AGREEMENT DEEMING THAT SUSPENSIVE CONDITION HAS BEEN MET, AFTER THE DUE DATE FOR PERFORMANCE, TESTED

Vantage Goldfields SA (Pty) Ltd v Siyakhula Sonke Empowerment Corporation (Pty) Ltd and Another (853/2023) [2025] ZASCA 1 (9 January 2025)

In this judgment, the Supreme Court of Appeal dealt with the question of whether an agreement, which otherwise would have lapsed due to the non-fulfilment of certain suspensive conditions, was revived by subsequent addendum agreements in which the parties agreed that it would be deemed that all the conditions were met timeously. The outcome illustrates, yet again, how treacherous suspensive conditions can be.

The judgment can be viewed here.

FACTS

On 1 November 2017, Vantage Goldfields SA (Pty) Ltd ('Goldfields') and Flaming Silver Trading 373 (Pty) Ltd ('Flaming Silver') concluded a written sale of shares agreement ('the principal agreement') in terms of which the shareholding of Goldfields in two of its subsidiary companies, and Goldfields' claims in those companies, were purchased by Flaming Silver for R310 million.

Clause 3.1 of the principal agreement provided that it was subject to the fulfilment of the 'conditions precedent' set out in subclauses 3.1.1, 3.1.2 and 3.1.3. These conditions were the following:

- In terms of clause 3.1.1, Flaming Silver was to procure financing in respect of the purchase price from reputable and verifiable sources on or before 31 January 2018, or a such later date as 'agreed to by the parties in writing prior to that deadline' ('**the financing condition**').
- In terms of clause 3.1.2, Flaming Silver was to pay an amount of R10 million plus R1.00 (of the purchase price) into the trust account of certain attorneys, pending the fulfilment of the conditions. This payment was to be made within 60 days, which meant it had to be paid on 2 January 2018 ('**the payment condition**').
- In terms of clause 3.1.3, all the necessary regulatory and statutory approvals (including ministerial approval under s 11 of the Mineral and Petroleum Resources Development Act No. 28 of 2002 ('the MPRDA')), had to be obtained by no later than 31 January 2018, or 'as otherwise agreed to by the parties' ('**the consent condition**').

The principal agreement provided in addition at:

- Clause 3.2, that if the condition in 3.1.1, i.e. the financing condition, was not 'fulfilled on or before 31 January 2018 or any other Condition Precedent not having been met by the due date thereof and the period for fulfilment thereof not be extended by the Parties in writing prior to the expiry thereof, then this agreement shall lapse and be of no force and effect.'
- Clause 12, that there was that no variation, or consensual cancellation of the principal agreement was of any force and effect unless it was in writing and signed by the parties.

The first addendum

- On 21 December 2017, the parties concluded a first addendum to the principal agreement, which dealt with the date for the fulfilment of (some) of the conditions. It was recorded, regarding the financing and consent conditions, that the date "31 January 2018" be amended to read "31 March 2018". The first addendum further confirmed that the remainder of the terms of the principal agreement, were still of 'full force and effect'. Significantly, the date for the payment condition (clause 3.1.2) was not dealt with and remained unaffected.

Payment of R10 million (without the additional R1) were made to the appointed attorneys before 31 March 2018, purportedly as contemplated in clause 6 of the principal agreement.

The second addendum

- On 3 May 2018, i.e. after expiry of the extended fulfilment date set in the first addendum, the parties entered into a second addendum agreement. They recorded that, except for the consent condition (clause 3.1.3 of the principal agreement), all the other conditions were 'by mutual agreement, deemed to have been fulfilled by no later than 31 March 2018'.
- Regarding the approval condition, the parties stated that the seller would proceed to submit the necessary applications, 'with the view to completing the same by no later than 30 July 2018 or such later date agreed in writing between the Parties.'
- With regards to the payment condition, the parties recorded that it 'shall be deemed to have been fulfilled by the due date for compliance thereof and to the extent required, the Seller waives compliance with said clause…by the date 60 (sixty) calendar days from the Effective date subject to the Purchaser complying with clause 4.4 of this Addendum.' (Clause 4.4 of the second addendum stipulated that the purchase price held in the attorneys' trust account will be paid to Goldfields upon successful completion of the MPRDA application and other approvals referred to in the principal agreement.)
- They further recorded that the terms of the principal agreement that were not varied in the second addendum, would remain in full force and effect.

Subsequently a third and fourth addendum agreements were signed. *(The details are not recorded here due to the outcome.)*

Relationships became strained. This matter relates to proceedings launched by Flaming Silver in the High Court for an order declaring:

(a) the principal agreement had lapsed on 31 January 2018, alternatively 1 April 2018, further alternatively on 31 July 2018, and was accordingly void and of no force and effect; and

(b) that the second and third addenda were of no force and effect.

This application was successful, the high court finding, amongst other things, that the principal agreement had lapsed on 3 January 2018, because of the non-fulfilment of the payment condition.

Goldfields appealed to the Supreme Court of Appeal. It argued that parties to an agreement, that lapsed due to the non-fulfilment of a suspensive condition, may revive the lapsed agreement if the relevant conditional term in the original agreement is amended to prevent the agreement from 'self-destructing' on account of the non-fulfilment of that same condition.

In the Supreme Court of Appeal, the only issue was whether the principal agreement, which otherwise would have lapsed due to the non-fulfilment of certain suspensive conditions, was revived by subsequent addenda to that agreement. Goldfields contends that it was revived. Flaming Silver maintains that it was not.

HELD

Lapsing of the principal agreement

- The wording of the principal agreement, and of the addenda, are reasonably clear and unambiguous. Clause 3.2 of the principal agreement provides, in effect, that if the *finance condition* (ie the condition in clause 3.1.1) is not fulfilled on or before 31 January 2018, *or any of the other conditions* are not met by the due date stipulated in the principal agreement, the principal agreement will lapse and be of no force and effect, unless date(s) for the fulfilment of those conditions are extended by the parties in writing, before those expiry dates.

- In the *first addendum,* the expiry date of '31 January 2018' for the fulfilment of the *finance condition* and the *consent condition* was changed to a later date, ie to 31 March 2018. The date for the fulfilment of the *payment condition* remained as originally agreed (payment was due before 1 or 2 January 2018).
- In terms of clause 5.1 of the first addendum, which was concluded on 1 December 2017 - before the expiry dates of the three conditions precedent - clause 3.2 of the principal agreement is preserved. (Clause 5.1 of the first addendum confirms that subject to the terms of that addendum, the other terms of the principal agreement, which include clause 3.2, remain of full force and effect and are not amended by the terms of the first addendum.)
- The payment condition was not fulfilled by the due date, ie on 1 or 2 January 2018 and that agreement accordingly lapsed.

Could the deeming provision in the second addendum agreement 'save' the principal agreement?

- In terms of the *second addendum*, which was concluded on 3 May 2018 - after the expiry date for the fulfilment of the *payment condition* - the parties purported to put in place a 'deeming' provision. In terms of clause 3.3 of that addendum they purported to agree that the finance and the payment conditions had been fulfilled by no later than 31 March 2018.
- There are difficulties with the deeming provision:
    - First, although the payment of R10 million was made, purportedly as contemplated in clause 6 of the principal agreement, an amount of R1.00 (one rand) of the purchase price was still outstanding, because in terms of the principal agreement the amount payable was R10 million and one rand.
    - Second, the *finance condition* had not been fulfilled at all by 31 March 2018.
- The second addendum effectively purported to extend or neutralise the due dates for the fulfilment of the finance and payment conditions by means of introducing a 'deeming' provision *after* the expiry of those due dates.
- The question that arises is whether the parties could do what they purportedly did in terms of the second addendum, notwithstanding the fact that clause 3.2 of the principal agreement was and remained in full force and effect throughout?
- The answer has to be in the negative: While an extension after the due date was, in those circumstances futile because of what the parties had agreed to in clause 3.2, namely, that it is only an extension agreed to before the expiry of the due date that is valid and effective, a deeming of the fulfilment after the due date, which effectively remains 'a fiction', cannot be any different.
- The parties were at liberty to introduce the deeming provision before the due date, but when they did not do so and the due date came and passed, the principal agreement lapsed and no longer had any force or effect.
- Even if their agreement could be construed as something in the nature of an attempt at a waiver, it is a trite principle of law that if a contract places a time limit for the fulfilment of a condition, the party for whose benefit it was imposed cannot waive it after the time limit has expired

CONCLUSION

The appeal was dismissed with costs.