

IN THE HIGH COURT OF
GAUTENG LOCAL DIVISION,



SOUTH AFRICA
JOHANNESBURG

CASE NO: A 5050/19
GJ 2797/18

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes

Signed electronically by Wright J

24 November 2022

In the matter between:

SIDERALLOYS INTERNATIONAL SA

APPELLANT

and

RAHIDA INVESTMENT (Pty) LTD

RESPONDENT

JUDGMENT

WRIGHT J

1. The appellant, Sideralloys concluded a written “*Offtake Agreement*” with the respondent, Rahida on 19 May 2017. Under this agreement, Sideralloys would buy manganese from Rahida. Rahida held a mining licence and Sideralloys traded in commodities, including manganese. The agreement was partially implemented.
2. Before long, the parties were at odds and on 20 December 2017 Sideralloys’ former attorneys wrote to Rahida alleging various breaches by Rahida amounting to an alleged repudiation of the agreement by Rahida and purporting to cancel the agreement. Rahida’s attorneys replied on 27 December 2017, alleging that Sideralloys had breached the agreement and giving Sideralloys a day to remedy the alleged breaches. On 3 January 2018, Rahida’s attorneys purported to cancel the agreement, the alleged breaches by Sideralloys not having been remedied.
3. In late January 2018, Sideralloys launched an urgent application seeking to place Rahida in business rescue. Affidavits were swapped and later, on 22 June 2018 and by agreement Keightley J made an order referring the matter to oral evidence before her. The learned judge heard the oral evidence and then handed down judgment against Sideralloys. Sideralloys now appeals with the leave of Keightley J.

4. After the launching of the urgent application but before the oral evidence was heard Sideralloys amended its notice of motion to add a prayer for payment by Rahida to Sideralloys of \$2 992 656 plus interest at the prescribed rate. The prayer for business rescue seems to have taken a back seat. When Keightley J granted leave to appeal it was against her order refusing the prayer for payment of money. It is only the prayer for money which is before us. It would appear that the amount claimed is made up of amounts allegedly paid by Sideralloys to Rahida pursuant to the agreement or its predecessors together with a damages claim of sorts. Given the conclusion to which I come below, there is no need to delve further into the quantification of the claim.
5. When the application was launched by Sideralloys, the thrust of the attack on Rahida and the bases for the alleged indebtedness by it were allegations, summarised in paragraph 46.2 of the founding affidavit, that Rahida had breached the agreement in two ways. Firstly, by failing to deliver manganese meeting the agreed specifications and secondly, that Rahida had failed to ensure that jiggling machines, purchased by Sideralloys but to be used by Rahida to improve the manganese were operational and able properly to improve the manganese.
6. These two grounds of attack by Sideralloys were expressly abandoned by Sideralloys in the agreed order on 22 June 2018. Under that order, the matter was referred to the hearing of oral evidence on, among other terms not presently relevant,

“3.1 Whether it was a tacit or implied term of the Offtake Agreement that Rahida would comply with the terms of the mining right (annexure FA26) and all statutory and regulatory obligations relating to its mining activities.

3.2 Whether Rahida breached the tacit or implied term in 3.1 above.

3.3 Whether Sideralloys was entitled to cancel the Offtake Agreement on the grounds that:

3.3.1 Rahida breached the implied or tacit term; or

3.3.2 the Department of Mineral Resources ordered Rahida to cease all mining operations on 5 December 2017.

3.3.3 the breach was material. “

7. It appears from the agreed court order that for Sideralloys to succeed it could follow either of two routes. It could prove the alleged term and its breach and that the breach was material, entitling it to cancel or it could cancel on the ground that the Department of Mineral Resources, (DMR) had ordered that Rahida cease operations, provided that this amounted to a material breach by Rahida. Neither route appears to incorporate a right to cancel for repudiation as appears to have been the basis for purported cancellation on 20 December 2017.
8. The affidavits and the record of oral evidence are lengthy but in my view, the case reduces to the following.
9. Under clauses 4 and 3 respectively, read with addendum 2 to the agreement, the agreement obliged Rahida to produce manganese at “*estimated*” quantities and at “*target*” quality within an envisaged time but it did not have definite start or end

dates. Under clause 6, Rahida “*will make its best efforts to produce required grade and quantity.*” This wording imposes on Rahida an obligation, even if it is to be measured objectively, to do no more than make its best efforts. It reduces an obligation to produce estimated amounts and target quality to an obligation to try to do so.

10. Under clause 4.1 of the agreement, 750 000 Dry Metric Tons of “*beneficiated*” manganese, that is manganese of higher quality, had to be produced by Rahida at an estimated 15 000 tons per month and this production had to begin within “*5 months of the start of the operation.*” There does not appear to be any certainty on precisely when operations had to start but during the hearing it seemed to be common cause that the total contract time was about 4.5 years. This accords with the total volume required to be delivered divided by the estimated rate of delivery.
11. Rahida held the mining right and it did so subject to certain conditions specified therein. It is common cause that on 5 December 2017, the DMR visited the mine where Rahida was working and in effect ordered Rahida to cease operations pending the meeting of certain named operational requirements by the DMR as set out in its report of that day.
12. A follow up inspection report made by the DMR and dated 7 February 2018, makes certain demands on Rahida, for example a demand is made that a conveyor belt installation is to meet certain regulatory standards.

13. Mr Pienaar, for Sideralloys correctly conceded that a comparison between the report of the DMR of 5 December 2017 and its report of 7 February 2018 showed that progress had been made by Rahida in addressing the DMR concerns.
14. The mining right itself does not appear to have been suspended or cancelled by the DMR.
15. In my view, the tacit or implied term alleged by Sidealloys finds no traction in the facts of this case. The alleged term must be read against the obligation of Rahida “to *make its best efforts*”. The alleged term seeks to place a higher obligation on Rahida than is required under the agreement and for that reason the alleged term cannot be tacitly read into the agreement nor may it be implied by law.
16. A tacit term is one contained in a contract, albeit quietly and it may not contradict the other terms. An implied term is one placed in a contract by law, provided that such a term does not offend the other terms of the contract. A court may not make a contract for the parties.
17. Technically, evidence that sought to bolster a case that placed a higher obligation on a party to perform than was expressly, tacitly or impliedly agreed upon is inadmissible as is evidence to the contrary. In modern law, context is important and it is for this reason that the matter went to oral evidence and much of the evidence was admissible.
18. It was open to the parties to have agreed on the alleged term and they chose not to include it in the written memorial of the agreement.

19. Even if I am wrong on the effect of the wording in clause 6, the appeal remains on shaky ground. If Rahida was obliged to deliver as required, and irrespective of its efforts, it does not follow that the alleged term finds a place in the agreement.
20. As far as the alleged term being tacit is concerned, had the parties been asked when they concluded the agreement what would happen if the DMR stopped Rahida's operations pending Rahida dealing with concerns raised by the DMR, the parties, represented as they were by practical business persons would have said something like "*Rahida will fix problems as and when they arise.*" In my view, the parties would not have gone on to say "*Of course, it is a term of the agreement that Rahida would comply with the terms of the mining right and all statutory and regulatory obligations relating to its mining activities.*" Such an answer would have been artificial and unnecessary to lend business efficacy to the agreement.
21. It appeared to be common cause that by about 23 March 2018 normal operations had been resumed by Rahida. The delay from 20 December 2017 to 23 March 2018 is not significant given the envisaged life of the contract of about 4.5 years. This is so for two reasons, namely the alleged failure of Rahida to deliver properly by 20 December 2017, coupled with the abandonment of this ground in the agreed court order and the fact that by no stretch of the imagination could the agreement be read to make time of the essence.
22. As far as the alleged term being implied is concerned, such a term might be reasonable and it may promote fairness and justice between the parties but it cannot be considered to be necessary or to be good law in general.

23. Even if Sideralloys has proved that on 5 December 2017 the DMR ordered Rahida to cease operations as set out in paragraph 3.3.2 of the agreed order of 22 June 20018, the appeal is weak for want of proof by Sideralloys of the term alleged in paragraph 3.1 of the order and for the reasons set out in the next paragraph.
24. Regarding the question of the right of Sideralloys to cancel under paragraph 3.3.2 of the agreed order, on the narrow ground that “*the DMR ordered Rahida to cease all mining operations on 5 December 2017*”, Mr Pienaar for Sideralloys correctly conceded that an interruption for a short time would not lead to the right to cancel accruing to Sideralloys. Rahida would sensibly have been entitled to a reasonable time to get its operations compliant with legal prescripts. It follows that the mere stopping of operations by the DMR on 5 December 2017 could not and did not accrue to Sideralloys a right to cancel. There could not be a material breach unless, at a minimum a reasonable time had passed after 5 December 2017. This is apart from any question of Sideralloys possibly needing to place Rahida in mora. In my view, Sideralloys was too quick out of the starting blocks on 20 December 2017.
25. Sideralloys allowed the appeal to lapse and it brought an application to re-instate the lapsed appeal. There was a considerable delay, of a number of months from the time that Rahida had granted Sideralloys two extensions of time to help it get its appeal on track and the consequent lapsing of the appeal and the later launching of the application to reinstate the appeal. On 3 July 2020, after Sideralloys’ former attorneys had warned it to get a move on, Sideralloys wrote to

its former attorneys saying “*The matter can remain dormant at this stage as there is nothing to gain from it. I don’t see specific reasons to accelerate anything.*”

This approach is not compatible with getting on with litigation as is required of litigants and their lawyers at least in the absence of agreement to the contrary.

26. Sideralloys and its former attorneys appear to have been engaged in a long-running game of cat and mouse in which the former attorneys kept advising Sideralloys of the need to prosecute the appeal. At the same time, Sideralloys balked at placing the former attorneys in funds. I see only diligence and concern by Sideralloys’ former attorneys in their attempts to keep the appeal on track.
27. In short, Sideralloys blames financial constraints made worse by covid and lockdown for its inability to fund its former attorneys to prosecute the appeal timeously. The view of Siderdalloys, as set out in its email of 3 July 2020 undercuts the professed inability to fund the appeal.
28. In my view, the grounds for re-instatement are weak and Sideralloys can’t succeed on the merits of the appeal. Taking both factors into account, re-instatement of the appeal is to be refused.

ORDER

1. The appeal of Sideralloys has lapsed and re-instatement is refused.
2. Sideralloys is to pay the costs of Rahida in the re-instatement application and in the appeal including those of counsel in both the re-instatement application and the appeal.

Signed electronically by Wright J for

Wepener J

I agree

Signed electronically by Wright J for

Fisher J

I agree

HEARD : 23 November 2022

DELIVERED : 24 November 2022

APPEARANCES :

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