

SOUTH AFRICA / JUDGMENT

Limpopo Economic Development Agency v Klopper NO & 10 Others (982/2020) [2022] ZASCA 73 (25 May 2022)

[2022] ZASCA 73

COURT

Supreme Court of Appeal

BEFORE

Petse DP, Plasket JA, Mbatha JA, Carelse JA, Musi
AJA

CASE / FILE NUMBER

982/2020

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no. 982/2020

In the matter between:

LIMPOPO ECONOMIC DEVELOPMENT AGENCY APPELLANT

and

JOHANNES FREDERICK KLOPPER NO

FIRST RESPONDENT

CHRISTOPHER RAYMOND REY NO

SECOND RESPONDENT

LIEBENBERG DAWID RYK VAN DER MERWE NO THIRD RESPONDENT

LEBOGANE MPAKATI NO

FOURTH RESPONDENT

DILOKONG CHROME MINE (PTY) LTD

FIFTH RESPONDENT

ASA METALS (PTY) LTD

SIXTH RESPONDENT

EASTERN ASIA METAL INVESTMENT CO LTD

SEVENTH RESPONDENT

MINISTER OF MINERAL RESOURCES

EIGHTH RESPONDENT

DIRECTOR-GENERAL: DEPARTMENT OF

MINERAL RESOURCES

NINTH RESPONDENT

REGIONAL MANAGER, LIMPOPO DIVISION OF THE

DEPARTMENT OF MINERAL RESOURCES

TENTH RESPONDENT

CHEETAH CHROME SOUTH AFRICA (PTY) LTD

ELEVENTH RESPONDENT

Neutral citation: Limpopo Economic Development Agency v Klopper NO & 10 Others (Case no. 982/2020) [2022] ZASCA 73 (25 May 2022)

Coram: Petse DP, Plasket, Mbatha and Carelse JJA and Musi AJA

Heard: 3 March 2022

Delivered: 25 May 2022

Summary: Mineral and Petroleum Resources Development Act 28 of 2002 – conversion of old order mining right into new order mining right – interpretation of shareholders agreement – interpretation of clause of mining right.

ORDER

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

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

Plasket JA (Carelse JA and Musi AJA concurring):

[1] The appellant, the Limpopo Economic Development Agency (LEDA), holds 40 percent of the shares of the sixth respondent, ASA Metals (Pty) Ltd (ASA). The seventh respondent, Eastern Asia Metal Investment Co Ltd (EAMI), holds the remaining 60 percent of ASA's shares. ASA,

in turn, is the sole shareholder of the fifth respondent, Dilokong Chrome Mine (Pty) Ltd (DCM). Both DCM and ASA are under business rescue, the first and second respondents being the business rescue practitioners (BRPs) of DCM, and the third and fourth respondents being the BRPs of ASA.

- [2] As DCM's name suggests, it is a company that mines chrome. It now does so on the authority of a mining right issued in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). Pursuant to a decision taken by DCM's BRPs to sell its mining right to the eleventh respondent, Cheetah Chrome South Africa

(Pty) Ltd (Cheetah), LEDA launched an application in the Gauteng Local Division of the High Court, Johannesburg (the high court) in which it sought wide-ranging relief that included, inter alia, a declarator that it held a 40 percent stake in DCM's mining

right; a prohibitory interdict to restrain DCM and its BRPs from disposing of the mining right without LEDA's consent; and a mandatory interdict to compel DCM to conclude an agreement with LEDA 'contemplated by clause 17 of the Mining Right' within three months.

- [3] The application was dismissed with costs by Cripps J. He refused leave to appeal. Leave was subsequently granted on petition by this court.
- [4] Despite the wide-ranging relief that was claimed by LEDA, the issues for determination are limited. They hinge, ultimately, on one issue: the interpretation of clause 17 of DCM's mining right.

Background

- [5] DCM was incorporated in 1978 and began its chrome mining operations thereafter. It did so under the authority of a so-called old order mining right – one issued in terms of the legislation which was in force before the coming into operation of the MPRDA on 1 May 2004. [1]
- [6] Item 7 of Schedule II provided for the conversion of old order mining rights to new order mining rights issued in terms of the MPRDA. It did so by preserving the validity of old order mining rights for a period, during which holders were given the opportunity to apply for the conversion of their rights.[2]
- [7] Item 7(3) placed an obligation on the Minister of Minerals and Energy to convert old order mining rights into mining rights under the MPRDA if the formal requirements of an application, set out in item 7(2), were complied with; if a holder 'has conducted mining operations in respect of the right in question'; if they undertake that they will continue with those mining operations once their right has been converted; if they have an approved environmental management program; and if they have paid the prescribed conversion fee.

- [8] In terms of item 7(7), on the conversion of the right and its registration, the old order right ceases to exist. In terms of item 7(8), if a holder does not apply for conversion before the expiry of the period of grace referred to in item 7(1), the old order mining right ceases to exist.
- [9] DCM applied for the conversion of its old order mining right. The converted mining right was issued to it on 20 March 2014.
- [10] DCM was placed under business rescue on 24 March 2016. As part of the business rescue plan, the BRPs envisaged the sale of DCM's mining right. LEDA was interested in acquiring it. To this end, it participated in a 'bid-out'. Bidders were required to pay a deposit of R50 million in order to take part. LEDA made an offer of R450 million. Cheetah submitted an offer of R456 million. It was accordingly the successful bidder.
- [11] At this point, LEDA, having become aware of clause 17 of DCM's mining right some time before the 'bid-out', sought to prevent the sale of the mining right to Cheetah. It did so, inter alia, by launching the proceedings that are the subject of this appeal. On 1 November 2019, the Director-General of the Department of Mineral Resources, on behalf of the Minister, granted consent in terms of s 11 of the MPRDA for the cession of DCM's mining right to Cheetah. LEDA has taken this decision on internal appeal to the Minister in terms of s 96 of the MPRDA.

The shareholders agreement

- [12] LEDA, then known as the Limpopo Economic Development Enterprise (Limdev), and EAMI entered into a shareholders agreement on 11 December 2006. They did so in relation to the 'company', defined in clause 1.2.4 as ASA. In clause 1.2.2, the term 'business' is defined to mean 'the business to be conducted by the company', including the 'business of an investment holding company and more particularly, the holding of an investment in Dilokong Chrome Mine (Pty) Ltd' and '[c]onducting the business of a ferrochrome smelting plant and related activities, including sales of finished chrome products'.
- [13] DCM is referred to in clause 1.2.7 and, in clause 1.2.8, the term 'designated business' is defined as 'the business to be carried on by DCM as a subsidiary of the company as contemplated in this agreement, namely the mining and sale of chrome ore to the company and to parties in favour of whom it has supply commitments'.
- [14] Two major issues that are dealt with in the shareholders agreement stand out. They are the planned expansion of the business of ASA and the inclusion of a BEE shareholder. As the second issue is particularly relevant to this matter I shall, in outlining the terms of the shareholders agreement focus on it.

[15] The need for the inclusion of a BEE shareholder in ASA arose because neither LEDA or EAMI were historically disadvantaged South Africans for the purposes of the MPRDA[3] and the Mining Charter. This was recognized in clause 1.2.1 of the shareholders agreement which defined the term ‘BEE transaction’

as ‘any transaction/s in terms of which shares are sold to a BEE corporate body to ensure that the company complies with the Mining Charter’.

[16] Clause 5.1 provides that ASA’s shareholding structure would be changed to cater for ‘the introduction of a BEE shareholder at the company level’. LEDA was required to identify, and then negotiate with the BEE shareholder, subject to ‘the approval of the shareholders in general meeting’. That person would purchase shares from LEDA so that they would hold 30 percent ‘of the total issued capital of the company’. The entire process was required, in terms of clause 5.2, to be completed by the end of March 2007 or an agreed extended period. Clause 5.2 proceeds to say:

‘It is further agreed that the identified BEE shareholder, if approved at the shareholders meeting, shall be expected to bind himself to this agreement, failing which he shall be disqualified. The parties hereby agree that for the identified BEE partner to be approved he must, amongst others, be broad based, compliant with the Broad Based Black Economic Empowerment Act and the mining Charter and be a single corporate entity.’

[17] Clauses 5.4 and 5.5 record the effect of the inclusion of a BEE shareholder on ASA’s shareholders. Prior to the proposed transfer of shares from LEDA to the new shareholder, LEDA would hold 40 percent of the shares, or 13 750 000 shares, while EAMI would hold 60 percent of the shares, or 20 625 000 shares. After the proposed transfer of shares from LEDA to the new shareholder, EAMI would continue to hold 60 percent of the shares, while LEDA would hold ten percent, or 3 437 500 shares, and the BEE shareholder would hold 30 percent of the shares, or 10 312 500 shares.

[18] Clause 5.6 provided for the event of the BEE shareholder wishing to sell its shares in ASA. If it wished to do so, it first had to comply with clause 21 which provided inter alia that the shares had first to be offered to the other shareholders. If it sold to an outsider, that purchaser had to be ‘a single corporate entity which is approved by the shareholders’ and be ‘broad-based, compliant with the Broad Based Black Economic Empowerment Act and be approved by the Department of Minerals and Energy’.

[19] It is not in dispute that LEDA never identified a BEE shareholder to purchase its shares in ASA. The result was that when ASA was placed in business rescue, its shareholding was unchanged from the position that applied at the commencement of the shareholders agreement.

DCM’s mining right

[20] As stated above, DCM's old order mining right was converted to a mining right in terms of the MRPDA. Clause 2 of the mining right effected this conversion by providing that '[w]ithout detracting from the provisions of item 7 of the schedule to the Act, sections 5 and 25 of the Act, the Minister converts the holder's old order right and grants to the Holder the sole and exclusive right to mine, and recover the mineral/s in, on or under the mining area for the Holder's own benefit and account, and to deal with, remove and sell or otherwise dispose of the mineral/s, subject to the terms and conditions of this mining right, the provisions of the Act and any other relevant law in force for the duration of this right'. The term 'holder' is defined in the unnumbered definitions clause as DCM.

[21] In terms of clause 3, the mining right became operative on 20 March 2014 and continues in force until 19 March 2044 – a period of 30 years. It authorized the mining of chrome ore in a defined mining area. Mining operations were required to be conducted in accordance with a mining work program and an environmental management plan.

[22] Clause 17, the provision that is central to this matter, is headed 'Provisions relating to sections 2(d) and (f) of the Act'. Those sections are two of the nine objects of the MPRDA. The section reads as follows:

'The objects of this Act are to-

- (a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
- (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
- (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
- (e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
- (f) promote employment and advance the social and economic welfare of all South Africans;
- (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
- (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

- (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.’

[23] Clause 17 of the mining right provides as follows:

‘In the furthering of the objects of this Act, the Holder is bound by the provisions of an agreement or arrangement dated 11 DECEMBER 2006 entered into between the Holder/empowering partner and it is being recorded that the parties shall within 3 (three) months of executing the right, conclude a new agreement wherein Limpopo Economic Development Agency will hold 40% of stake in the right without an obligation to dilute. The above is subject to the transfer of Limpopo Economic Development 40% stake at a later stage to SOMCO upon due notice by the Minister (the empowerment partner) which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and or Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right.’

The judgment of the high court

[24] In the high court, Coppin J held, correctly, that the case turned on the interpretation of clause 17 of the mining right. This was so because LEDA’s entire case was premised on the Minister having granted to it, in clause 17, a 40 percent stake in DCM’s mining right or, alternatively, that the Minister placed an obligation on DCM to grant to LEDA that stake in its mining right.

[25] He found that LEDA’s interpretation of clause 17 was incorrect, principally because it ignored the context and purpose of the clause in favour of a literal interpretation that opportunistically sought to take advantage of the ‘inelegant and poor construction and wording of clause 17’. The result was an interpretation that was unbusinesslike and flawed.

[26] Coppin J concluded:

‘Clause 17 merely means that the Minister (or his delegate) required the shareholders agreement to be amended, insofar as it required that LEDA transfer 30% of its 40% stake in the shareholding of ASAM, which was the sole shareholder of DCM and effectively in control of DCM, to the BEE partner, and instead, provide that LEDA would hold onto its 40% shareholding stake until duly notified by the Minister, whereupon it had to transfer the entire 40% stake. This, according to clause 17 was to satisfy the objectives articulated in section 2(d) and (f) of the MPRDA.’

The interpretation of clause 17

[27] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] this court set out the proper approach to the interpretation of written instruments as follows:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document,

consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[28] The court continued to explain the mechanics of interpretation process when it stated:[5]

‘Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.’

[29] It is common cause that the ‘agreement or arrangement’ referred to in clause 17 is the shareholders agreement concluded by EAMI and LEDA in respect of ASA. It is clear that the Minister has put in place an arrangement that differs from the agreement concluded by EAMI and LEDA but never implemented. SOMCO, the entity referred to in clause 17 as the ‘empowerment partner’ is African Exploration Mining and Finance Corporation SOC Ltd, the State-Owned Mining Company which was established to hold and operate the State’s mining assets and to mine strategically important minerals on behalf

of the State.

- [30] It is also clear that clause 17 is particularly poorly drafted. Its drafter was confused as to the relationship between LEDA and EAMI, ASA and DCM. They were also confused about what the shareholders agreement sought to do and as to the nature of shareholding in a company. In respect of this last point, in *Princess Estate and Gold Mining Co Ltd v Registrar of Mining Titles*,^[6] it was made clear that the assets of a company belong to the company and not its shareholders, and that shareholders only have a right to their share of any dividend that may be declared. This trite principle was confirmed recently by this court in *Clicks Group Ltd and Others v Independent Community Pharmacy Association and Others*,^[7] citing with approval a line of well-known cases.^[8]
- [31] I turn now to the point of departure – the words of clause 17. The first point that I note is that the drafter has made patent errors in the choice of language that they used. First, in relation to the shareholders agreement, they stated that the ‘Holder’ was bound by it. As the term ‘Holder’ is defined in the definitions clause as DCM, that is obviously incorrect: DCM was never a party to it and, unsurprisingly, no obligations to do anything or abstain from doing anything were imposed on it. Secondly, the drafter stated that the shareholders agreement was ‘entered into between the Holder/empowering partner’. That too is erroneous to the extent that this suggests that the parties to the shareholders agreement were DCM – the ‘Holder’ – and LEDA – the ‘empowering partner’. It clearly was an agreement concluded by LEDA and EAMI in relation to their shareholdings in ASA.
- [32] What is to be done in the case of drafting mistakes such as these – mistakes that are evident from the context and purpose of the provision? In *Investors Compensation Scheme Ltd v West Bromwich Building Society*,^[9] Lord Hoffmann set out the position thus:
- ‘The “rule” that words should be given their “natural and ordinary meaning” reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.’
- [33] The intention of the drafter was to record no more than that LEDA and EAMI had concluded a shareholders agreement in relation to their shareholding in ASA. This accords with the common cause facts known to all concerned at the time – and avoids the absurdity that would result from an interpretation that did not recognize that something went wrong with the drafting. When it is accepted, as it must be, that the shareholders agreement and its amendment is the subject of clause 17, a sensible meaning consistent with that purpose can also be given to the term ‘40% of stake in the right’ that, according to LEDA, gave it an entitlement of some sort in DCM’s mining right.
- [34] Once again, something went wrong with the drafting. The purpose of clauses 3 and 5 of the shareholders agreement was to create a mechanism through which LEDA would identify an empowerment shareholder so that ASA would comply with the empowerment requirements

of the mining charter. LEDA and EAMI had agreed in the shareholders agreement that when LEDA had identified an empowerment shareholder, it would dilute its shareholding by selling most of its 40 percent shareholding to that new shareholder. LEDA owned 40 percent of the shares of ASA, not of DCM, and it had no interest of any nature whatsoever in DCM's mining right. To the extent that the drafter suggested that it did, they made a mistake. The result is that, in the light of the context of clause 17, that nobody disputes, as well as the purpose of clause 17, the reference to a '40% stake in the right' cannot logically or sensibly mean a stake in DCM's mining right. Instead, it is a reference to LEDA's 40 percent shareholding in ASA.

- [35] There is a further reason why this is so. I agree with Cripps J in the high court that LEDA's interpretation of the term, vague as it is, is untenable. It is evident that the Minister, in granting the new order mining right to DCM had no lawful authority to arbitrarily grant a 'stake' in that mining right to anyone other than the person who applied for it. The interpretation contended for by LEDA is premised on the Minister having acted beyond his powers and thus unlawfully – and on him having arbitrarily deprived DCM of its property. That is neither a sensible or a businesslike interpretation and, as Cripps J concluded, LEDA's 'literal interpretation would produce an illegal result'.
- [36] Once the patent errors that I have referred to have been recognized, and accounted for against the context and purpose of clause 17, it is possible to make sense of clause 17. It does no more than record that LEDA, as the holder of 40 percent of the shares in ASA, was required by the shareholders agreement to dilute its shareholding in favour of an empowerment shareholder, once it had identified that entity. It failed to identify that entity. Because of this failure, clause 17 postulated another solution in order to meet the requirements of s 2(d) and s 2(f) of the MPRDA, albeit 'upstream' from DCM. The Minister required LEDA and EAMI to enter into a new agreement in terms of which LEDA was to transfer its entire 40 percent shareholding in ASA to SOMCO when the Minister told it to do so. LEDA was given nothing by clause 17, and the Minister had no power to give it anything, let alone a 'stake' in someone else's mining right. It had, in other words, no stake in DCM's mining right but only a 40 percent shareholding in ASA, which it would divest itself of when the Minister gave it notice.

Conclusion

- [37] This interpretation of clause 17 puts paid to the appeal. LEDA was never granted a 40 percent stake – whatever that may mean – in DCM's mining right. That being so, it did not make a case for a declarator to this effect, for an interdict to prevent the BRPs of DCM from selling DCM's mining right to Cheetah without its consent or for any of the other relief that it claimed. The appeal must fail.
- [38] I make the following order.

C Plasket

Judge of Appeal

Mbatha JA (Petse DP concurring):

- [39] I have had the benefit of reading the judgment of my colleague, Plasket JA, in this matter in terms of which he proposes to dismiss the appeal. Therefore, if what my colleague proposes prevails, the order granted by the court a quo dismissing the appellant's application with costs will stand. I regret that I am unable to agree with the proposed outcome and its underlying reasoning. The basis upon which my view diverges from that of my colleague is elucidated below.
- [40] I agree with my colleague that the most contentious issue before us relates to the interpretation of clause 17 of the DCM's Mining Right. The interpretation of clause 17 requires a careful consideration of the scheme of the MPRDA, its objectives considered against the principles embodied in the Mining Charter, the Mining Right itself and the Shareholders Agreement.
- [41] In interpreting clause 17, the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10] find application. *Endumeni* is authority for the proposition that a holistic approach should be uniformly applied to the interpretation of all documents, be it a contract or statute. Most importantly, as explained in *Endumeni*, a sensible approach which avoids anomalies must be adopted. Equally, in *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others*,[11] this Court reiterated that this is the proper approach to adopt also in relation to the interpretation of the requirements of a policy. In this regard the Mining Rights Charter, will require consideration.
- [42] Against the backdrop of these principles, I now turn to analyse the legislative prescripts applicable to the subject matter before us. The MPRDA seeks to make provision for equitable access and sustainable development of the nation's mineral and petroleum resources and for related matters. Under s 3(1), all mineral and petroleum resources are the common heritage of the people of South Africa, and the State is the custodian thereof for the benefit of all South Africans. As such, the government has the prerogative to grant, issue, refuse, control, administer and manage any mining and petroleum rights.
- [43] A significant feature of the MPRDA is that when Mining Rights are to be granted, there must be full compliance with the provisions of MPRDA. In this regard, specific reference may be had to s 2, which sets out the objects of the MPRDA.[12] Amongst the other objects, the MPRDA in particular envisions the following objectives:
- ' . . . 2(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
- (e) . . .
- (f) promote employment and advance the social and economic welfare of all South Africans. . . .’

Due deference should be given to the aforementioned objectives of the MPRDA when interpreting the Mining Right, which is at the core of this appeal.

- [44] It bears emphasising that the MPRDA does not preclude foreign companies from holding mineral rights in South Africa. However, the MPRDA contemplates that such foreign companies comply with the prescripts of the Mining Charter by having a BEE shareholder. This would satisfy the noble objectives of the MPRDA.
- [45] The Mining Charter issued in terms of s 100 of the MPRDA provides for the inclusion or participation of the historically disadvantaged masses of South Africans to participate in the mining sector. It has been described as ‘a binding regulatory instrument . . . designed to ensure that the objects of the [Act] and the Constitution are realised . . .’.[13]
- [46] Thus, in interpreting the provisions of clause 17, it is necessary to keep at the forefront of our minds not only the mischief that the MPRDA seeks to prevent but also what it seeks to accomplish. This needs to be considered against the backdrop that the State has a duty to administer the national mineral resources for the benefit of all South Africans. In this regard, the interests of a minority shareholder, either an empowerment party or BEE partner, need to be protected. This applies even in instances involving a conversion of unused old order Mining Rights.
- [47] This then takes me to the DCM's position. As of 1978 DCM was the holder of old-order unused mineral rights. In terms of the MPRDA, which came into effect in 2004, DCM had to apply for a conversion of the unused old-order rights to the new order Mining Rights. Although the MPRDA gives security of tenure to the holder of such rights for such a conversion, it is not automatic. The conversion must be in compliance with the provisions of the MPRDA. Section 23 regulates the grant and duration of Mining Rights. Section 23(3) provides that ‘the Minister must . . . refuse to grant a Mining Right, if the application does not meet [all] the requirements referred to in ss 1’. For the purposes of this appeal, s 23(1)(h) requires that ‘the granting of such right will further the objects referred to in s 2(d) and (f) and in accordance with the charter contemplated in s 100 and the prescribed social and labour plan’. This means that due cognisance should be taken of the objects of the MPRDA, specifically the empowerment of historically disadvantaged persons and the advancement of the social and economic welfare of all South Africans.

- [48] If the conclusion reached by my colleague stands, namely that that the sole holder of the mineral rights is DCM, that would entrench the mischief sought to be prevented and defeat the whole purpose of the MPRDA. Moreover, DCM would not have been able to convert the old unused rights without having had a BEE shareholder, or a stakeholder as it would have failed to meet the requirements of s 2(1) read with s 23(3) of the MPRDA. To hold that DCM is the sole owner of the Mining Right simply because it was the owner of the old-order rights that were later converted under the MPRDA would defeat the primary objects of the MPRDA. On this score it is as well good to remember that a fundamental tenet of statutory interpretation is that statutory provisions must be interpreted purposively and contextually consistently with the Constitution.[14] This is what s 39(2) of the Constitution decrees. Thus, when interpreting any legislation for example, every court is enjoined to 'promote the spirit, purport and objects of the Bill of Rights'.
- [49] The transitional arrangements relating to the conversion of unused old-order rights, did not preserve the status quo, which existed in terms of the now repealed statutory regime. For the conversion to be granted by the Minister, the holders of such unused old-order rights had to comply with the prescripts of the new legislation. Section 23 of the MPRDA empowers the minister when granting a Mining Right, for example, to impose such conditions as the exigencies of each case require. In this instance, the minister saw it fit to grant DCM a Mining Right in substitution of its old-order right subject to certain conditions. One such condition which is central to this appeal is embodied in clause 17 of the Mining Right granted to DCM.
- [50] Accepting that the conversion occurred under the provision of s 23, DCM cannot be said to be the sole 'owner' of the rights in the context of the Company Law provisions. What the Constitutional Court said in *Aquila Steel (South African) (Pty) Ltd v Minister of Mineral Resources & Others*[15] bears repeating. The court there held that: 'holders of [the] unused old order [were only] accorded the privilege of exclusivity
- [i.e.] . . . the sole entitlement to apply for the new-order right over the property to which the unused old-order right relates . . .'. [16] The Constitutional Court further held that it gave such holders the ' . . . privilege to apply under the MPRDA for a new order right . . .'. [17] This did not entail that the BEE or empowerment partners would serve only as catalyst for the conversion of such rights and not derive any benefit in relation thereto.
- [51] Whilst I accept that as a general rule the shareholders of ASA were only entitled to dividends, I cannot see how that consideration can assist the respondents for Item 7(4) of the schedule to the MPRDA states that '[n]o terms and conditions applicable to the old-order Mining Right [shall] remain in force if they are contrary to any provisions of the Constitution or this Act'. It is therefore a pre-requisite for a conversion of an old-order right to the new-order Mining Right, that the objectives of the MPRDA be fulfilled. I pause to mention that the provisions of the MPRDA supersede any common law inconsistent with them. Section 4(1) specifically provides that 'when interpreting a provision of this [MPRDA], any reasonable interpretation which is consistent with the objects of this [MPRDA] must be

preferred [over] any other interpretation which is inconsistent with such objects'. The MPRDA lends further assistance to the interpretation in Item 7(2) which provides as follows:

'7(2) A holder of an old order Mining Right must lodge the right for the conversion within the period referred to in [the] sub item

1. . . together with:

. . .(k) documentary proof of the manner in which, the holder of the right will give effect the subject referred to subsection 2(d) and 2(f).'

It is clear to me that provisions such as these may not be waived as they are designed for the protection of the historically disadvantaged persons.

[52] In the light of the foregoing, recognition must therefore be given to the appellant's stake as a 40% shareholder in ASA. The respondent contended that the appellant is not a BEE Company. It is common cause that on 11 December 2006 in Beijing EAMI and the appellant entered into a Shareholders Agreement. This is the agreement to which the Mining Right refers in clause 17. The material terms of that agreement were that EAMI would hold 60% of the shares and the appellant 40% of the shares in ASA. It was recorded that for the purposes of the Shareholders Agreement a BEE partner was to be procured. This would have enabled ASA to sell a portion of the shares to the BEE partner to comply with the Mining Charter. The minister approved DCM's application for the conversion of its old-order rights into a Mining Right under the MPRDA subject, inter alia, to the appellant acquiring a 40% shareholding in DCM until such time as the minister gave 'due notice' to the appellant to divert its '40% stake at a later stage to SOMCO'. As already indicated in paragraph 4 of this judgment, the State is the custodian of all mineral and petroleum resources in South Africa and thus has the prerogative, as in this case, to grant any mining and petroleum rights.

[53] The failure by the appellant to transfer the 30% shareholding to a BEE company has no impact on the rights it holds, because it was sanctioned by the minister and once a suitable BEE partner is found, such a transfer will take place. Without the benefit of the joint venture between the appellant and EAMI, the conversion would not have materialised. On that score, DCM cannot claim to be the sole beneficiary of the Mining Right. The registration of the right without compliance with s 2(d), was not absolute as it was made subject to clause 17 of the Mining Right.

[54] I now turn to examine the terms set out in clause 17 of the Mining Right. It provides as follows:

'1.3.3.1. DCM is subject to and bound by an "agreement or arrangement" of 11 December 2006,

1.3.3.2. DCM is obliged to conclude a new agreement with LEDA wherein LEDA will hold a 40% "stake in the right without an obligation to dilute"'

It is common cause that the reference to the 11 December 2006 agreement is to the agreement signed by EAMI and the appellant. The subject of the agreement being their shareholding in DCM. DCM is bound by the agreement concluded on 11 December 2006. DCM also failed to conclude an agreement with the appellant whereby 40% of the stake in the Mining Right without an obligation to dilute would vest in the appellant. It cannot be accepted that the minister intended that DCM avoided its obligations as set out in clause

17. Therefore, the contention by the respondents that the appellant has no rights in the Mining Right is plainly unsustainable.

[55] Cheetah's position is unknown, save that it is a shelf company incorporated on 15 March

2017. The identities of Cheetah's shareholders remain shrouded in mystery. The indifferent dismissal of this important factor by the BRPs is difficult to understand, as it goes against the objectives of the MPRDA and the Mining Charter. It, in effect, translates to an award of full Mining Rights in mineral resources of the country to a Chinese company without due cognisance of the dictates of the MPRDA. Cheetah, cited as the eleventh respondent, elected not to file any answering affidavit. Therefore, it is unclear whether or not it is compliant with all the necessary requirements as set out in the objectives of the MPRDA. This is tantamount to selling the family silver by allowing foreign investors to purchase the assets in DCM free from the obligation that the minister saw fit to impose in terms of clause 17 of the Mining Right. The requirements of Item 7(2)(k) of Schedule II which require that the holder of the unused old-order rights must lodge 'documentary proof of the manner in which, the holder of the right will give effect to the object referred to in s 2(d) and (f)' should equally apply to Cheetah as the intended purchaser of such rights.

[56] At this juncture I consider that it would be helpful to set out the relevant background to the interpretation of clause 17. As at 14 November 2013, DCM's application for conversion had not yet been granted. The parties to the shareholding agreement continued to identify a suitable BEE shareholder. As of 15 January 2014 at a meeting of the boards of ASA and DCM, LEDA reported that it still awaited the minister's decision to dilute its shares in ASA. However, instead of the dilution of the LEDA's shareholding in ASA, the minister, on 20 March 2014, granted the Mining Right subject to certain conditions, and in particular that LEDA 'will hold 40% of the stake in the right without an obligation to dilute'. EAMI, a Chinese company was awarded a 60% interest. Since the conversion of the old-order rights into a Mining Right, no one, in

particular DCM, challenged the terms and conditions of the Mining Right imposed by the minister. The terms and conditions were accepted at the shareholders meeting held on 13 May 2014. The other condition for the conversion, which was accepted by all the parties, was that the parties had to amend the shareholders' agreement to indicate that LEDA would acquire a 40% stake in the Mining Right 'without an obligation to dilute' and that the 40% LEDA's shareholding would be transferred to SOMCO at a time deemed appropriate by the minister. This had not yet materialised when, two years later, ASA was placed under business rescue on 29 January 2016.

[57] The change of attitude from the BRPs is inexplicable. The conditions of the business rescue plan as set out in clause 5.12.3 recognised LEDA's interest as follows: 'Although the Company [ASA], as DCM's holding company, is not subject to the provisions of the DCM's Mining Right or any related legislative provisions, the shareholder structure of the company is an incorporated and express conditions of the Mining Rights of the DCM'. And they further stated that 'Bid Assets' contemplated for sale excluded the DCM shares held by ASA. Furthermore, clause 21 of the business rescue plan provided: '[t]his B.R. Plan does not envisage an effect on the shareholders of the Company'. It was startling that the recognition of LEDA's rights was subsequently denied by the BRPs, as it was never contemplated that the disposal of the Mining Right would be without reference to the terms and conditions of the Mining Right as granted to the shareholders. The BRPs are also acting contrary to the business rescue provision which states that the primary goal is to facilitate the rehabilitation of a company in distress, and only when it is not possible for the company to continue in existence can they sell the assets of the company. Furthermore, s 134(3) of the Companies Act, provides that 'if during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must [inter alia], obtain prior consent of that other . . .'. In this case the BRP's simply deprived the appellant the exercise of such a right.

[58] The appellant was criticised for having regard to the language used in clause 17. I endorse what this Court stated in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[18] when it emphasised that while the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at the perceived literal meaning of those words, but considers them in the light of all the relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, *Bothma-Batho Transport* tells us, 'was never very clear and has since fallen away'. Interpretation is no longer a process that occurs in stages but is "essentially

one unitary exercise". It bears mentioning that clause 17 must be interpreted by having due regard to the language used in the light of the ordinary rules of grammar and syntax, in the context of each other and the agreement as a whole, and its apparent purpose so as to give them a commercially sensible meaning that will promote the objects of the MPRDA.[19]

[59] In *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC*[20], concerning the interpretation of a written agreement, this Court held that what the parties and their witnesses ex post facto think and believe regarding the meaning to be attached to the clauses of the agreement, and thus what their intention was, is of no assistance in the exercise. In relation to the expression 'the intention of the parties' it referred to what was stated in *Endumeni* regarding that expression, which is in line with what was expressed by this Court six decades ago in *Worman v Hughes & Others*[21] namely: "it must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the

parties' intention was, but what the language used in the contract means . . .". It therefore follows that, what the

respondent's post facto think clause 17 meant or what was intended should be disregarded. Much emphasis was placed on what the clause was meant to mean.

[60] The judgment of Plasket JA, with respect, fails to have due regard to the context and circumstances attended upon the coming into existence of the shareholders' agreement and most importantly the language of clause 17 – notwithstanding its imperfections – embodied in the Mining Right. It is therefore highly unlikely that a different scenario would have been contemplated when clause 17 was crafted. Whilst clause 17 is not a model of good draftmanship, there can nevertheless be no doubt as to what the minister sought to achieve when he imposed the condition embodied in this clause. On its proper construction, in line with all the tenets of interpretation, its manifest purpose becomes readily apparent, namely the appellant is the holder of a 40% interest in the Mining Right. In contrast, the interpretation favoured by the high court and endorsed by my colleague has the effect that Cheetah will acquire the Mining Right free from the strictures of s 2(d) and (f) of the MPRDA.

[61] Most recently, this Court in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*[22], stated that the issue which has long troubled our courts is how to marry the expansive approach to the interpretation adopted in *Endumeni* with the parol evidence rule, which remains an important principle and part of the South African law. Referring to the *University of Johannesburg v Auckland Park Theological Seminary and Another*,[23] this Court stated that the Constitutional Court rejected the approach fixated on the text's plain meaning, but has in the contrary given due weight to extrinsic evidence as to context and purpose, in determining the meaning of the contract. The Court emphasised that interpretation is a matter strictly for the court and not what witnesses consider a contract to mean. The Court expressed itself as follows: 'Most contracts, and particularly commercial contracts, are constructed with a design in mind and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text'.[24] This is exactly what was contended by the appellant in this case.

[62] The rights of the appellant as confirmed by clause 17, which makes reference to the provisions of an earlier agreement concluded on 11 December 2006, are entrenched in that the parties are required to conclude a new agreement with LEDA, wherein LEDA will hold 40% of the stake without an obligation to dilute. Furthermore, it contemplates that at a later stage LEDA will transfer its 40% stake to SOMCO upon notice from the minister to do so. The agreement concluded on 6 December 2006 refers to the business to be conducted by ASA, being the business of an investment holding company with a stake in DCM. The designated business is defined as follows: 'means the business carried by DCM'. Most significantly DCM

is described as a subsidiary of ASA Metals.[25]

[63] DCM is bound by the provisions of the agreement dated 11 December

2006. DCM may be the holder of the Mining Right, but this is subject to the conditions set out in the Mining Rights itself and in particular clause 17. The Mining Right signed by DCM also provides that DCM is bound by the shareholders' agreement. As a result, DCM cannot act contrary to the provisions of clause 17. The appellant also enjoys the protection afforded to it by s 134 of the Company's Act, which requires that the BRPs obtain the requisite consent from LEDA or any holder of a title interest, when transferring an interest. Lastly, DCM signed the conditions without any qualms. It can therefore not lie in the mouth of DCM, which has never challenged the power of the minister to incorporate clause 17 as one of the conditions for the grant of the Mining Right, to now contend that the minister exceeded his statutory powers when he imposed the condition embodied in clause 17. Consequently, in the context of the facts of this case this Court is, in my view, enjoined to give a sensible and businesslike meaning to clause 17 of the Mining Right in the light of the objects of the MPRDA.

[64] The decision cited in the judgment of my colleague, confirming that ownership of the assets of a company vest in the company itself and not its shareholders, does not avail the respondents in this matter.

[65] Accordingly, I would uphold the appeal with costs, set aside the order of the high court substituting it with an order granting appropriate relief to the appellant.

YT Mbatha

JUDGE OF APPEAL

APPEARANCES

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- [1] An old order mining right is defined in item 1 of Schedule II of the MPRDA as ‘any mining lease, mynpachten, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted’.
- [2] Item 7(1).
- [3] The term ‘historically disadvantaged person’ is defined in s 1 of the MPRDA. It means: ‘(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect; (b) any association, a majority of whose members are persons contemplated in paragraph (a); (c) a juristic person, other than an association, which- (i) is managed and controlled by a person contemplated in paragraph (a) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or (ii) is a subsidiary, as defined in section 1(e) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (c)(i).’
- [3] The term ‘historically disadvantaged person’ is defined in s 1 of the MPRDA. It means:
- ‘(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
- (b) any association, a majority of whose members are persons contemplated in paragraph (a);
- (c) a juristic person, other than an association, which-
- (i) is managed and controlled by a person contemplated in paragraph (a) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or
- (ii) is a subsidiary, as defined in section 1(e) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (c)(i).’
- [4] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. See too Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others
- [2021] ZASCA 99; 2022 (1) SA 100 (SCA) para 25.
- [5] Para 25.

- [6] Princess Estate and Gold Mining Co Ltd v Registrar of Mining Titles 1911 TPD 1066 at 1079-1080.
- [7] Clicks Group Ltd and Others v Independent Community Pharmacy Association and Others [2021] ZASCA 167; [2022] 1 All SA 297 (SCA) paras 23-26 and 36-37.
- [8] It suffices to mention but two: Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 550-551; and The Shipping Corporation of India Ltd v Evdomon Corporation and Another
- [1993] ZASCA 167; 1994 (1) SA 550 (A) at 565I-566H.
- [9] Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28; [1998] 1 All ER 98 (HL) at 115c-d. See too Chartbrook Ltd v Persimmon Houses Ltd and Another
- [2009] UKHL 38; [2009] 3 All ER 677 (HL) paras 14-15. Both cases are referred to with apparent approval in Natal Joint Municipal Pension Fund v Endumeni Municipality (note 4) para 25 fn 38.
- [10] Natal Joint Municipal Pension Fund v Endumeni Municipality
- [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (Endumeni).
- [11] Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others
- [2015] ZASCA 76; 2015(5) SA 63(SCA); [2015] All SA 274 (SCA) para 27.
- [12] 'The objects of this Act are to – (a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources

within the Republic; (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources; (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa; (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's

mineral and petroleum resources; (Section 2(d) substituted by section 2 of Act 49 of 2008 with effect from 7 June 2013). (e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream

industries through provision of feedstock, and development of mining and petroleum inputs industries; (Section 2(e) substituted by section 2 of Act 49 of 2008 with effect from 7 June 2013); (f) promote employment and advance the social and economic welfare of all South Africans; (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations; (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while

promoting justifiable social and economic development; and (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.’

[12] ‘The objects of this Act are to –

- (a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources

within the Republic;

- (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
- (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
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mineral and petroleum resources; (Section 2(d) substituted by section 2 of Act 49 of 2008 with effect from 7 June 2013).

- (e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream

industries through provision of feedstock, and development of mining and petroleum inputs industries; (Section 2(e) substituted by section 2 of Act 49 of 2008 with effect from 7 June 2013);

- (f) promote employment and advance the social and economic welfare of all South Africans; (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations; (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
- (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.’

[13] See *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*

[2018] ZAGPPHC 8; [2018] 2 All SA 391 (GP); 2018 (4) SA 581 (GP) para 181.

[14] *Cool Ideas 1186 CC v Hubbard and Another*

[2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

[15] *Aquila Steel (S Africa) (Pty) Limited v Minister of Mineral Resources and Others* [2019] ZACC 5; 2019 (4) BCLR 429 (CC); 2019 (3) SA 621 (CC).

[16] Ibid para 68.

[17] Ibid para 72.

[18] Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk

[2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12 (Bothma-Batho Transport).

[19] Roazar CC v Falls Supermarket CC

[2017] ZASCA 166; [2018] 1 All SA 438 (SCA); 2018 (3) SA 76 (SCA) para 9.

[20] Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC

[2015] ZASCA 62 (17 April 2015) para 11.

[21] Worman v Hughes & Others[21] 1948

(3) SA 495 (A) at 505.

[22] Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others

[2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 39.

[23] University of Johannesburg v Auckland Park Theological Seminary and Another

[2021] ZACC 13; 2021 (8) BCLR 807 (CC).

[24] Ibid para 51.

[25] See also para 12 of Plasket JA judgment.

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