THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 277/2021

In the matter between:

NAKA DIAMOND MINING (PTY) LIMITED **APPELLANT**

and

JOHANNES FREDERICK KLOPPER N O **FIRST RESPONDENT**

RYNETTE PIETERS N O **SECOND RESPONDENT**

SOUTHERNERA DIAMONDS (PTY) LIMITED **THIRD RESPONDENT**

Neutral citation: *Naka Diamond Mining (Pty) Limited v Johannes Frederick Klopper NO & Others* (case no 277/2021) [2022] ZASCA 94 (17 June 2022)

Coram: DAMBUZA, GORVEN, MOTHLE and MABINDLA-BOQWANA JJA, and SAVAGE AJA

Heard: 13 May 2022

Delivered: 17 June 2022

Summary: Contract Law – whether obligations created under a joint venture contract survived termination of the contract – principles governing interpretation of legal documents reaffirmed – reconstruction of the terms of the contract by the court on termination impermissible – all obligations ceased on termination of the contract.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Spilg J sitting as court of first instance):

1 The appeal is dismissed with costs of two counsel, where so employed.

2 The cross appeal is upheld with costs of two counsel, where so employed.

3 The order of the high court is set aside and replaced with the following order:

'1 It is declared that any and all obligations of SouthernEra Diamonds (Pty) Ltd (in business rescue) owed by it in respect of the Klipspringer Joint Venture Agreement (being the agreement concluded on 31 July 2001 between SouthernEra Diamonds (Pty) Ltd, formerly SouthernEra Resources Ltd, Naka Diamond Mining (Pty) Ltd, formerly Steppon Investments (Pty) Ltd and De Beers Consolidated Mines Ltd), as amended on 6 October 2004, terminated, at the latest, on 24 May 2020.

2 Naka Diamond Mining (Pty) Ltd is liable for the costs of the application, including the costs of two counsel where so employed.'

JUDGMENT

Dambuza JA (Gorven, Mothle and Mabindla-Boqwana JJA and Savage AJA concurring)

[1] The issue in this appeal is whether certain obligations which the third respondent, SouthernEra (Pty) Ltd (in business rescue) (SouthernEra), had under a joint venture agreement survived the termination of that agreement. The

Gauteng Division of the High Court, Johannesburg (Spilg J) (high court), before which the matter served, did not make any order in this regard. It merely granted a declarator that the joint venture agreement was terminated prior to the commencement of SouthernEra's business rescue, an order which displeased both parties. The appeal by the appellant, Naka Diamond Mining (Pty) Ltd (Naka), and the cross-appeal by the first and second respondents, Mr Johannes Klopper and Mr Rynette Pieters, SouthernEra's business rescue practitioners (the practitioners), are with the leave of the high court.

[2] In 2001 SouthernEra, which was then known as SouthernEra Resources Limited, concluded a joint venture agreement with Naka, then known as Steppon Investments (Pty) Ltd, and De Beers Consolidated Mines Limited (De Beers). The object of the agreement, termed the Klipspringer Joint Venture Agreement (JV agreement), was to prospect for, mine and sell diamonds.

[3] Each party was to make a contribution to the joint venture (JV). Naka had to contribute development costs of up to R49,6 million which was to be used to boost the underground mining activities.[1] SouthernEra had to contribute its 'old order mining rights' in respect of Farm Rusland 93 KS, on which the Klipspringer fissure diamond mine was located (Klipspringer right), together with the use of its mining plant and infrastructure.[2] De Beers had to contribute its mining rights in respect of Farm Marsfontein 91 KS, together with the rights to mine in respect of the De Beers Rights and De Beers Exploration Properties.[3] Naka and SouthernEra also contributed the mining rights jointly held by them in respect of the Farm Doornrivier 86 KS (the Doornrivier old order rights).[4] In addition, each party had to make available to the JV all technical data relating to the respective

[1] Clause 7.5 of the JV agreement.
[2] Clause 7.1 and 7.2.
[3] Clause 7.5 and 7.6.
[4] Clause 7.3.

JV mining rights.[5] In return, a 'participation interest' would be allocated to each party, being their share (expressed as a percentage) of the net revenue earned by the JV.

[4] The JV was to continue for an indefinite period; for as long as diamonds were produced on the relevant properties.[6] However, in terms of Clause 14 of the JV agreement the parties could terminate the agreement by mutual agreement at any time, or if a land claim or expropriation impacted negatively on the feasibility thereof[7], or if the precious stones to which the JV mining rights related were exhausted.[8]

[5] 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.[9] However, the royalties payable in respect of the State rights, the costs of purchasing additional mineral rights, and royalties payable in respect of the Klipspringer rights and SouthernEra Exploration Properties would be borne by the JV.

[6] In October 2004 the parties concluded an addendum to the JV agreement which, amongst other things, regulated De Beers' exit from the JV and for its participation interest to be transferred to Naka. The De Beers' rights, as transferred to Naka, and Naka's share of the Doornrivier rights lapsed and returned to the State in May 2009. Thereafter Naka made no further contribution to the JV.

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[5] Clause 7.4.
[6] Clause 5.3.
[7] Clause 12.
[8] Clause 14.2.
[9] Clause 7.8 of the JV agreement p70.

[7] During 2010 operations on Farm Rusland ceased as a result of underground flooding. Furthermore, no Management Committee meetings had taken place since 2008. SouthernEra maintained that the JV had terminated by operation of law following Naka's inability to contribute De Beers' and the Doornrivier rights and costs of care and maintenance of the mining operations. On 22 February 2013 the Klipspringer old order right was converted into a new order mining right as a result of a conversion application that had been lodged by SouthernEra in 2009. By March 2015 the mining operations at Rusland had been conducted at a loss of R563 990 176. Thereafter, the JV suffered further losses.

[8] In an email to Naka's attorneys dated 7 August 2018, SouthernEra, through its attorneys, advised that it was cancelling the JV agreement because of Naka's failure to transfer the De Beers rights to the JV and to maintain them. SouthernEra asserted that Naka's failure constituted an irremediable breach of the JV agreement as the rights in question had since been allocated to the local community. There does not seem to have been any response from Naka in this regard. However, judging from its conduct subsequent to the cancellation, it did not accept same.

[9] During February 2020 SouthernEra sold some of its mining equipment located at Farm Rusland. Naka attempted but failed to stop the sale. Naka's attorneys then sent a written warning to SouthernEra's attorneys advising that the disposal of the equipment was in breach of the JV agreement and threatening that action would be taken by Naka if the equipment was not returned to the JV. The sale of equipment proceeded. All that Naka managed to secure on 24 February 2020 was an interim interdict in terms of which SouthernEra was restrained from continuing with mining activities on Farm Rusland and from disposing of its business interests in the Farm Rusland mining operations, pending an action or mediation that was to be instituted by it (Naka) by 1 June 2020 for resolution of

the dispute as to whether the JV agreement remained extant. The interim interdict was granted on the basis that throughout the years 2009 to 2017 SouthernEra had acknowledged the existence of the JV in its business activities, notwithstanding Naka's failure to contribute the De Beers mining rights. The court held that it was not open to SouthernEra to raise as its defence to Naka's application for an interdict, Naka's failure to contribute the rights.

[10] On 23 March 2020 SouthernEra went into voluntary business rescue and the practitioners were appointed. The following day Naka's attorneys wrote to SouthernEra's attorneys advising that Naka was cancelling the JV agreement as a result of a SouthernEra's irremediable breach thereof. In this regard, it too, invoked clause 26.2 of the JV agreement. This was in reference to the sale of equipment by SouthernEra. In the written cancellation Naka's attorneys advised that the breach by SouthernEra constituted a withdrawal from the agreement and relinquishment of SouthernEra's entire participation interest as provided in Clause 8.7 of the JV agreement. Naka insisted that SouthernEra remained bound to perform its obligations under the agreement as provided in Clause 8.7 after the cancellation of the JV agreement.

[11] On 24 June 2020 the practitioners launched an application in the high court on an urgent basis, seeking a declarator that all of SouthernEra's obligations under the JV agreement had terminated, alternatively, that such obligations as might have survived the termination of the agreement be cancelled as provided in s 136(2)*(b)* of the Companies Act 71 of 2008 (Companies Act). Initially, in prayer 2 of the Notice of Motion, the practitioners had sought a declaratory order that the Joint Venture Agreement had terminated. The Notice of Motion was later amended by adding prayer 2A in which a declaratory order was sought that any and all obligations of SouthernEra under the JV had been terminated, at the latest on 24 March 2020.

[12] In the application the practitioners contended that the JV had been an 'abject failure' because of various factors, including Naka's failure to comply with its obligations under JV agreement. In addition to what SouthernEra had raised in its letter of cancellation it was asserted that Naka had failed to maintain the black ownership level necessary to enable the JV to comply with the Black Economic Empowerment requirements of the Department of Mineral Resources. The R600 million financial losses during the years 2014 and 2015 borne by SouthernEra alone were another source of complaint. There was, however, no intention of laying a claim against Naka for its share of the losses, as it had no realisable assets from which it could satisfy such a claim. SouthernEra had discontinued all mining and business operations during 2019.

[13] With regard to the alternative prayer, brought under s 136(2)*(b)* of the Companies Act, the practitioners contended that the declarator sought was necessary to provide certainty regarding the termination of the JV and any obligations that SouthernEra had thereunder, so that a rational Business Rescue Plan could be prepared and presented to the creditors.

[14] In opposing the application, Naka highlighted that in the interdict judgment the high court had found in its favour, that the JV remained extant and had not been an 'abject failure' as had been contended by SouthernEra. It repeated its contention that SouthernEra had withdrawn from the JV agreement and that it remained bound to continue its contributions to the JV.

[15] Regarding the alternative prayer, Naka contended that there were no reasonable prospects that SouthernEra could be rescued. It further contended that the practitioners could only seek cancellation of residual obligation once they had prepared a business rescue plan.

[16] 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 termination remained unresolved. In its submissions in this Court Naka contended, somewhat curiously considering its letter of cancellation, that the issue whether the agreement had been terminated was pending in the action it had instituted as per the interdict. However, at the hearing of the appeal its counsel clarified that Naka had accepted that the agreement was terminated but insisted that such termination was consequent to SouthernEra's breach. In the cross-appeal the practitioners maintained that all obligations on SouthernEra under the JV agreement terminated on cancellation of the JV agreement.

[17] Naka's main contention on appeal was that, following the irremediable breach by SouthernEra in selling its mining equipment, it cancelled the JV agreement as provided in Clause 26.2 of the JV agreement (the breach clause) and that Clause 26.3 which became operative on termination of the agreement for breach, prescribed that the provisions of Clause 8.7 came into effect. Consequently, Naka sought a declarator that, as provided under Clause 8.7, SouthernEra was bound to continue with its contributions to the JV as specified under Clause 7.8 of the JV agreement. Clause 7.8 provided that:

'7.8 Each of Steppon [Naka], De Beers and SouthernEra shall at its own cost do all things necessary to maintain the validity and enforceability of the portion of the KJV Rights contributed by each of them respectively (except as determined by the Management Committee) for the duration of the Joint Venture except that:

7.8.1 royalties payable in respect of the State Rights;

7.8.2 the costs of purchasing any additional mineral rights within the Exploration Properties; and

7.8.3 royalty obligations payable to MSA in respect of the Klipspringer Rights and the SouthernEra Exploration Properties, as set out in clause 3.4 shall be expenses of the Joint Venture.'

[18] It should be noted that there remains a dispute in the pending action as to which party terminated the agreement. It is common cause that the agreement was terminated, by SouthernEra or Naka, and that it was terminated under Clause 26.2. The dispute as to which party terminated is not relevant to the appeal and is the subject of the unfinished litigation. If it terminated at the instance of SouthernEra on 8 August 2018 on the basis that Naka had committed an irremediable breach of the agreement, it is common cause that no residual obligations rested on SouthernEra thereafter. If, on the other hand, it terminated at the instance of Naka on 24 March 2020 due to an irremediable breach by SouthernEra, the question arises whether any residual obligations rested on SouthernEra thereafter. The appeal was argued before us on the basis that this question alone should be decided and not the prior question of whether SouthernEra or Naka terminated the JV agreement. This addresses prayer 2A of the amended notice of motion referred to above. I agree that this is an appropriate way to deal with the matter. The parties want clarity on that point and it is not possible to resolve who terminated the JV agreement in these proceedings.

[19] The breach clause provided:

'26. BREACH

26.1 The remedies of the Parties under 26.2 shall not be exhaustive and shall be in addition and without prejudice to any other remedies in law which they might have, whether under this Agreement or at common law.

26.2 A party shall be entitled to cancel this Agreement by written notice to the others upon the occurrence of any one or more of the following events:

26.2.1 if the other Party commits a material breach of this Agreement which is incapable of being remedied;

26.2.2 if the other Party commits any other material breach of this Agreement and fails to remedy the breach within a reasonable time (which shall not be less than 30 days) after receiving written notice to do so;

26.2.3 if the other Party commits a breach of the Principal Agreement or this Agreement, which breach is either incapable of remedy or, if capable of remedy, is not remedied within the period allowed for remedy in terms of such agreement;
26.2.4 if any provisional or final order is made or an effective resolution passed for the winding up of the other Party otherwise than for the purposes of its reconstruction or an amalgamation with another company;
26.2.5 if any provisional or final order is made for the judicial management of the other Party;
26.2.6 if any event analogous to any of the events set out in 26.2.4 and 26.2.5 should occur with respect to a Party in any other jurisdiction.
26.3 On termination of this Agreement in terms of 26.2, the provisions of 8.7 shall apply mutatis mutandis.' (My emphasis.)

[20] On Naka's argument, on its cancellation of the agreement under Clause 26.2.1, Clause 26.3 became operative and in terms thereof Clause 8.7 regulated the consequences of the termination. Clause 8.7 provided:

'If either Steppon [Naka] or SouthernEra's Participation Interest is diluted to 5% or less, such party shall be deemed to have withdrawn forthwith from this Agreement and shall relinquish its entire Participation Interest free of any consideration; provided that such withdrawing party shall nevertheless be obliged to maintain in place and continue its contribution to the Joint Venture as set out in clause 7 (but excluding funding of capex in 7.2.1) and shall remain bound by the Principal Agreement (if it is party thereto) *and shall be liable for its obligations under this Agreement until termination of this Agreement*, save that it shall have no further funding obligations in terms of this clause 8. Such relinquished Participation Interest shall be deemed to have accrued automatically to the other party free of any consideration.' (My emphasis.)

[21] Counsel for Naka conceded that the basis for the deeming portion in Clause 8.7 has not been established. He submitted, however, that Naka was entitled to invoke Clause 8.7 because the parties to the agreement intended that in the event of breach the 'guilty party' would be divested of its right to participate in the JV. He submitted that the words *mutatis mutandis* in Clause 26.3 empowered Naka, as the innocent party, to make the necessary alterations to Clause 8.7 in order to

divest the 'guilty party' of its participation interest. In terms of Clause 8.7, on termination of the agreement, SouthernEra was to be deemed to have withdrawn from the agreement because its interest in the JV had been diluted to 5% or less, and it would then remain liable for its obligations under the agreement until the termination thereof.

[22] This contention then led to a distinction being drawn between the JV agreement and the JV; the argument being that the JV survived the cancellation of the agreement, such that SouthernEra's contributions would still be used in advancing the business of the surviving JV until the termination thereof.

[23] This submission is untenable. 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'.[10] The continuing contributions provided for under Clause 7.8 fall under this category (as opposed to accrued rights) and therefore became extinguished on termination of the JV agreement. Furthermore, 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.

[24] Clause 8.7 must be interpreted and applied sensibly, within the context of Clause 8 in which it is located and the entire JV Agreement, in line with the established approach to interpretation of legal documents.[11] Clause 8 regulated the funding requirements of the JV, over and above the R49,6 million that would have been provided by Naka. In terms thereof the parties would provide a

[10] Van Huyssteen et al *Contract- General Principles* 6 ed (2020) at 455.
[11] *In KPMG Chartered Accountants (SA) v Securefin Limited and Another* (644/07) [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

determined proportionate share of funding to the JV.[12] In the event of failure by a party to provide its proportionate share of the funding, the other party could provide the defaulting party's share, together with its own.[13] The result would be that the defaulting party's participation interest would then be diluted to the extent determined by a specified formula.[14] If the defaulting party's participation interest became diluted to 5% or less, that party would be deemed to have 'withdrawn' from the agreement, but would remain obliged to continue with the contributions prescribed in Clause 7 until termination of the JV agreement.[15]

[25] Notably, the trigger for the provisions of Clause 8.7 would be the occurrence of a specified event – the dilution of a party's participation interest to 5% or less. On the other hand the termination of the agreement under the breach clause resulted from the exercise of an election by a party to cancel the agreement upon breach by the other party as specified in the breach clause.

[26] Significantly, the trigger event under Clause 8.7 resulted in a 'withdrawal' from the agreement compared with the 'termination' of the agreement under Clauses 14 and 26. The use of the two different words suggests that the parties envisaged different processes and consequences in the relevant clauses. On the deemed withdrawal of a party the agreement and the JV would remain valid until terminated. On termination, under the breach clause, the agreement and the JV would come to an end. The provisions of the termination clause have already been discussed in paragraph 4 above.

[27] The interpretation contended for by Naka was effectively an impermissible reconstruction of Clause 8.7 of the agreement. The entire portion in that clause

[12] Clauses 8.1 to 8.3.
[13] Clause 8.4
[14] Clause 8.4.2
[15] Clause 8.7

which specified the basis for its application would have to be deleted and a new basis be substituted. The words 'until termination of the Agreement' would be rendered superfluous or meaningless. It was submitted that those words should be altered to read 'until termination of the Joint Venture', which would be absurd given that the JV was terminated under Clause 26.2.

[28] Consequently, the premise on which Naka sought to invoke the provisions of Clause 8.7 was unsustainable. Once the JV Agreement was terminated under the breach clause, the provisions of Clause 8.7 could not apply *mutatis mutandis*. The substance regulated in the breach clause and Clause 8.7 differ substantially. On termination of the agreement, the JV terminated and all the parties' obligations thereunder ended. The practitioners were accordingly entitled to the declaratory order sought in the amended prayer 2A of the Notice of Motion.

[29] It is not necessary to deal with the alternative relief brought under s 136(2)*(b)* of the Companies Act. The following order shall therefore issue:

1 The appeal is dismissed with costs, including cost of two counsel, where so employed.

2 The cross appeal is upheld with costs, including costs of two counsel, where so employed;

3 The order of the high court is set aside and replaced with the following order:

'1 It is declared that all obligations of SouthernEra Diamonds (Pty) Ltd (in business rescue) owed by it in respect of the Klipspringer Joint Venture Agreement (being the agreement concluded on 31 July 2001 between SouthernEra Diamonds (Pty) Ltd, formerly SouthernEra Resources Ltd, Naka Diamond Mining (Pty) Ltd, formerly Steppon

Investments (Pty) Ltd and De Beers Consolidated Mines Ltd), as amended on 6 October 2004, terminated at the latest on 24 May 2020.

2 Naka Diamond Mining (Pty) Ltd is liable for the costs of the application, including the costs of two counsel, where so employed.'

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N DAMBUZA
JUDGE OF APPEAL

Appearances:

For appellant:	BM Gilbert
Instructed by:	David Levithan Attorneys, Sandton
	Lovius Block Inc, Bloemfontein
For respondents:	A Gautshi SC with J Smit
Instructed by:	Van Wyk Van Heerden Inc, Paarl
	Symington & De Kock, Bloemfontein