REPUBLIC OF SOUTH AFRICA

**IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 2012/25017

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

24/2/14 DATE SIGNATURE

In the matter between:

YAKANI RESOURCES (PROPRIETARY) LIMITED	Plaintiff
and	
NEL, RONALD JOHN	Second Defendant
NEL, NATALIE	Third Defendant
RIVER CORPORATE FINANCE (PROPRIETARY) LIMITED	Fourth Defendant
PKF (GAUTENG) INCORPORATED	Fifth Defendant

J U D G M E N T

LAMONT, J:

[1] The plaintiff instituted action against the five defendants; the first defendant is a public listed company (the company), the second and third defendants (the directors), the fourth defendant (plaintiff's advisor) and the fifth defendant (the company's auditor).

[2] The claim between the plaintiff and the company was settled. The plaintiff's claims against the remaining parties proceeded to trial.

[3] The plaintiff's claim was founded on allegedly negligently made misrepresentations which caused the plaintiff loss. The claims made in claims 2 and 3 were not proceeded with; and the claim was limited to the claim made in claim 1.

[4] No misrepresentation either negligently made or at all was established to have been made to the plaintiff by the plaintiff's advisor. The claim against the plaintiff's advisor falls to be dismissed with costs.

[5] In regard to the remaining defendants the plaintiff alleged that there were representations made in the SENS statements and the 2007 and 2008 Annual Reports. It was alleged that those statements were inaccurate and that the directors and the auditor had acted negligently by making them.

[6] It was alleged that in consequence of the statements made and induced thereby the plaintiff had purchased a number of shares in the company.

[7] 7.1 the plaintiff alleged that it had subsequently sold the shares purchased at a price less than the price it had paid for them and had suffered a loss. The allegation was made in the following terms:

> *"19. As a consequence of the misrepresentations Yakani hereby cancels the acquisition of the shares purchased and tenders the remaining shares ... at a cost of R37,032,809,40 to [the company] including a tender to take all necessary steps to have the shares registered in the name of the company."*

7.2 the claim is one in which the plaintiff seeks to restore the status quo ante as between itself and the company and recover its contractual loss from the alleged misrepresentation,

7.3 the contractual loss of the plaintiff is not necessarily its patrimonial loss.

[8] During late 1999 and in the course of its unbundling Goldfields Mining and Development Ltd sold a variety of mineral rights to the company. Those rights were duly ceded to the company during January 2000.

[9] The rights so ceded included the rights to minerals but excluded the rights to gold, silver and precious stones which were reserved to the State. The purchase price for the bundle of rights ceded to the company was R40 000.

[10] The then shareholders of the company were instrumental in causing the disposition of certain rights contained within the bundle. The company retained the rights to the mineral resources on the farm Rozynenbosch (the farm) and certain other rights which were an asset of the company and which remained its asset throughout the relevant period.

[11] The farm had been identified as being an area where ore existed and which was worthy of exploration. During 1972 to 1987 exploration and extensive drilling had been undertaken. This reflected ore contained lead, zinc, copper and silver present on the farm.

[12] When the rights to mineral resources on the farm were purchased the rights to exploration data reflecting work done prior to the cession formed part of the sale and became an asset of the company. The company at the relevant time owned the ceded rights to the minerals and also the knowledge concerning the nature and extent of the minerals which the earlier exploration had revealed. This knowledge acquired pursuant to the exploration and drilling was accordingly known to and owned by the company.

[13] No further exploration was undertaken after 1987.

[14] Although the previous exploration had presumably taken place pursuant to the existence of the relevant permission entitling the exploration no evidence was adduced of the existence of such right. The company held only the rights to the minerals in terms of the cession. It held no further

permission entitling it to explore or mine. It was also neither mining nor exploring.

[15] The company was in due course reverse listed. At that time, December 2005, the assets reflected by the company included intangible assets consisting of clay deposits at Turffontein (valued at R22 million), cash (R2,7 million) and other assets including an intangible asset which although not identified expressly is a reference to the farm which was then together with other smaller assets valued at some R311 000.

[16] On 1st May 2004 the Mineral and Petroleum Resources Development Act, Act No 28 of 2002 (the MPRDA) came into operation. That Act repealed the Minerals Act No 50 of 1991.

[17] In terms of the provisions of the MPRDA the State accepted the right to exercise sovereignty over all the minerals resources within the Republic of South Africa. As such the State became the custodian of the nation's mineral resources (section 2). As custodian of the mineral resources the State acting through the Minister became entitled to grant, issue, refuse, control and manage any prospecting or mining rights (section 3). A set of transitional arrangements was put in place. The purpose of the transitional arrangements was inter alia to ensure that security of tenure was protected in respect of rights which were owned by but not being exercised by the owner at the time when the MPRDA came into force. The rights conferred included an exclusive right to the holder of an unused right to apply for a prospecting right

in terms of the MPRDA. The MPRDA in effect created the right for a person holding the unused right to stand first in the queue to apply for the right to prospect. The fact that the holder stood first in the queue conferred no other rights upon the holder. The holder was compelled in respect of all other requirements of the MPRDA to establish the necessary facts and circumstances to entitle it to the licence for which it had applied.

[18] The company was in the position of the holder of a right to minerals (the registered cession) which was not being used by way of actual prospecting or actual mining at the time the MPRDA took effect and accordingly the only right which the MPRDA conferred upon the company was the right to stand first in the queue in an application for a licence to prospect. This application is not referred to colloquially as a conversion. The right which is referred to colloquially as a conversion is a right which a holder has which was being used at the time the MPRDA came into effect which could in certain circumstances be converted into a new right under the MPRDA. The evidence was that it was virtually a formality to obtain a conversion.

[19] There is no need to canvass the detail of the relevant provisions. The point of relevance is that there can be no conversion of a right such as the company held in the present case. Persons speaking of conversion are speaking of the change of used old rights to new rights not of the application of an owner of an unused old order right for rights under the MPRDA.

[20] On 25th January 2005 the company which held the unused old order mineral rights on the farm applied for a prospecting right in respect of the farm in terms of section 16 of the MPRDA to enable it to be licensed to prospect for copper, cobalt, zinc and lead. The application reflected a prospecting programme consisting of three separate phases. None of those phases had yet occurred, indeed none could lawfully occur until such time as the permit had been issued. In the application the company recognised that the right which it sought was not a right involving a conversion as it applied for a prospecting right. A prospecting right is different from a mining right. A prospector wishing to mine must apply for the appropriate mining right. The fact that the company held neither a prospecting nor a mining right would lead any person with some knowledge on the issue to conclude that the company while it may have been the registered owner of mineral rights, was not exploring or mining and that until the relevant licences were granted it had no right to do so.

[21] The company and its directors well knew of the difference between an application for a conversion and an application such as the one lodged by the company. This knowledge apart from the fact that it appears from the manner in which the application is drawn is apparent from the SENS announcement dated 8th March 2006 in which the company refers to its application for a new order prospecting permit and not to a lodgement for conversion. A SENS announcement is a publication of information by the company about its affairs. What appears in such an announcement becomes public knowledge.

[22] On 17th January 2006 the Regulatory Authority established under the MPRDA notified the company that its application for a prospecting right in respect of the farm had been refused due to its failure to comply with certain requirements. This letter was not received. On 5th July 2006 the Regulatory Authority sent a letter to the company dealing with the refusal of the application the company had made for permission to prospect on the farm. Shortly thereafter the company lodged an appeal against the refusal. In making the appeal the company recognised that it was appealing against the refusal of an application for a prospecting right as opposed to a conversion of a right.

[23] During 2006 the company undertook through one Mossom (who was a competent person), for the preparation of a competent person's report. This is the report of a person who is able to identify and make estimates in respect of the various mineral reserves in places on the farm. These reserves are underground. Their nature and extent can only be established by scientific guesstimations bases on the competent person's skill and the knowledge gained by the exploration results. Mossom relied upon the data which had been furnished to the company at the time of the cession. No new data in relation to the existence of the reserves was obtained. Mossom identified various quantities of reserves and prepared a report. In the report he made it clear that he had not himself undertaken any work but relied on the work of others to prepare the report. He further stated that he had not had regard to various other issues concerning the actual mining, metallurgical processing, mineral products of beneficiation, financial analysis or metal price forecasting.

[24] The company made use of the report which had been prepared and on 8th March 2006 issued a SENS announcement. No mention was made in the announcement of the refusal of the application or the qualifications appearing in the report.

[25] On 15th June 2006 in a further SENS announcement the company issued its abridged interim financial results for the six month period ending 28th February 2006. This SENS announcement introduced the farm as an asset onto the balance sheet at a value of R284 million under the heading Capital and Reserves. The valuation of R284 million was founded on a model created by the company, based on the Mossom report's calculations. The model used the cash flow which would be received as a royalty (a percentage of gross earnings) from the exploitation of the reserves estimated to be present by Mossom as the basis for its calculations. The Johannesburg Stock Exchange (JSE) queried the company's reliance on an indicated resource estimate which had been used to determine the royalty cash flow. The reason for this query appears to have been, to ascertain what degree of certainty there was concerning the figures used by the company to determine the cash flow stream. An indicated resource estimate is a much less reliable state of knowledge as to the mineral reserve than a proven reserve. In order for the reserve to be upgraded to a proven reserve additional work was required to be done to ascertain the additional knowledge and the relevant data which would lead to the additional certainty. This additional work had not been and was never done.

[26] On 6th September 2006 the company responded to the query from the JSE and explained that the projected royalty cash flow was based on the competent person's report (CPR) report of Mossom. The company estimated the nett present value of the farm allowing for the discounting of various values. The company formed the view that an appropriate discount would be 20%. That would have resulted in a nett present value of the farm at some R99 million. The calculations made by the company included calculations valuing silver as if the company was entitled to silver royalties notwithstanding that it did not have such right. The company at that time hoped to obtain rights in respect of the minerals it owned and which it would mine and hoped that the miner and the State would allow it a royalty for silver after appropriate agreements had been concluded with the State which owned the silver. There was no disclosure to the JSE that the application for prospecting rights at the farm had been refused.

[27] On 11th October 2006 the JSE approved the valuation on the basis disclosed by the company of it. The company accordingly could as far as the JSE was concerned publish such a valuation and rely on it. The company was a listed company on the JSE and complied with JSE requirements to maintain its listing. It was accordingly a matter of some moment for the company that an independent person in the form of the JSE which had all publicly known facts concerning the company at its disposal had sanctioned its approach to the valuation of the farm.

[28] On 26th March 2007 (and pursuant to the appeal lodged) the decision to refuse the company's application for a prospecting permit was set aside by the relevant authority. The company was requested to submit further data and the application would then be considered. It appears that the effect of the setting aside was that the application to prospect was re-instated and the company was afforded an opportunity to supplement the application. This being so, from that date the company in fact held the mineral rights and had in existence an application to prospect which was under consideration. The relevant data to supplement the application was only furnished to the Regulatory Authority during 2012 as the decision was not brought to the attention of the company until approximately 13 February 2012. Nonetheless the fact remains that from March 2007 the application was pending.

[29] Notwithstanding the fact that the refusal of the application for the prospecting permit had been set aside on 7th October 2007 and the application was pending a right to prospect was granted to Guma Resources. This right was to allow Guma Resources to prospect for the same base metals as the company. The award of this right to Guma was unlawful and in contravention of the MPRDA which required the application of the company to be finalized prior to the award of rights to anyone else.

[30] During November 2008 the plaintiff obtained publicly known information from River. The information consisted of the contents of the 2008 draft financial reports and a confidential briefing memorandum which contained publicly known knowledge. The plaintiff was interested in acquiring

a shareholding in the company. The directors of the company were empowered to issue shares each year. The plaintiff had in mind that it would invest R50 million. It would purchase the shares issued by the company as also further shares which it would buy on the open market. On 16th November 2008 the plaintiff accessed the 2007 annual report of the company to confirm that the nett asset value referred to in the confidential briefing memorandum corresponded with the nett asset value in the balance sheet of the 2007 annual financial statements. The plaintiff at the time that it inspected the annual financial statements checked who the auditors were, whether or not the auditors were reputable and further whether or not there had been a qualified auditor's report. It made no further enquiries and had no further regard to the annual financial statements or publicly known information about the company. On 17th November 2008 the plaintiff purchased the 15% shareholding issued by the company at a price of 53 cents per share.

[31] The plaintiff had in mind that it would invest in a company which was near mining and that the R50 million investment would grow to approximately R700 million over a 5 year period. The R50 million which it would use as its investment would purchase shares which could be freely exchanged on the JSE. There was a good spread of shareholders so the shares were saleable. The company had assets on the balance sheet of R306 million which reflected a discounted value of R455 million being the true perceived value. The company had coal assets which were valuable. The view of the plaintiff was that the shares considered on the basis of the company's nett asset value should trade at R5,70 instead of the R0,53 which was then the current price.

The shares were accordingly in the plaintiff's view a bargain, being sold at less than10% of their value. The current price was an open market price of the shares which were traded on the JSE. The plaintiff did not consider that there might be a reason why the market price of the shares was so different from the price it believed the shares were worth. It made no investigations into publicly known matters concerning the company including information contained in the documents in its possession.

[32] The shares are traded freely in a market at the price which willing buyers will sell to willing sellers. The representations made in the annual financial statements coupled with other publicly known data resulted in the fair market price for the shares being R0,53. The price paid by the plaintiff.

[33] After it had bought the shares which were issued by the company the plaintiff over a period purchased further shares in the open market at an average price of 64 cents per share. The impact of the plaintiff's continued interest in the shares presumably had an impact on the price.

[34] The claim of the plaintiff was based on allegations that there was no asset to value and that in any event the value attributed to the minerals on the farm was misstated in that:

1 the company did not hold any right to explore. It only held a right at best for it to the ceded rights to the specified minerals reflected in the notarial deed of cession and,

2 had generally practised accounting standards been applied the value stated could not have been achieved.

[35] The claim of the plaintiff became that the directors and auditors had negligently misstated the existence of the asset and also its nett asset value. There was no claim and no evidence to establish the actual value of the minerals or of the shares. The plaintiff sought to establish its damages by deducting from the price paid the price recovered from time to time for the sale of the shares.

[36] The plaintiff sought to establish the representation made by reliance limited to those representations to which it had reference to in the annual financial statements. The underlying thesis was that the other facts in the annual financial statements could be disregarded as accounting standards were so structured that reliance could be placed on the figures it considered alone. Nett asset value of mineral resources could only be ascertained in a particular way and the value provided was reliable.

[37] The IFRS, the relevant accounting standard sets out that information provided is to be considered in its totality and should be studied by the reader.

AFS 2007

[38] I set out the information which is contained in the 2007 annual reports.

[39] The company was formed when it acquired the mineral rights to 894 mining properties from the Goldfields Group in 1999 and 2000. The mineral properties were subject to varying degrees of surveying, sampling and drilling during past decades but exploration activity was mostly halted before the identification of proven reserves. Initially the company identified potentially feasible projects on 74 farms. A total of 54 applications for the most promising of these projects were lodged with the Department of Minerals and Energy (the DME) by 30 April 2005 to convert from 'old order' to 'new 'order' rights in terms of the MPRDA. The company was currently in the process of narrowing its focus further and this would see a discard of a number of the less economically feasible projects.

[40] The business model was that the company's business was mining exploration. The operating model was to permit the company to use its existing or acquired geological and technical information to bring the project some way up the value chain. Thereafter the company would enter into a joint venture agreement with a potential mining partner to conduct exploration on a particular resource (over which the company typically would hold a prospecting permit) with a view to upgrading its mineral status to that of either a measured resource or a probable or proved reserve. The JV partner would have the exclusive right to mine the project and the company would earn a fee. The financial model set out by the company reflects that exploration companies are not cash generative in the initial years and bringing prospects up to pre-feasibility phase requires various amounts of funding. The company

set out that the first two stages of the funding model relied on the support of the founders (Phase 1) and the empowerment, equity and shareholder loans (Phase 2). Until the middle of the 2007 financial year these were the main sources of funding. In February 2007 however the company had accessed the market and raised R15,4 million by means of an oversubscribed private placement. The approach of the company was to only raise capital for required specific projects as and when required. The company set out the income generation perspective as to "*generate income by entering into strategic JV partnerships with reputable mining and exploration companies willing and able to develop and mine a particular property*". The company hoped to earn an initial upfront option fee. The chairman's letter indicated that once a pre-feasibility study had been completed on a project, management usually had sufficient information available to estimate its value on a discounted cash flow basis using conservative assumptions. The company had decided to adopt this approach and to bring projects onto the balance sheet (as intangible assets) as early as reasonably viable in order to signal the management assessment of the potential of a project to market participants. The CEO indicated in his review that there was exploration. He did not indicate that any mining was in fact taking place or that there were any contracts in place generating royalty income. It is apparent that this company itself did not mine and held no mining permits. The CEO further said in respect of the 2007 financial year that the Board had made strong advances in starting to unlock value for shareholders but there were a number of challenges which still needed to be overcome one of which was the conversion of mining rights. The report relating to the farm itself indicated the following:

1. Geological investigations had been conducted.

2. The property had been explored by Goldfields during the 1970's and 1980's.

3. A competent person's report showed an indicated mineral resource having an estimated gross project value of R3,63 billion.

4. The next phase in the development of the farm namely the completion of the internal pre-feasibility study was completed during 2006. This study showed a robust project. The details were available on the company's web site.

5. The last step in the exploration programme was to conduct limited drilling to confirm previous results in metallurgical recoveries and to conclude a scoping study. This was expected would enable the projects indicated resource status to be upgraded to that of a probable or proven reserve and for the completion of a bankable feasibility study most likely in cooperation with a JV partner. The company stated that it expected to proceed with this phase once a new order permit

had been issued by the DME. The valuation was reflected by the directors at R284 million on the project in February 2006. This value was *"consistent with the company's business model of earning royalties from strategic joint venture partners who will mine the deposit ..."* Under the summary the information supplied reflected that the mineral rights in the company in respect of zinc, copper, lead and silver; that there was a conversion under appeal as being the DME status; that the project status was that there was a competent person's report and an internal pre-feasibility study. The resource was classified as being an indicated resource and the value put at R284 million. With regard to the DME status the following was said:

> *"All references to permits or applications on South African properties relate to 'new order' prospecting rights. The respective group companies have legal entitlement only in the cases where it has been indicated that the permits or concessions have been granted. In all other cases, the permit conversion and/or application process has not yet been concluded. Further information on the specific properties concerned is available from the company's offices."*

The report of the auditors reflects that the auditor believed that the audit evidence was sufficient and appropriate to provide a basis for the audit opinion and further that the financial statements fairly represented in all material respects the financial position of the company and its cash flows in accordance with international financial reporting standards and in the manner required by the Companies Act of South Africa.

[41] The following litigation statement appears:

> "*Certain applications relating to the conversion of the company's 'old order' prospecting and/or mining rights to 'new order' in terms of the MPRDA have been rejected by the DME. Consequently the Board has exercised its rights in terms of the MPRDA to appeal against these decisions and reserve its right to take the necessary legal action to ensure the timeous conversions of these rights. Apart from the appeal process the directors are not aware of any other legal or arbitration proceedings including proceedings that are pending or threatened that may have or have had in the recent past a material effect on the company's financial position.*"

[42] The only income the company received over the year was R2 million being option fees earned for exploration rights. The 2006 income was R1 000. It is apparent from these income declarations that no mining was being undertaken which generated an income during 2006 and 2007. It is also

apparent that the discounted cash flow models were not based on cash received in the year under review.

[43] The notes to the annual financial statements reflect that the farm was valued at some R284 million and that the clay deposit in Turffontein at some R22 million.

AFS 2008

[44] I turn now to the draft annual financial statements for 2008.

[45] The farm and Turffontein clay deposits are reflected under intangible assets at the same value as before. The intangible assets (being the farm and the Turffontein clay deposit) remain the same. The valuation is stated to be based on discounted cash flow reserves resulting in an increased carrying value of R455 million which the directors had conservatively valued by leaving the value as it was. The following is then stated:

> *"Prior to the enactment of the MPRDA certain mineral rights were acquired from Goldfields Limited one of which was the … project. The new Act required that all 'old order' rights be converted to 'new order' rights and the date of 1st May 2005 was given by which application should be made. The holder of any 'old order' right has first preference to convert … The company consequently applied for the conversion of these rights within the prescribed period. The group was subsequently*

advised by the DME that these applications had been refused. Consequently the Board of the company has exercised its rights in terms of the Act to appeal against this decision which the Board believes is without foundation. The appeals have been lodged with the DME and are now in the process of being evaluated during which time the DME may not grant any of these rights to a third party. The Board is confident that the Group will be successful with its appeal and will be granted new order prospecting rights over these properties."

[46] It is possible from the above information in the 2007 and 2008 annual reports to identify the nature and extent of the statements concerning the status of the company's rights to explore:

1. Exploration had taken place in the Goldfields area, in the 1970's and 1980's.

2. There had not been further exploration.

3. Accordingly as at 2005 no exploration was taking place.

4. The company had legal entitlement only in cases where it was indicated that permits or concessions had been granted.

5. The indication was that the application for a permit had been refused.

6. The opinion of the company's Board was that the rejection was unfounded.

7. There was accordingly an appeal in place.

8. The application which had been rejected was an application relating to the conversion of the rights. The appeal was in the process of being evaluated.

9. Until such time as the litigation is finalised the company does not hold the right.

10. Only after the litigation is finalised will it be capable of ascertainment whether or not the company has a right.

11. The company expects its appeal to succeed.

[47] In fact there was no question of a conversion of the rights the company had. The company had only a deed of cession entitling it to certain mineral resources (not silver). It had never itself had a prospecting permit nor had it ever itself prospected.

[48] The statement that there was a conversion in process is inaccurate. The company stood "first in the queue" in relation to competing applications for prospecting rights.

[49] The statement sets out fairly that the company does not hold the right which has been refused and that it cannot hold a right until the finalisation of the litigation.

[50] A reader relying upon the statement would accordingly know that the company had no right and that he would have to wait for the outcome of the litigation to ascertain whether or not there was a right. A reader would also know that the existence of the right in the hands of the company was fundamental to exploration of the mineral resource. If there was no right there could be no exploration. A fortiori there could be no mining and no income stream.

[51] The fact that the person reading the statement might know that a conversion was more easily granted is irrelevant to the above considerations.

[52] The IFRS provides readers of financial statements, to read, and understand data provided for users who have a reasonable knowledge of business and economic activities and accounting practices and also a willingness to study the information supplied with reasonable diligence. The information is organized and published on that basis. The level of education and the skills of the person who acting for the plaintiff, that read the annual financial statement cannot be ignored. He must have known that all the information supplied is supplied as a unit and must be studied in its entirety as a unit.

[53] A reader of the statements would know that there was no certainty as to the company's rights and that if it chose to invest or buy shares in the company it would only be on the finality of the litigation that this risk would convert to certainty. In 2013 the application which had been pending for many years was finalized and an exploration permit was granted. The company might have been able to finalise had it been in receipt of the letter notifying it of the partial success of the appeal, reversing the original decision allowing the application to continue the litigation quicker than it did.

[54] The International Financial Reporting Standards (IFRS) provides for the recognition and valuation of assets. Assets may only be recognised in terms of IFRS if they are owned by the company or the company is able to control the benefit expected to flow from the asset.

[55] The primary submission of the plaintiff was that the asset recognized in the balance sheet was neither owned by nor was the company able to control any benefit which would flow from it. This submission was founded on the fact that although the rights to the asset had been ceded to the company pursuant to the notarial deed of cession the company had lost the asset in consequence of the decision made under the MPRDA.

[56] This submission in my view loses sight of two material elements of the asset:

56.1 The company owned the minerals pursuant to the deed of cession. The application for the right to explore under the MPRDA although initially refused was subject to an appeal. The refusal was subsequently overturned and in fact in due course albeit in recent times the right was allowed. Currently the company owns the right. At the time it controlled any benefit flowing from the right in the sense that prior to the determination of its rights no other person could obtain or use the right.

56.2 There was a widely held belief that even if the right was refused that the authority was obliged to pay compensation for the right (this belief ultimately turned out he incorrectly held once the matter had been heard in the Constitutional Court). The company believed it held a right of equivalent value in substitution of the asset if the asset itself had been lost.

[57] There was, in the annual financial statements, full disclosure of the status of the right. If that disclosure revealed circumstances which were incompatible with an application of IFRS then it was obvious to the reader that the valuation was of an asset otherwise than in compliance with IFRS.

[58] The recognition of the asset was considered by the authority which controls the sale of shares of public listed companies (the JSE). The

specialists employed by the JSE to ensure that appropriate disclosures are made by companies concluded on the basis of the disclosures about the status of the asset that there was compliance with appropriate accounting standards and that the asset could be recognised.

[59] The right was properly recognized.

[60] I now turn to the valuation of the mineral resources at R284 million.

[61] The submission was made that the stated value had been irregularly arrived at in that generally acceptable accounting principles set out in the "IFRS" had not been followed.

[62] The company attributed a value of R284 million to the mineral resources on the farm. It did this on the basis of a cash flow projection of what the project would generate in the event of mining taking place pursuant to a contract with a miner who would pay the company a royalty. The cash flow model which founded the valuation was dependent upon the findings as to the mineral resource which had been made by surveys and which were analysed by Mossom. Before there could be any project there had to be further drilling and exploration. This is disclosed in the annual financial statements. The mineral resource which existed was not well identified and further exploration was required to raise the level of knowledge concerning the nature and extent of the resource. The submission was made that the resource was insufficiently identified to enable the calculation. There was no

evidence that the resource as a fact did not exist as calculated. The JSE accepted the calculation and its examiners had the same information as was available to the public. There was no evidence as to the relationship between the share price and the risk that the valuation was made on a too speculative basis as against the risk actually disclosed in the annual financial statement.

[63] No contract had been concluded with the miner either for the project to start the next year or at all. The submission was made that there being no contract, no mining date, that the income stream to flow from the resource was inadequately established and in any event too uncertain to be of value. The model used by the company is dependent upon an income represented by a percentage of gross revenue which can be established by multiplying the nature and extent of the ore by the price for the product. The cost of production is a feature relevant only to whether or not the company would be able to find a person prepared to mine. There was no evidence as to whether or not the company's view that it could obtain a miner was wrongly held. The evidence was directed towards an attack upon the underlying components founding the calculation as defined by the "*SAMREC*" method.

[64] How the SAMREC method is applied is primarily a mining issue. The auditor is required to bring a sceptical neutral intelligent approach to the issue. He is however not required as a starting point to seek independent expert advice. If the valuation appeared to him to be reasonable, rational and probably achievable and in line with the SAMREC approach he would be

entitled to approve it. He could derive comfort when it came to approving it and the fact that the JSE had approved it.

[65] When the farm first was placed on the balance sheet as an asset valued at R284 million it was so placed in pursuance of a re-valuation. The re-valuation of assets takes place in terms of IFRS 6. IFRS 6 allows for the re-valuation of the assets on the basis of ISA 38 (intangible assets) or ISA 16 (property, plant and equipment). The company used the income stream model which is expressly permitted by ISA 16 which provides that if there is no market based evidence of fair value and the item is readily sold an entity may need to estimate fair value using an income stream approach (ISA 16:33).

[66] The objective of the IFRS 6 standard is to specify the financial reporting for the exploration for and evaluation of mineral resources (IFRS 6:1).

[67] Once there has been recognition the company must choose to apply either the ISA 16 or ISA 38 model (IFRS 6:12).

[68] The manner in which the asset shall be presented and classified namely as tangible or intangible is dependent upon the nature of the asset acquired. The rider is that once a choice of classification has been made that classification shall be consistently applied (IFRS 6:15).

[69] The asset however shall be re-classified once the technical feasibility and commercial viability of extracting the mineral resource is demonstrable (IFRS 6:17).

[70] The technical feasibility and commercial viability of extracting the mineral resource has never been proved to be in existence. The plaintiff's submission was founded on the fact that the resource was inadequately identified. The evidence of the company was that further exploration was required. There is hence no question of re-classification under IFRS 6:17.

[71] The asset was originally, using the rights conferred by IFRS 6 classified as an intangible asset. That classification was required to remain throughout on the evidence before me. The company was hence entitled to use the income stream model to found its valuation.

[72] Submissions were made concerning the unrealistic nature of the model and hence that there was a risk of an inaccurate evaluation. The model was based on the data in the Mossom report. That set of data was of a less probative value than it could have been had further exploration taken place. These risks attaching to the value were dealt with in the annual financial statements which set out full material facts affecting the risk including that there was no project in existence generating income, until such time as further exploration had been done and the issues concerning the right to explore and mine were resolved. The company at no time held a mining right. There was accordingly no question of mining being imminent. If a reader assumed that

the valuation was based on mining which was soon to take place that assumption was patently wrong on the basis of a proper reading of the annual financial statements.

[73] It was submitted that the question of fair value and a market arises for consideration. I do not agree with this submission. IFRS 6 when it invokes the right of the person making a classification to use ISA 38 or ISA 16 does not invoke all the additional features of the sections. What is invoked is the right to proceed in a particular way coupled with an obligation to remain with the choice made.

[74] It remains to deal with the question of silver. The rights to silver at all times vested in the Government. The company included silver as a resource which would generate an income on the basis that the other mining would generate the silver as a by-product. That silver so generated (at no cost) would be valuable in the hands of the person generating it as the Government would, in return for the processed silver it owned pay a fee by way of paying a royalty. The company at no time held the right to the silver but believed on the probabilities that it would be able to generate income from the silver. The rationale underlying this is that the Government owned silver as a resource in the ground and that this resource had been converted to a processed silver product. There was no evidence that this belief was improbable or not genuinely held. There are no facts indicating that the belief was negligently held. The silver constitutes an asset in the accounting sense in that the company controls the income stream generated by it. Hence in my view

although the company was not the owner it was entitled to reflect silver in the calculation used to derive the income stream and value.

[75] The value so derived was, discounted heavily. There is no evidence that the discounted value in any way misrepresents the true value of the resources. A significant discount is also an appropriate way of overcoming the risks attached to the values used in performing the calculations.

[76] This being so there is no evidence that the stated value is otherwise than the actual value. There is also evidence of what impact the statements in the annual financial statement had on the price of the shares of the company. The statements which influenced the plaintiff were the same as those available to the public which traded the shares.

[77] The plaintiff as appears from the extract of its pleadings quoted above formulated a claim which appears on the face of it to be in contract. Its claim is in fact in delict. The test to be applied is the difference in the value of the plaintiff's patrimony prior to and immediately after the commission of the delict. No attempt was made by the plaintiff to adduce evidence of this nature. The evidence reflected the plaintiff over a period buying shares at a point in time selling shares at a further point in time holding shares and at a further point in time selling all the remaining shares. The plaintiff used the difference between the total cost of purchases and total cost of sales to determine its quantum.

[78] This would in the ordinary course be a contractual measure of damages designed to place the plaintiff in a position it would have been in had it not contracted. It has no regard to the actual value of the plaintiff's patrimony. The plaintiff submitted that it could not know its damages until it:

79.1 discovered that the delict had been committed;

79.2 measured the damages from time to time by selling the shares.

[79] In my view these factors are irrelevant to the plaintiff's case. The long line of well-settled authority determines that damages are quantified by comparing the plaintiff's position immediately prior to and immediately after the delict. If those damages are to be measured by the actual assets owned by the company or to which the company had rights then the assets did not change at all. What the company owned it always owned irrespective of the delict. In that sense its value did not change.

[80] If the value is represented by the price of the shareholding then that too appears to have been discounted on the plaintiff's valuation and that did not change for a long period of time. When it changed it may have been in consequence of other events. There is in any event no evidence linking the share price change to the alleged delict.

[81] The plaintiff has accordingly failed to establish the liability of any of the defendants and its claims against the second, third, fourth and fifth defendants fall to be dismissed with costs such costs to include the qualifying fees of the experts called by the defendants as also of two counsel, senior and junior where same were employed.

C LAMONT
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

APPEARANCES:

For Plaintiff:	**Adv. B Roux SC** **Adv. E van Vuuren** **Instructed by:** **Werksmans Attorneys, Sandton**
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For 4th Defendant:	**Adv. M van der Nest SC**

Adv. D. Smit
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Date of hearing:	12 November - 5 December 2013
Date of judgment:	24 February 2014