REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 26743/21

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

17/10/2022 .....
DATE SIGNATURE

In the matter between:

COLT RESOURCES (PTY) LTD **APPLICANT**

and

PELONGWE HOLDINGS (PTY) LTD **RESPONDENT**

JUDGEMENT

Barit AJ

Introduction

[1] This is an application for specific performance brought by the applicant, Colt Resources (Pty) Ltd (Colt) with respect to prospecting and mining rights, which applicant wishes to secure from the respondent Pelongwe Holdings (Pty) Ltd (Pelongwe).

[2] The applicant is Colt Resources (Pty) Ltd, a company with registration number 2017/027715/07 duly incorporated in accordance with the company laws of South Africa.

[3] The respondent is Pelongwe Holdings (Pty) Ltd, a company with registration number 2012/082815/07 duly incorporated in accordance with the company laws of South Africa.

Application for condonation

[4] An application for condonation in this matter was launched by Pelongwe, with respect to the late filing of the respondent's (Pelongwe's) answering affidavit. The reason for the late filing, as alleged by the "counsel for the respondent", was in particular due to financial circumstances during which Pelongwe was not able to proceed. This placed Pelongwe out of time.

[5] Once internal factors as detailed by Pelongwe allowed them financially to proceed, Pelongwe instructed their attorney to attend to the matter and brief counsel.

[6] Pelongwe maintained that amongst other reasons, the granting of condonation would:

(a) Be in the interests of justice.

(b) Cause the applicants no prejudice.

[7] When looking into the matter of condonation, it is useful to refer to the matter of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there will be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion".*

[8] On perusing the documentation, as well as the argument and weighing up the factors submitted by Pelongwe, the application for condonation is granted.

Substance of the matter

[9] The crisp factor to be decided in this matter is whether Colt has a valid contract with Pelongwe, based on which Colt can succeed with an application for specific performance.

[10] The issue pertains to Colt wishing to purchase a shareholding, namely 70% of the prospecting rights for minerals from Pelongwe. The shareholding is in prospecting rights held by Pelongwe on various areas in the Northern Cape. For that right (i.e. the shareholding) Colt is willing to pay R5million. While Pelongwe has the prospecting rights, Colt maintains that it has capital and know how to pursue these rights for the benefit of both parties, namely Colt and Pelongwe.

[11] Colt states that there is a valid contract between the parties and based on the contract, Colt is applying for a specific performance. Pelongwe maintains that no valid and enforceable contract exists and hence opposes the specific performance application of Colt. Hence, without the existence of a contract, Pelongwe's opposition to the application by Colt is basically that the application for specific performance must be dismissed.

The law

[12] Gibson, in *South African Mercantile and Company Law* (6th Edition, 1988 p10) gives a definition which is all encompassing, of a contract:

> *A contract is a lawful agreement made by two or more persons within the limits of their contractual capacity, with a serious intention of creating a legal obligation, communicating such intention, without vagueness, each to the other and being of the same mind as to the subject-matter, to perform positive or negative acts, which are possible of performance.*

Gibson maintains that all the essentials as listed in this definition must be part of any valid contract. Without these essentials the contract becomes a nullity. Hence, Gibson subdivides the definition into 7 specific items, any one of which if missing will invalidate or what might be believed to be a contract.

(a) The agreement must be lawful.
(b) The agreement must be made within the limits of the party's contractual capacity.
(c) The parties must seriously intend to contract.
(d) The parties must communicate their intention to each other.
(e) The agreement must not be vague.
(f) The parties must be of the same mind as to the subject matter.
(g) Performance must be possible.

[13] In the case of *Premier Free State and others v Firechem Free State (Pty) Ltd 2000 (4) SA 413 SCA* (para 98), the Appeal Court adopted the view that an

agreement to negotiate another agreement is unenforceable "*because of the absolute discretion vested in the parties to agree or to disagree*".

Background

[14] In terms of the Memorandum of Agreement (CR2), which was signed by representatives of Colt and Pelongwe on 13 April 2021, clause 2 headed "Introduction" states as follows:

> "*It is hereby recorded that the parties hereby agree to prospect and mine the Fritz iron ore and manganese in the Northern Cape (the project) together with partaking in the following farms: Dagbreek 474, Limebark 471, Dutha 470, Simcoe 481, Templin 477, Lanham 530, Wright 538, Fritz 540, Blahopswood 471, Durdham 474 totalling 387.47 hectares and covered by the prospecting right issued by the Department of Mineral Resources and Energy, file no NC10861 PM situated in the manga field district of Kuruman Northern Cape.*"

[15] The memorandum of agreement in terms of CR2 has two terminologies, namely that of "Memorandum of Agreement" and "Memorandum of Understanding". The two must be separated in terms of the heading to the two pages (the Memorandum of Agreement being only two effective pages), headed with the words "Memorandum of Agreement" whilst Clause 4 of this "Memorandum of Agreement" is headed "Memorandum of Understanding". Here it states that:

> "*The parties undertake to sign an addendum to this agreement within ten days of the signature hereof which shall set out the manner in which this agreement will be executed.*"

[16] From this, if such is not signed within 10 days, the question is, is there an agreement at all. From evidence brought to the attention of the Court, the addendum has never been signed. However, the question is whether the applicants can impose on the respondents the obligation to sign. In different words, can the applicants unilaterally now state that same (known as CR5) is part of the original agreement, which is evidenced by CR2.

[17] In order to establish whether Colt has a valid contractual agreement with Pelongwe, one must look at the various essentials of a valid contract. The Court has to determine whether to grant or dismiss the application for specific performance based on whether there is a valid contract between Pelongwe and Colt.

The matter

[18] Clause 2.1.2 on the first page of the "Memorandum of Agreement" which states:

> *"The parties agree that they will jointly apply for a section 11 authorisation in terms of the MPRDA, to accommodate and give effect to this agreement."*

[19] As no joint action was attempted by the parties with regards to "applying jointly for section 11 authorisation in terms of MPRDA to accommodate and give effect to this agreement", the respondent maintains that there cannot be said to be any effect to this attempted agreement.

[20] Another important aspect of any such agreement (remembering that 70% of the particular rights are being sold by the respondent to the applicant), for a sum of money. From information to hand, both in the papers and evidence in Court not a cent passed from one party to another.

[21] The applicant believes that two contracts exist, even though it admits (supplementary heads of argument paragraph 33) that no signature appears from the respondent on CR5. The result is that CR2 exists (signed) whilst it is dependent on CR5 being agreed to – which would only take place if signed by the respondents (Pelongwe), which they did not sign. Hence, Pelongwe maintains that no valid agreement exists.

[22] If an agreement is so vague that the Court cannot ascertain its true meaning, such would render it void. An incomplete contract, which based solely on CR2 is alleged to be the case by the defendant, is one where the Court would have to construct on its own accord certain factors. This is not the course the Court

should follow. In the instance before the Court at this stage, the contract is incomplete and same cannot be constructed to completeness by the Court (See *Levenstein v Levenstein* 1955 (3) (SR) at 619; *Towert v Towert* 1956 (1) SA 429 (W); *South African Reserve Bank v Photocraft* (Pty) Ltd 1969 (1) SA 610 (C).

[23] The only conclusion that can be gathered is that in terms of the definition of a valid contract (see above), in this instance is that there is no valid contract.

[24] The element of uncertainty in this case before the Court, is fatal to the existence of the so-called contract, which Colt is alleging exists. This, uncertainty makes it so that the Court cannot really decide what the parties meant, or if there was any final agreement at all between Colt and the defendant. As such, without a valid contract, specific performance as requested by the plaintiff cannot be granted.

[25] The following is to be noted:

(a) The contract was never concluded in terms of contractual requirements hence no contract exists.

(b) No money has ever changed hands hence no payment was made by Colt to Pelongwe.

(c) The particular attempt to create a contract appears never to have been completed and the applicant is attempting for the completeness of a contract to be made by the Court for them.

As such, no agreement exists between the parties. No fulfilment is made to any of the aspects related to the so called "agreement" and hence, one is faced with what could basically be called an attempt to negotiate an agreement which fell flat.

[26] More particularly, in CR2, it was stated that "the parties undertake to sign an addendum to the Agreement within (10) days of which the signature of which shall set out the manner in which the agreement will be executed". In other words a secondary agreement had to be signed, to complete CR2. This will give effect to CR2. Without the secondary agreement, CR2 is an incomplete document. What is known as CR5, which would have been the document to complete any

valid contract, would have had to be signed by Pelongwe, and it was not so signed.

[27] The crux of the matter is that CR2 is subject to various conditions, which from the evidence before Court and the papers just did not take place. CR2 depends on the suspensive condition, which, would be part of what is in CR5, if same had been signed.

Dispute resolution

[28] The applicant believes that CR5 is enforceable as a "contract". Hence it follows that clauses in it are part and parcel of the applicant's contentions as to what the parties should be bound by (see by way of example only, applicant's supplementary head of argument dated 28 April 2022).

[29] It will be noted that CR5 has numerous annexures to it. By way of example, various clauses, are detailed allowing for certain eventualities and also certain procedures:

(a) Paragraph 14 of Annexure D to CR5 states:

> Dispute Resolution: any disputes between the parties must be resolved by AFSA Arbitration.

(b) Paragraph 9 of Annexure B to CR5 states:

> Dispute Resolution: any disputes other than para 8 (sic), between the shareholders must be resolved by AFSA arbitration.

(c) Paragraph 16 of Annexure C to CR5 states:

> Dispute Resolution: Any disputes between the parties must be resolved by AFSA arbitration.

(d) Paragraph 16 of Annexure E to CR5 states:

> Dispute resolution: Any disputes between the parties must be resolved by AFSA arbitration.

[30] If, as alleged by the applicant, CR5 is part and parcel of the contracts and agreement between the parties, namely Colt and Pelongwe then what action was taken with respect to the implementation of these paragraphs. What transpired with respect to the "arbitration". Was arbitration held and if so what was the result. If arbitration did not take place (and there is no evidence before the Court that arbitration did take place) then the matter as presented before this Court by the applicant is premature. This is so if a decision has to be made based on Colt's contention that there is a valid contract as it stands.

[31] On this factor alone, the application for specific performance will fail.

Summing up

[32] It is not necessary to deal with other evidence, as they have no bearing on the outcome of this matter.

[33] The parties can be seen to have attempted to create obligations between themselves but such was never completed, resulting in no validity in a legal sense. What is before the Court just does not meet the requirements for a legally binding contract. Without such a legally binding contract, the application for specific performance, as applied for by Colt must fail.

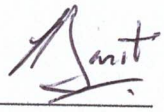
Court order

[34] Therefore the following order is made

a. The application by the respondent for condonation is granted with no order as to costs

b. The application by Colt for specific performance is dismissed.

c. The applicant to pay the costs of the main application on a party and party basis.



L BARIT
Acting Judge of the High Court
Gauteng Division, Pretoria

Appearances

For the Plaintiff:	Mr. Straus
Instructed by:	Gildenhuys Malatji Inc
For the Respondent:	Mr. Macgregor Kufa
Instructed by:	Machaba Attorney's