidence to satisfy the so-called "bystander test" for importing such a term *ex consensu*.
84. It is trite that on the cancellation of a contract due to breach or anticipatory breach (repudiation), a party has a right to contractual restitution of that which it has

performed by not received the countervailing performance from the breaching party²³. At first blush it would seem that the advance payments by the Plaintiff can be recovered as a contractual restitution claim. However, *Mr Strydom* for the Defendant contended that those cases were distinguishable since in those cases, the right to contractual restitution arose on the cancellation of a contract due to breach, whereas in this matter, the Plaintiff did not rely on a cancellation of the contract due to a breach by the Defendant but rather on the termination of the contract due to effluxion of time. Insofar as I found that the Defendant's purported cancellation of the IMA due to a breach by the Plaintiff could not be upheld and insofar as the IMA had terminated by effluxion of time on 31 January 2017, before the Plaintiff exercised its election to accept the Defendant's repudiation (i.e. its purported cancellation of the IMA) in February 2017, it would mean that the IMA terminated by effluxion of time. In other words, the IMA terminated by the mutually agreed date of 31 January 2017.

85. The question is then whether a party who has made advance payments in expectation of countervailing performance from the other party, can claim restitution of its advance payments on the termination of the agreement by effluxion of time without relying on a tacit term to that effect. In *Ace Motors v Barnard* 1958 (2) SA 534 (T) at 537F-G, Dowling J held as follows in this regard:

“The authorities quoted by Mr. Pienaar and certain others, seem to me clearly to establish that on an agreed rescission of a partly executed contract of sale the seller must refund such of the purchase price as the purchaser has paid, if it is not otherwise agreed.

In Combrinck v Maritz, 1952 (3) SA 98 (T), the head-note reads: -

²³ See *Baker v Probert* 1985 (3) SA 429 (A) at 438I-439C and *Tweedie and Another v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 807B-D

'When a contract of purchase and sale is mutually cancelled and one party has performed his part of the original contract then, if he is the purchaser, he is entitled to recover the price paid.'"

86. This finding was upheld by the Appellate Division in *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 274H, where it was held as follows (per Botha JA):

"Een van daardie gevolge was die terugbetaling aan eiser van die bedrag van R10 000 wat hy as deel van die koopsom ingevolge die gekanselleerde ooreenkoms betaal het, want dit is duidelik dat waar partye na sluiting van 'n ooreenkoms weer ooreenkom om uit die eerste ooreenkoms terug te tree, en een of albei van die partye reeds gedeeltelik onder die eerste ooreenkoms gepresteer het, daar uit die tweede ooreenkoms, tensy anders ooreengekom, 'n verpligting ontstaan tot teruggawe van dit wat reeds gepresteer is. (Ace Motors v Barnard, 1958 (2) SA 534 (T))."

87. And at 277F:

"Myns insiens was eiser geregtig om die terugbetaling aan hom van die bedrag van R10 000 te vorder bloot op grond van die kansellasië van die ooreenkoms van 12 Junie 1970 en die onmoontlikwording, as gevolg van die kansellasië van die twee ooreenkomste van 19 November 1970, van die wyse en tyd waarop terugbetaling van daardie bedrag in die ooreenkoms van 2 Desember 1970 beding is. Dit was vir eiser dus nie nodig om op 'n stilswyende beding te steun nie." (my emphasis)

88. I therefore find that the Plaintiff has adequately pleaded a case for the restitution of its advance payments made under a contract which expired by effluxion of time.

89. The Defendant however correctly contends that since the Plaintiff seeks to enforce its rights under the IMA and not under the prior 24 000 MT order in terms of the prior agreement, it is clear that it cannot take into account advance payments made under the previous agreement and therefore the claim for the sum of R1 604 105 as

set out in annexure “POC2” to the Plaintiff’s particulars of claim (which includes payments prior to the conclusion of the IMA on 1 December 2015), cannot be granted. On this basis, the Plaintiff is only entitled to recover pre-payments made from 1 December 2015, which is the period governed by the IMA, the amount of which is R1 334 254, as set out in annexure "POC2.1" to the Plaintiff’s particulars of claim.

90. In its second claim, the Plaintiff claims the sum of R945 181 being the value of 1 279 tons of pellets which were allegedly incapable of being reworked or resold. This is calculated at a cost of R739 per ton. The evidence of Mr Behrens and Mr Ziemerink was led in this regard.
91. As explained by Mr Klue in his evidence, there is a difference between oversized pellets (generated at the start of a production session) and waste, being the residue in the granulation pan at the end of a production session.
92. There was no contractual obligation placed upon the Defendant in the IMA to rework oversized material. In any event, the oversized pellets had to be blended with fresh raw material in a ratio of 3%-6% of the oversized pellets and 94%-97% of fresh material. Furthermore, in terms of clause 3.2.1.4 of the IMA "production shrinkage" of 3% in the case of limestone was allowed and the Defendant was not responsible for this production shrinkage.
93. In order to discharge its onus in respect of proving its second claim, the Plaintiff had to prove:
 - 93.1. That some granules produced under the IMA were oversized, in other words, more than the permissible 2mm – 6mm in size. However, it was

common cause that there was indeed oversized product as recorded in the monthly stock-sheets;

- 93.2. That some of the oversized pellets were indeed not re-workable. This would have required expert expert evidence, yet the Plaintiff relied solely on Mr Ziemerink's inspection and subjective opinion and he was not qualified as an expert in this regard;
- 93.3. The exact volume of oversized pellets which was not re-workable, which would also require expert evidence. Again, the Plaintiff merely led the evidence of Mr Ziemerink who conducted a physical inspection and counted the number of bags which in his subjective opinion were not re-workable;
- 93.4. That the volume of oversized product which was not re-workable falls outside the production shrinkage margin of 3% of the total raw materials supplied. However, 3% of the total volume of 20 899 tons of raw material supplied by the Plaintiff in the period of the IMA amounts to 627 tons. This must be deducted from the Plaintiff's claim of 1 279 tons;
- 93.5. the oversized product did not result from non-complying raw material. There was no such evidence and particularly no expert evidence.
- 93.6. the Plaintiff followed the contractually prescribed rejection procedure in clauses 3.2.3.8 – 3.2.3.10 of the IMA in respect of non-conforming product. There was no evidence that such procedures were indeed followed by the Plaintiff;

- 93.7. the Plaintiff had to prove the cost of the raw material that became wasted. Mr Behrens testified that the cost price was R739 per ton and that the proof was in the Plaintiff's system. No documents were discovered or proved in evidence to substantiate this cost price. Bearing in mind that most of the raw material came from the Plaintiff's own quarry at Port Shepstone and had to be transported to Gauteng, the cost is not a readily apparent figure.
94. The Plaintiff led insufficient evidence to prove its claim in this regard and I was not satisfied that it was proved that the material was in fact all wasted or what proportion was wasted and the value of the remaining still usable material.
95. In the circumstances, I find that the Plaintiff did not prove its second claim and this claim must be absolved from the instance.
96. In its third claim, the Plaintiff claims the amount of R83 488 as the amount still owing in terms of an agreement between the parties that the Defendant would pay for missing bags. Payment was to take place in three instalments of which only the first instalment was effected. The Defendant has accepted liability for the of R83 488 but relied on the set-off as provided for in Rule 22(4) of the Uniform Rules of Court on the basis that the Plaintiff's third claim would be extinguished by the Defendant's counterclaim. However, since the Defendant's counterclaims are dismissed, there is no viable defence raised to the Plaintiff's third claim and in the circumstances the Plaintiff is entitled to payment of R83 488.
97. In respect of costs, there is no doubt that a large proportion of the trial was devoted to evidence in relation to the Defendant's counterclaim. This counterclaim has been unsuccessful and there is no reason that the Defendant should not pay the Plaintiff's costs of successfully defending the counterclaim. The Plaintiff has also been

successful in its first and third claim but has had absolution granted in respect of its second claim. On a conspectus of the whole matter, the Plaintiff has been substantially successful and should be awarded the cost of the its action and of its defending of the counterclaim.

98. In the circumstances, the following order is made:

98.1. The Defendant is to make payment to the Plaintiff of the amount of R1 334 254.00;

98.2. The Defendant is to make payment to the Plaintiff of interest *a tempore morae* on the amount of R1 334 254, at the legally prescribed interest rate of 10,25% from date of demand, being 14 February 2017, to date of final payment in full;

98.3. The Defendant is to make payment to the Plaintiff of the amount of R83 488.00; The Defendant is to make payment to the Plaintiff of interest *a tempore morae* on the amount of R83 488.00, at the legally prescribed interest rate of 10,25% from date of service of summons to date of final payment in full;

98.4. The Defendant's counterclaims are dismissed;

98.5. The Defendant is to make payment of the Plaintiff's costs of action and the costs of defending the Defendant's counterclaims as taxed or agreed on scale C of Rule 67A read with rule 69 of the High Court Rules.


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KAIRINOS AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

For the Plaintiff:

Adv JG Smit

Instructed by:

NLA Inc Attorneys

For the Defendant:

Adv F Strydom

Instructed by:

Nolte Incorporated Attorneys

Dates of Hearing: 22 – 26 April 2024; 1 and 2 July 2024 and 13, 14, 16 and 17 January 2025

Judgment date: 31 January 2025

This judgment is delivered by upload to the digital data base of the court and by transmission email to the parties on 31 January 2025. The judgment is deemed to be delivered on 31 January 2025.