



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED**

FROM The Registrar, Supreme Court of Appeal
DATE 17 June 2022
STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

*Naka Diamond Mining (Pty) Ltd v Johannes Frederick Klopper NO
and Others (case no 277/2021) [2022] ZASCA 94 (17 June 2022)*

MEDIA STATEMENT

Today the Supreme Court of Appeal dismissed an appeal against an order granted by the Gauteng Division of the High Court, Johannesburg, in terms of which a joint venture agreement concluded between Naka Diamond Mining (Pty) Ltd and SouthernEra (Pty) Ltd was declared terminated before the commencement of SouthernEra's business rescue.

In 2001 the parties and an entity named De Beers Consolidated Mines Limited formed a joint venture (JV) and concluded a joint venture agreement, termed the Klipspringer Joint Venture Agreement (JV agreement), which had the object to prospect for, mine and sell diamonds. Each party made a contribution to the joint venture: Naka had to contribute development costs and SouthernEra had to contribute its 'old order mining rights' in respect of Farm Rusland, together with the use of its mining plant and infrastructure. Naka and SouthernEra also contributed the mining rights jointly held by them in respect of the Farm Doornrivier. De Beers had to contribute its mining rights in respect of Farm Marsfontein, together with the rights to mine in respect of the De Beers Rights and De Beers Exploration Properties. In return, a 'participation interest' would be allocated to each party, being their share of the net revenue earned by the JV. The JV was to continue for as long as diamonds were produced on the relevant properties. The agreement made provision for the cancellation thereof due to breach as well as cancellation based on other grounds. Furthermore, it was the responsibility of each of the parties to the JV to maintain the validity of, and enforceability of the mining rights contributed by it to the JV.

In 2004 De Beers left the JV and transferred its participation interest to Naka. In May 2009 the De Beers' rights, as transferred to Naka, and Naka's share of the Doornrivier rights lapsed and returned to the State due to the failure to convert them in terms of the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002. Thereafter Naka made no further contribution to the JV and operations on Farm Rusland ceased as a result of underground flooding. By March 2015 the mining operations at Rusland had been conducted at a loss. On 7 August 2018 SouthernEra cancelled the JV agreement in writing because of Naka's failure to make any contribution and asserted that the failure constituted an irremediable breach of the JV agreement. After SouthernEra went to voluntary business rescue on 23 March 2020 and had sold some of its mining equipment, Naka also terminated the JV agreement in writing as a result of a SouthernEra's irremediable breach being the sale of the equipment.

Naka insisted that SouthernEra remained bound to perform its obligations under the agreement after the cancellation of the JV agreement. SouthernEra's business rescue practitioners launched an urgent application in the high court in June 2020 seeking a declarator that all of SouthernEra's obligations under the JV agreement had terminated, alternatively, that such obligations as might have survived the cancellation of the agreement be cancelled as provided in s 136(2)(b) of the Companies Act 71 of 2008. The high court's declarator that the JV agreement had been cancelled left both parties in limbo because the dispute regarding the consequences of the cancellation remained unresolved.

In dismissing the appeal by Naka, the SCA rejected their argument that the JV survived the cancellation of the agreement. The Court held that generally, cancellation of a contract results in termination of the obligations created thereby. If a contractual obligation has not yet been fulfilled, cancellation has the result that obligations from the contract are extinguished and can therefore no longer be enforced. The SCA found that the JV being a form of a legal relationship that was created by the JV agreement, with the rights and obligations thereunder regulated thereby, could not survive on termination of the agreement. The court concluded that on termination of the agreement, the JV terminated and all the parties' obligations thereunder ended.

--- ends --