

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 273/09

ABERDEEN INTERNATIONAL INCORPORATED

Appellant

and

SIMMER AND JACK MINES LTD

Respondent

Neutral citation: *Aberdeen International Incorporated v Simmer and Jack Mines* (273/09) [2010] ZASCA 24 (25 March 2010)

Coram: NUGENT, HEHER, VAN HEERDEN, MHLANTLA
AND TSHIQI JJA

Heard: 23February 2010

Delivered: 25 2010

Updated:

Summary: Contract - Approach to interpretation of an ambiguous clause – reliance on factual matrix
- term 'financing' in the relevant clause of a loan agreement excludes equity financing.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ellis AJ sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

TSHIQI JA (NUGENT, HEHER, VAN HEERDEN AND MHLANTLA JJA concurring):

[1] The appellant, Aberdeen International Incorporated (Aberdeen), is a Canadian based company whose business entails provision of financing to companies in the resources industry. The respondent, Simmer and Jack Mines Ltd (Simmer), is a South African based company conducting gold mining operations in the country. This appeal relates to the interpretation of clause 2.11 of the amended version of a loan agreement that was concluded between Simmer and Aberdeen on 6 November 2006. The controversial clause 2.11 reads:

'Additional Consideration. As additional consideration for the Facility, the Borrower agrees to grant the Lender a right of first refusal for the financing of all of the Borrower's properties until the Final Repayment Date, excluding . . .

Subject to the aforementioned exclusions, in the event the Borrower seeks financing for its properties and obtains financing terms from a third party before the Final Repayment Date, the Borrower shall present such terms to the Lender and the Lender shall have a period of 60 (sixty) days to agree to match such terms to provide financing to the Borrower.'

[2] Aberdeen launched an application in the Pretoria High Court for an order declaring that Simmer had acted in breach of the clause and for further ancillary relief. At issue was whether the provision for a right of first refusal for the financing of all Simmer's properties contained in that clause was intended by the parties to include an issue of shares for cash. The Court below concluded that it was not. Aberdeen now appeals to this Court with leave of the court below.

[3] The background leading to the conclusion of the agreement may be summarised as follows: During 2005 the parties entered into negotiations for the financing by Aberdeen of two gold mines which Simmer intended purchasing. This culminated in a loan agreement that was signed on 30 March 2006. On 6 November 2006 the agreement was amended for purposes not related to the present dispute and that is the agreement that is now in issue. Subsequent to the conclusion of the agreement in 2006, Simmer issued shares for cash in order to raise additional capital on six occasions. No objection was raised by Aberdeen. The reason advanced for this failure by Aberdeen is that they were not aware of these previous issues. In June 2007 Simmer again initiated a private share placement for cash to raise funding for further exploratory and development work to be conducted in the mines. It is this placement that led to the present dispute.

[4] It is the use of the term 'financing' in clause 2.11 that is the source of this controversy. Aberdeen

contends that the term 'financing' should not be restricted to loan financing because it includes equity financing such as the issue of shares by Simmer, and further contends that Aberdeen was consequently entitled to a right of first refusal in regard to these shares. Simmer contends that the term only refers to loan financing and not equity financing, and that it was therefore not obliged to offer the shares to Aberdeen before it accepted the offers from successful subscribers.

[5] It is trite that the correct approach in interpretation of an ambiguous term is to refer to its context or factual matrix.¹ Counsel for Aberdeen submitted that, in interpreting the clause, no reliance should be placed on the Johannesburg Stock Exchange Listing Requirements nor the Black Economic Empowerment Requirements imposed by the Department of Minerals and Energy because these may not have been within the knowledge of Aberdeen, a Canadian based company. This submission has no merit. The agreement expressly stipulates that it will be governed by the laws of the Republic of South Africa and subjects the parties to the jurisdiction of the courts in this country. Moreover clause 3(1)(c) of the agreement contains a warranty to the effect that:

'The execution, delivery and performance by the Borrower [Simmer] of the documents to which it is a party and the consummation of the transactions contemplated therein do not conflict with, result in

¹ *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 SCA.

any breach or violation of, or constitute a default under the terms, conditions or provisions of the articles or by-laws of, or any unanimous shareholder agreement or declaration relating to the Borrower or of any Applicable Law binding on or applicable to the Borrower.' (Emphasis added.) The definition of 'Applicable Law' in terms of clause 1.1 of the agreement clearly includes the JSE Listing Requirements and all other relevant regulatory rules such as the abovementioned Black Economic Empowerment requirements. The specific reference to South African law shows that the parties intended to be bound by South African law and the JSE Listing Requirements and other regulatory rules must indeed be considered as part of the factual matrix within which clause 2.11 must be interpreted.

[6] The agreement between the parties was a loan agreement and the clause should be interpreted in that context. The right of first refusal contemplated in the clause means that Simmer would present to Aberdeen whatever loan financing terms it had been offered by a third party or third parties before accepting them. Aberdeen would in turn have 60 days to consider whether they were willing to match the terms of the third party. The main problem with the interpretation contended for by Aberdeen is that equity financing operates in a converse manner. Loan financing envisages that, should it seek additional finance, Simmer would approach a third party who would propose terms of a new loan agreement. The final decision to grant the loan would be made by the third party which would probably prescribe most of the terms. Equity financing on the other hand, envisages that Simmer would issue its own shares, with the authority of its shareholders, several interested investors would apply and there would be no financing terms applicable because the shares would be issued for cash. The final decision to whom the shares are allocated and the conditions would be determined by Simmer without having to negotiate with any single third party.

[7] The language used by the parties is a clear indicator that the parties envisaged a loan agreement. Clause 7 of the first letter of intent dated 22 July 2005 addressed by Aberdeen to Simmer provides that 'Simmer and Jack would grant Aberdeen a right of first refusal . . . such that Aberdeen would be able to enter into a similar agreement with Simmer and Jack.' The use of the words 'similar agreement' shows that the parties contemplated a loan agreement.

[8] Clause 2.10 of the agreement provides for the conversion of existing loan liability into shares 'subject to the approval of the shareholders of the Borrower'. It can be inferred from the provisions of this clause that the parties were mindful of the requirement of shareholder approval for any issue of shares and specifically included that proviso in this clause. If it was their intention that 'financing' would also include equity financing they would have specifically stated so in Clause 2.11 as well.

[9] Any contrary interpretation of this term would be unworkable in view of the following further consequences that would flow from such an interpretation, which could not have been intended.

[10] The extension of this clause to include funding by means of share capital would mean that Aberdeen is given a preferential right to acquire the shares before the shareholders are able to exercise this option. Apart from the fact that this undermines one of the fundamental rights usually reserved for shareholders, it deprives them of the right to decide the conditions applicable to the allocation of such shares. Aberdeen would have a preferential right to that of the shareholders and would be at liberty to acquire the shares before the shareholders are able to exercise this option. The practical effect of this is that the shareholding of Simmer would inevitably be diluted. Such dilution would occur beyond the control of the shareholders because if they made a contrary decision in a general meeting, they would be acting contrary to the terms of the agreement concluded on their behalf by the directors of the company. It is unlikely that the directors would have agreed to restrict the shareholders' rights at the behest of a creditor, without having sought an agreement by the shareholders at a general meeting.

[11] It was not disputed that Simmer was bound to comply with Black Economic Empowerment (BEE) requirements. The dilution caused by a preferential issuing of shares to Aberdeen would lower the BEE shareholding below the minimum requirements stipulated by the Department of Minerals and Energy. This in turn would jeopardise the mining rights of Simmer, the acquisition of which was premised on a minimum BEE shareholding. That this was a major concern is evident from the fact that this disputed private share placement was heavily oversubscribed and the allocation had to be made in such a manner that non-BEE subscribers were allocated 7% of their request and the BEE subscribers 90% of their requests to ensure that the BEE shareholding remained above 26%.

[12] Various listing requirements place limitations on the issue of shares for cash. Any issue of shares for cash would have to comply with the listing requirements of the Johannesburg Stock Exchange, which the JSE exercises in terms of the Securities Services Act 36 of 2004. Section 5.52(d) of the JSE listing requirements provides:

'The maximum discount at which equity securities may be issued is 10% of the weighted average traded price of such equity securities measured over the 30 business days prior to the date that the price of the issue is determined or agreed by the directors of the issuer. The JSE should be consulted for a ruling if the applicant's securities have not traded in such 30 business day period.'

The 60 day period given to the applicant to exercise its right of first refusal would render section 5.52(d) ineffective because an acceptance later than the 30 day period, even if within the 60 day grace period given to Aberdeen, would be contrary to the provisions of this section and would require approval by the JSE. If the parties intended to deviate from this listing requirement, they would have specifically provided for this in the agreement. This is so because the stipulated 30 day period is to prevent manipulation of the share market and to safeguard the interests of existing shareholders. It is unlikely that the JSE would readily grant such approval.

[13] It follows from the above that clause 2.11, seen in context and with regard to the relevant 'factual matrix' does not apply to equity financing but to loan financing. Simmer therefore did not breach clause 2.11 and the appeal must fail. I make the following order:

The appeal is dismissed with costs including the costs of two counsel.

Z L L TSHIQI _____
JUDGE OF APPEAL

Appearances:

APPELLANT: B H Swart SC (with him K W Lüderitz)

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