Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Case No: 642/2009
Heard: 19/06/2009
Delivered: 03/07/2009

In the matter between:

RIVER CORPORATE FINANCE (PTY) LTD **Applicant**

and

DIAMOND CORE RESOURCES (PTY) LTD **Respondent**

JUDGMENT

KGOMO JP

[1] This is an opposed application seeking an order for the winding-up of the respondent, Diamond Core Resources (Pty) Ltd, on the basis that it is unable to pay its debts as contemplated in ss 334(f) and 345 of the Companies Act, No 61 of 1973 (the Act). The Sheriff, at the instance of the applicant, River Corporate Finance (Pty) Ltd, served the statutory demand in terms of s345(1)(a)(i) of the Act at the respondent's registered office on 06 November 2008. The demand was for the payment of R5, 066, 400-00 and therefore exceeds the minimum jurisdictional amount stipulated in the Act by far.

[2] It is convenient at this very early stage to point out that the denial by Mr Brian Scallan, a director of the respondent who

deposed to the Answering Affidavit, that the s345 demand has not been made reflects very poorly on him because the demand was served personally on him. The return of service **(Annexure "RA1")** reads thus in its entirety:

"In the matter between:

RIVER CORPORATE FINANCE (PTY) LTD
Applicant

and

DIAMOND CORE RESOURCES (PTY) LTD Respondent

RETURN: SERVICE OF NOTICE IN TERMS OF SECTION 345 OF THE COMPANIES ACT 61 OF 1973

IT IS HEREBY CERTIFIED:

That on 06 November 2008 at 16h20 at BLOCK C, ST ANDREWS OFFICE PARK, MEADOWBROOK LANE, EPSOM DOWNS, BRYANSTON being the principal place of business of DIAMOND CORE RESOURCES LTD, a copy of the Notice in Terms of Section 345 of the Companies Act 61 of 1973 was served on Mr B.P. Scallan, director, a responsible employee of DIAMOND CORE RESOURCES LTD, after the original document was displayed and the nature and contents thereof explained to him. Mr B.P Scallan a person apparently not less than sixteen years of age and in the employ of DIAMOND CORE RESOURCES LTD accepted service. Rule 4[1](a)(v)."

The return of services also demonstrates that Mr Scallan was less than frank when he claimed in his Answering Affidavit that the respondent had vacated the premises in October 2008.

[3] Prior to the service of the letter of demand alluded to a courtesy e-mail was dispatched to the respondent, apprising it

of the impending letter of demand. It is common cause that before Mr Scallan's deposition he met Mr Casper Van Wyk, the executive director of the applicant, at an hotel where the demand was broached. Absent any innocent explanation forthcoming from Mr Scallan I must oblige Adv Vorster SC, for the applicant, that an adverse inference must be drawn against him in this regard.

[4] Before or concurrently with dealing with the merits relating to the central issues in this application a number of preliminary matters, raised by the respondent as defences, need to be addressed. They are the following:

4.1 That the launching of this application has not been duly authorized by the applicant;

4.2 That the applicant should first have had its claim adjudicated by way of arbitration, before launching this application;

4.3 The respondent denies that the applicant is its creditor;

4.4 It is suggested that it should be investigated whether the respondent (or its holding company) is the applicant's debtor;

4.5 The respondent denies that it is unable to pay its debts;

4.6 The respondent alleges that it has a counterclaim against the applicant.

[5] AS TO 4.1: WANT OF AUTHORITY.

The respondent contents that the applicant's resolution, Annexure "FA1" to Casper Van Wyk's Founding Affidavit, is defective in the respect that it fails to disclose where the Board of Directors purportedly met on 30 March 2009 and accordingly, disputes that there was in fact such a meeting. In particular it is stated that Mr Theunis Maree, a director of

the applicant, is resident in Vancouver, Canada, and did not attend the alleged board meeting nor was he a signatory to the resolution. This is what the resolution provides:

"***RESOLUTION OF THE BOARD OF DIRECTORS OF RIVER CORPORATE FINANCE (PTY) LTD ("THE COMPANY") PASSED ON THE 30TH DAY OF MARCH 2009***

RESOLVED:

1. *That the Company bring such legal proceedings ("the legal proceedings") as are necessary to bring about the liquidation of Diamond Core Resources Limited and that the Company may take any action in regard to the legal proceedings as may be reasonably required to protect the interest of the Company, which action shall include, inter alia, the launching of applications, the issuing of summonses, the pursuit of any relative proceedings and the prosecution of any appeals.*

2. *That* ***CASPER VAN WYK*** *be and is hereby authorized to do all such things and to sign documentation as might be necessary, to pursue or defend any appeal against any decision in such proceedings or to defend or pursue any related proceedings."*

Respondent has also served a notice in terms of Rule 7(1) of the Uniform Rules of Court in which the authority of applicant's attorneys of record in Kimberley to act for the applicant is contested.

[6] The applicant countered this allegation by conceding that the board meeting was not conducted *inter praesentes*. Mr Van Wyk maintain that, as a general rule, and as the exigencies

demanded, several telephonic directors' meetings were held per week and that this *modus operandi* was indeed invoked during the evening of 30 March 2009. Mr Maree submitted a confirmatory affidavit to this effect. There is no bar to a tele-conferencing of the nature employed by the applicant's directors nor does Mr Solomons SC, for the respondent, contend otherwise. The applicant's attorneys of record in Kimberley, Van der Wall & Partners have filed a power of attorney with the Registrar of this Court and a copy thereof has been served on the respondent. The Rules of Court have therefore been compiled with. See: **First National Bank of SA Ltd v EU Civils (Pty) Ltd** 1996(1) SA 924 (C) at 931 H-I.

[7] I am in the premises, satisfied that it was properly resolved by the applicant to launch this application. The question of ratification therefore does not arise in this matter. See **Smith v Kwanonqubela Town Council** 1999(4) SA 947(SCA).

AS TO 4.2: THE ARBITRATION QUESTION.

[8] The respondent has invoked clause 18.1 of the agreement between the parties (referred to as the Terms of Engagement, Annexure "FA5") to contend that the applicant was not entitled to pursue the winding-up route before having their dispute relating to applicant's claim adjudicated upon by way of arbitration. Clause 18.1 stipulates as follows:

"18.1 The terms and conditions of this engagement are governed by and construed in accordance with the laws of South Africa and any dispute arising from this engagement shall be settled by final and binding arbitration at the unilateral written request of any of the parties at least 14 days after such dispute arises."

[9] If the respondent was of the view that a dispute has arisen between the parties from the Terms of Engagement, more pertinently when it received the s345 demand, it was at liberty to initiate an arbitration process in writing because this can be done "at the unilateral written request of any of the parties at least 14 days after such dispute arises." The respondent chose to let matters drift along and did nothing. As will be demonstrated hereinafter the reason for this attitude could only have been that the respondent had already acknowledged its indebtedness to the applicant. In that event there could not have been any dispute that any of the parties could have referred for arbitration. The respondent's somersault from this position through its Mr Scallan will be dealt with under a separate heading. The respondent's counsel made the following concession, correctly in my view, in his heads of argument which he stuck to throughout:
"Obviously the [invocation of the] arbitration clause depends upon a finding by this Honourable Court that a dispute exists in regard to the indebtedness."

[10] For these and further reasons to come I am satisfied that no dispute exists between the parties justiciable by way of arbitration under clause 18.1 of the Terms of Engagement. Even if I were to be wrong in this respect, there are further dimensions to this aspect. Mr Theodoros Botoulas, although not a party to this application, has made out a strong case that the respondent owes him an amount running into millions of rands and has quantified it. Mr Botoulas will benefit through this liquidation proceedings, but he is not constrained to trundle the arbitration route. I may add that a satisfactory resolution of this application may have the effect of causing a settlement between the current respondent (as respondent)

and Quemic (Pty) Ltd (as applicant) in other liquidation proceedings – Case 641/2009 (Kimberley). In the Quemic matter the arbitration question does not arise. The Quemic matter, which was to be argued by the same counsel before me, was crowded out and postponed sine die.

[11] It is a settled principle of our jurisprudence that an arbitration clause in an agreement does not oust the jurisdiction of the Court:

11.1 In **Universiteit van Stellenbosch v J A Louw (Edms) Bpk** 1983(4) SA 321 (A) at 333G – 334B **Galgut AJA** restated the position in this manner:

"It has always been recognized that an arbitration agreement does not necessarily oust the jurisdiction of the Courts; see The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 375. See also s3(2) of the Arbitration Act 42 of 1965. However that may be, when a party to an arbitration agreement commences legal proceedings, a defendant who was party to the agreement and who has entered appearance to defend and not delivered any pleadings is given the right by s6 of the Act to apply to the Court for a stay of the proceedings. The onus of satisfying the Court that it should not, in the exercise of its discretion, refer the matter to arbitration is on the party who instituted the legal proceedings. See Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd 1970 (2) SA 498 (A) at 504H. It follows that the plaintiff had to discharge that onus. In Rhodesian Railways v Mackintosh (cited above) at 375 it was said that the discretion of the Court to refuse arbitration, where such an agreement exists, was to be

exercised judicially, and only when a "very strong case" had been made out.

It is not possible to define, and certainly it is undesirable for any court to attempt to define with any degree of precision, what circumstances would constitute a "very strong case". In Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) COLMAN J at 391H refers to English authorities which say:

"there should be 'compelling reasons' for refusing to hold a party to his contract to have a dispute resolved by arbitration".

It has also been said that before a court refuses a stay of proceedings it has to be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement. See Bristol Corporation v John Aird & Co 1913 AC (HL (E)) 241 at 252,257 and 260."

11.2 Most recently the Supreme Court of Appeal reiterated the fact that merely because the parties have agreed that disputes between them shall be decided by arbitration does not mean that the court proceedings are incompetent. In **PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd** 2009(4) SA 68 (SCA) at 71H-73A the Court went on to say:

"If a party institutes proceedings in a court despite such an agreement, the other party has two options:

i) It may apply for a stay of the proceedings in terms of s6 of the Arbitration Act 42 of 1965; or

ii) it may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration. ---

In the present proceedings, the defendant has simply pointed out that the lease contains an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set the terms of the dispute. As ***Didcott J*** *succinctly pointed out in* ***Parekh v Shah Jehan Cinemas (Pty) Ltd and Others [1982(3) SA 618 (D)]****:*

'Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise. It includes Re Carus-Wilson and Greene (1887) 18 QBD 7 (CA); London and Lancashire Fire Assurance Co v Imperial Cold Storage and Supply Co Ltd (1905) 15 CTR 673; King v Harris 1909 TS 292.'

The passage just quoted was approved by this court in ***Telecall (Pty) Ltd v Logan [2000(2) SA 782 (SCA)]*** *and* ***Plewman JA*** *went on to say:*

'[12] I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there can not be an arbitration and therefore no appointment of an

arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word 'dispute'. If, for example, A the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon.'

I would merely emphasise that a failure to pay does not without more imply that there is a dispute as to liability."

I therefore have a discretion in this matter which I exercise in favour of the applicant who has satisfied me that there is no reason or sufficient reason to uphold the objection which would importune me to direct that the parties go for arbitration.

AS TO 4.3: RESPONDENT'S DENIAL THAT APPLICANT IS ITS CREDITOR AND 4.5: RESPONDENT DENIES THAT IT IS UNABLE TO PAY ITS DEBTS.

[12] For convenience I will deal with these defences together because they go to the crux of the case and enables me to deal simultaneously with the background and the merits of the case.

[13] The applicant was engaged by and acted as corporate advisor for the respondent in terms of the aforementioned written instrument labelled "Terms of Engagement," Annexure "FA5." Applicant's mandate was to advise the respondent on the merger of Diamond Core Resources Ltd with BRC Diamond Corporation, a Canadian company. It will be noted that

Diamond Core Resources Ltd was a public company because the description "proprietary" or "Pty" was absent from its name at this stage.

[14] Clause 10.2 of the Terms of Engagement provides that in the event of a take-over offer or a scheme of arrangement the success fee payable to the applicant would be an amount in South African Rand equivalent to US $ 1 million (one million United States dollars) as determined by the exchange rate ruling on the date of signature of this mandate, exclusive of VAT. In terms of clause 10.2.3 the success fee would only become "due and payable within seven working days of the shareholders transaction at [an] Extraordinary General Meeting called for that purpose."

[15] It was common cause that for a year the merger was successful. Consequently the only condition that had to be fulfilled was the approval of the transaction at an extraordinary general meeting of the shareholders. It is also common cause that this condition was fulfilled on 14 January 2008 when the meeting in question was held. The success fee therefore became due and payable on 23 January 2008, the seven working days grace period after the shareholders' approval.

[16] The quantification was done effective from 23 January 2008. There is no dispute that on that date US $ 1 million could buy you R7 136 400-00 (inclusive of VAT). It is further common cause that during February, April and June 2008 the respondent paid the applicant a total R 2 070 000-00 leaving a balance of R 5 066 400-00. This balance is the amount that

the applicant claims the respondent is indebted to it, which corresponds to the s345 demand already adverted to.

[17] The respondent's ultimate attitude (the position somersaulted to as foreshadowed in para 9 earlier) is to be gleaned from a letter (Annexure "FA14") dated 29 January 2009 written by Mr Scallan to Mr Van Wyk. The respondent's counsel relied heavily on the contents of this letter both in his heads of argument and presentation of oral argument. As it is just about the sum-total of respondent's case I quote copiously from it (the numbering of the paragraphs is mine):

"1. I have now had an opportunity to study the engagement letter concluded between River Corporate Finance (Pty) Ltd ("River Group") and the Company and frankly I am appalled by the extent by which River Group has failed to meet its obligations in terms of the mandate and the particularly unprofessional manner in which it discharged the few obligations that it did carry out in terms of the mandate.

2. The River Group fee was agreed at a premium based upon the representations made to the Company regarding the experience, expertise and the ability to execute its mandate professionally and to the full satisfaction of the Company. The fee agreed based upon a satisfactory fulfilment of your mandate was US $ 1 million.

3. Although, prior to my appointment, and at your request certain amounts were paid for work done in terms of the mandate, the Company resisted paying the balance of your fee because of its dissatisfaction with the extent that River Group failed to meet its mandate.

4. *Unfortunately as a result of an oversight by the Company a portion of your fee was paid despite the agreement reached between River Group and the Company that the fee mentioned in the Mandate would only be paid from the proceeds of funds that River Group undertook to raise in conjunction with the Royal Bank of Canada ("RBC"). This arrangement was specifically agreed because it was common cause at the time that due to the expensive costs of the merger including your fee funds would be required to be raised to cover these merger costs. Since your efforts to raise funds failed hopelessly there arose no obligation on the part of the Company to pay a fee to River Group and it should not have been paid the amount that it has been paid to date. In this regard I will obtain legal advice and as such I reserve the rights of the Company to pursue a claim for a refund of this erroneous payment.*

5. *As one of many examples of River Group's absence of any professionalism in the manner that it carried out its Mandate and which caused the Company financial prejudice relates to your interaction and liaison with all professional advisers in South Africa, Canada and all other jurisdictions to the extent required. River Group failed to diligently carry out its work and relied excessively on other advisors which resulted in a substantial duplication of work that occurred between these professional advisors and a duplication of the fees claimed by yourselves, Werksman and Faskins. This specifically relates to the work associated with the legal due diligence in anticipation of the merger between BRC Diamond Corporation and the Company. The additional fees charged as a result of River Group's inadequate*

management of the process ran into several hundred thousand rand.

6. *In an attempt to reach finality and in light of the aforesaid facts I propose that River Group abandon its claim for the payment for the balance of its Mandate fee, against which the Company will abandon its claim against River Group for a refund of the amount already paid and its additional unnecessary fees charged by Werksmans and Faskins which the Company attributes to River Group's failure to professionally carry out its Mandate.*

7. *If this proposal is unacceptable, the Company will defend any action that may be pursued by River Group and it will pursue its counterclaims against River Group. I note from the Mandate that there is an arbitration clause (clause 18) which requires that any dispute be referred to arbitration. I will take instructions on the obligation of the contracting parties to proceed by way of arbitration rather than court proceedings should the Company's proposal to River Group be rejected."* (My emphasis).

[18] The contents of Mr Scallan's letter, "FA14", quoted above is diametrically opposed to the malleable stance the respondent adopted initially as evidenced by a few extracts from respondent's correspondence which preceed "FA14" and are very instructive:

18.1 On 27 August 2008 Mr Van Wyk addressed an e-mail to Mr Simon Village, the chairman of the respondent's holding company in Canada, in which he expressed his concern and frustration that the R5 066 400-00 was still outstanding after seven months. Mr Village responded

on the same day via e-mail, and copied to Mr Scallan (Annexure "FA8") and stated in part:

"I have a board meeting this Thursday to sign off on a number of resolutions, one of which is the Rivergroup fees and structure that the board will approve to finalise this with you.

At present we do not have the funds to settle this with you, and as such a proposal was discussed with you surrounding a share/cash alternative. The share component of this was met with some resistance by members of the board, for both dilution, overhang and compliance perspectives. The company is currently in negotiations with two parties regarding deals that should allow us to restructure the balance sheet, settle with creditors in full, and advance the projects.

I appreciate that this is extremely frustrating for you, but not as frustrating as for us as we are not dealing with yourselves in isolution, but RBC, Faskens, Werksman, Venmyn and SRK.

Unfortunately as we all appreciate the aftermarket side of our transaction fell away with the credit crisis, but we will have to work through this, as we have no other choice.

I apoligise sincerely about our position at present but please know that we are trying to juggle a number of balls and in all reality we are dong so with our hands tied behind our backs.

I will revert post our board meeting, Thursday, and also have Brian [Scallan] sit with you to agree the terms of our settlement with you."

18.2 On 03 September 2008 Mr Scallan e-mailed Mr Van Wyk and informed him ("FA10"):

"As you can appreciate I am working flat out on many issues but the most important are getting funding and improving cash flow. As announced we are busy with a capital raising in Canada and we are also pursuing other initiatives here. I know you are aware of our position and the distracting issue that with which we are having to deal. As funds come in our corporate advisers to whom we are in credit will be paid.

I would not have taken on this job if I did not think the Company would succeed in its endeavours. We are formulating plans which will i.a. address your requirements. I know that you have been waiting a long time and your needs were not addressed over that period because expected funds were not forthcoming. You are not being ignored and I assure you that as appropriate funds come in your needs will be addressed.

Please call in the morning and we can discuss this further."

18.3 On 12 October 2008 Mr Scallan told Mr Van Wyk per e-mail ("FA11"):

"I haven't forgotten my commitment to get back to you with regard to the payment to you of our long outstanding fees. As you know only too well the Black Swan event we are observing in the current financial

markets makes fund-raising extremely difficult. Previous indications of support have been put on hold by credit committees. Nevertheless, we are busy with an alternative financing structure using a funding source outside of the conventional banking industry. In order to secure funding there is a process that we have to go through but I am confident that we will have something in place before December or January at the latest."

It is not without significance that Mr Scallan in FA11 above actually also asks the applicant to do other work for the respondent, unrelated to the merger contract work, for additional payment.

18.4 By 16 October 2008 Mr Scallan and Mr Van Wyk had become e-mail "pen-pals." Scallan wrote to him ("FA12"):
"Thanks for coming to our offices yesterday morning and the discussion on the markets and other issues affecting BRC Diamond Core---.

I am acutely aware that your fees for the work that River Group did on the merger between Diamond Core Resources and BRC Diamond Corporation are still outstanding.

Despite this I do believe that BRC Diamond Core will pull through. We have currently initiated a programme to secure the refinancing of the business using alternative non-banking sources of finance. There is an implementation process which has to be gone through. However my banking experience tells me that we will get through all the known barriers and plan to have this process completed by end December but

January may be a more conservative target date. At that stage we hope to be able to settle your outstanding fees.

We have considered your offer to convert debt into equity and you are not alone in suggesting this proposal. The current external forces affecting all markets means that the true value of the company is not reflected in the current market price and thus an issue of shares to a creditor at the current price would be unfair to the existing shareholders. I firmly believe that he plan we are working on will come to fruition and because of it I do not wish to recommend the dilution inherent in a settlement of debt with equity.

I appreciate our review this morning and look forward to further reviews on a regular basis not only until your debt is settled but more particularly thereafter as we move forward on what I hope will be a significant development programme.

These are the most difficult times our respective industries have ever faced and I request your indulgence for what I hope will be a relatively short period and your future support thereafter. I shall continue to keep you informed of progress."

[19] To expect a clearer expressed unequivocal acknowledgement of indebtedness than those encapsulated in the letters by Mr Village and Mr Scallan would amount to over-fastidiousness by courts that would hamper creditors immeasurably in asserting their right to liquidate their debtors who are unable to pay. Respondent acknowledged its indebtedness to the applicant not once but at least four times over a period of one year: essentially from 14 January 2008 when the applicant's

merger assignment and fee were approved by the extraordinary shareholders' general meeting up to 29 January 2009 when Scallan wrote "FA14", the recanting letter that borders on the scandalous.

[20] In presenting the respondent's case Mr Solomons, not surprisingly, ignored respondent's confessed indebtedness, set out in para 18 above, and relied on Mr Scallan's recanting letter which was reaffirmed and expounded upon in Mr Scallan's Answering Affidavit. The submission was made that the seven-odd million rand fee payable to the applicant was dependant upon applicant's fulfilment of certain obligations or responsibilities. Amongst others, the argument went, it was always contemplated that the applicant would be responsible for or at least organize a round of fund-raising from shareholders and investors from which proceeds the applicant's fee will be paid. What this suggestion means, and it is no more than a suggestion, is that, the applicant would not be entitled to have its fee settled in full unless or until sufficient funds had been raised by itself to discharge the merger costs which applicant's fee was a component of.

[21] According to respondent's counsel that this precedent condition "was contemplated is foreshadowed in subsection 1.7 of the document which provides '*any capital raising fee will fall under a separate mandate if so required by the merged entity.'* The "document" referred to is in fact the "Terms of Engagement" ("FA5"). The context within which clause 1.7 appears has to be seen from this broad scope:

"1. SCOPE AND NATURE OF THE ENGAGEMENT

Under the engagement the advisor will advise on and assist in the merger of the Company with BRC, which can be concluded by means of:

- *An offer by BRC to the shareholders of the Company in terms of the Securities Regulation Panel's Code on Mergers and Acquisitions;*
- *A scheme of arrangements; or*
- *An offer to the Company in terms of the Companies Act to acquire all of its assets and operations.*

Regardless of the ultimate transaction structure, the advisor's responsibilities will include but not be limited to:

[1.1 … 1.6]

1.7 Any capital raising fee will fall under a separate mandate if so required by the merged entity."

[22] This is the closest that respondent could come to justifying its claim that it was always contemplated that the applicant would not be paid its fee or full fee unless it devised means for its own payment. The claim is belated and far-fetched. It is unnecessary to dwell on the numerous machinations put forward by the respondent. The issue can be disposed of by simply stating that when, at the duly constituted general meeting, the respondent approved that the merger was successfully done and approved payment, there were no further obligations outstanding for applicant to contend with. At least none that could cause payment to be withheld or scuppered. It was the respondent's contentedness that accounts for the absence of any demur from its side for over a year. The respondent pleaded impecuniousity and deferred payment indefinitely until it, not the applicant, could raise the funds in various ways to pay the applicant. I regard it as utterly ridiculous to have expected the applicant to undertake

the merger task if it had to see to its own payment by raising funds through unspecified projects.

[23] I am satisfied that respondent is indebted to the applicant in the amount reflected in the letter of demand in terms of s345. It is evident that the respondent is in financial dire straits and is therefore, on its own admission as well, unable to pay its debts. It is common cause that the respondent has not commenced mining and that all the properties within the Diamond Core Resources group are still in the exploration stage. All bulk sampling which appears to have been the main source of income, if not the only source, have been discontinued. The projects have been placed on care and maintenance. There is therefore no reasonable prospect of these suspended projects yielding any viable income in the foreseeable future. In the circumstances, it is fair to declare that he respondent is at the very least commercially insolvent. See **Johnson v Hirotec (Pty) Ltd** 2000(4) SA 930 (SCA) at 933H – 934C.

AS TO POINT 4.4: THAT IT BE INVESTIGATED WHETHER RESPONDENT (OR ITS HOLDING COMPANY) IS APPLICANT'S DEBTOR.

[24] The respondent postulates that applicant should properly have instituted action against the merged entity, and that this question ought to be referred for the hearing of oral evidence to determine who is in fact the applicant's debtor. The introductory part of the Terms of Engagement reads as follows:

"***TERMS OF ENGAGEMENT OF RIVERGROUP AS CORPORATE ADVISOR TO DIAMOND CORE RESOURCES LIMITED ("DIAMOND CORE")***

Thank you for considering the appointment of River Corporate Finance (Propriety) Limited as exclusive South Africa corporate advisor for the purpose of advising on the merger of Diamond Core Resources Limited and its subdiaries (hereinafter referred to as "you", "the Company" or "the Group") with BRC Diamond Corporation ("BRC") a company listed on the TSX Venture Exchange in Canada.

We are writing to confirm the terms and conditions upon which River Corporate Finance (Propriety) Limited (hereinafter referred to as "the advisor") will be acting as such."

[25] The agreement makes it plain who the parties to the agreement are. The respondent throughout admitted its indebtedness to the applicant and never suggested that the merged entity and not itself incurred the obligations. I am in agreement with Mr Voster that the substitution of a debtor for another cannot occur without the deliberate act of delegation. **Christie, The Law of Contract , 5th Edition**, has this to say at 462 concerning delegation:

"Delegation is a form of novation by which, by agreement between all concerned, a third party is introduced as debtor in substitution for the original debtor , who is discharged. Its nature was well expressed by ***Millin J*** *in* ***Van Achterberg v Walters*** *1950 3 SA 734 (T) 745:*

'This was no mere consent to a cession of rights under the lease, leaving the obligations of the lessee (Stohr) unimpaired and involving no priority of contract between the appellant and the respondent. (Cf. Wessels, Law of Contract (vol. 1, sec. 1721)). Stohr was being discharged and a new debtor taken in his place. This was a novation by way of delegation and necessitated a new contract to which the creditor, the original debtor and the debtor

proposed in his place had all to be parties. The creditor has to agree to accept the new debtor in place of the old. (Ibid., paras. 1693, 2433, 2435, 2436, 2438.) The agreement may be that the new debtor shall be bound by all the conditions which were binding on the old debtor, or there may, as here, be a variation of the conditions; but there can be no novation by delegation (of which the assignment of rights and liabilities under a lease is an example) without agreement between the creditor and the assignee. If this agreement is recorded in writing the ordinary rules precluding the variation of written agreements by oral evidence must apply.' [1]

The essence of delegation being the intention to transfer the burden of the debt irrevocably from the original to the new debtor, it follows that after it has taken place the creditor can sue the new but not the original debtor."

AS TO POINT 4.6: THAT THE RESPONDENT HAS A COUNTERCLAIM AGAINST THE APPLICANT.

[26] According to Scallan part of the counterclaim is based on the erroneous payment to applicant of an amount of just over R2 million during February, April and June 2008. This claim was mooted for the first time in Scallan's letter, "FA14", para 6 of 29 January 2009 (see para 17 above). Mention is also made that applicant sourced out or subcontracted part of its work to a firm of attorneys or agents in South Africa and earned an over-inflated fee which was not entirely the fruits of its labour. The contention is that the work so sourced out escalated the applicant's fee unduly and in certain instances duplicated the costs. No prohibition in the Terms of Engagement was placed on employing the services of an agent or subcontractor. In any event, this submission makes

[1] The leading authorities to the same effect are reviewed in **Jacobz v Fall** 1981 2 SA 863 (C) 868G - 869H.

no sense because the agreement between the parties was that the applicant would be paid a composite amount of US $1 million in South African currency for the successful merger of the two companies in question. On the contrary the respondent's proposition would make the applicant the loser because the engagement of the attorneys or agents could only have had the effect of eroding or diminishing the applicant's profit margin.

[27] The second leg of the counterclaim by the respondent is that the applicant breached one of its obligations relating to the prohibition on divulging confidential information to its competitors in contravention of certain confidential clauses in the Terms of Engagement. Mr Scallan, who makes this allegation for the first time in his Answering Affidavit, claims to have gleaned the information from Mr Michael Dennis Cook, a director of Miranda Mineral Holdings, on 09 April 2009. He undertook to furnish the court with Mr Cook's affidavit verifying the allegation but failed to do so. The allegation can therefore be discarded as mere conjecture or inadmissible hearsay. At any event in a statement obtained by applicant Mr Cook denies that the respondent was discussed at the meeting of February 2009, also attended by Mr Van Wyk of the applicant. He also denied that Mr Botoulas, a former director of the respondent, attended the meeting.

[28] The respondent is also very vague on its counterclaim based on this alleged breach of confidentiality. For instance Mr Scallan says in his statement:

"The disclosure of this confidential information has directly undermined respondent's negotiations with MMH [Miranda Mineral Holdings Ltd] and certain other competitors … who

were all recipients of confidential information belong to respondent. --- Respondent believes that it has a substantial counterclaim arising from the damages caused as a consequence of the applicant's disclosure."

[29] The unliquidated portion of the counterclaim, which has not even been quantified, is in any event incapable of set-off. In para 5 of FA14 (par 17 above) Mr Scallan states that the "additional fees charged as a result of River Group's inadequate management of the process ran into several hundred thousand rand". In addition the respondent has not claimed that its unliquidated counterclaims exceed the amount owing to the applicant. The question therefore does not arise on whether I could exercise my discretion in favour of the respondent. See: **Ter Beek v United Resources CC and Another** 1997(3) SA 315(C) at 333C- 334C.

[30] I am satisfied that the respondent's defences are without merit and most of them amount to mere stratagems to defeat the relief claimed by applicant. As far as its version of events is concerned it is so far-fetched and untenable that it warrants rejection out of hand on the papers. The respondent feebly raised the question of a genuine dispute of fact. However, its Mr Scallan, as already demonstrated, came up with two conflicting versions which are mutually destructive of each other and makes his evidence not worthy of any credence. In **Kalil v Decotex (Pty) Ltd and Another** 1988(1) SA 943 (A) at 980B-D Corbett JA stated:

"(T)he disputes which arise on the affidavits may relate to the locus standi of the applicant, either as a member or creditor, or as to whether proper grounds for winding-up have been established. In regard to locus standi as a creditor, it has been held, following certain English authority, that an

application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds."

[31] The respondent's version is devoid of any *bona fides*. The applicant has, in the result, made out a proper case that the respondent is indebted to it in the amount of over R5 million and is unable to pay its debts.

[32] Mr Solomons has submitted that in the event that this Court be disposed to granting the winding-up order the respondent be placed under provisional liquidation. Applicant has asked for a final winding-up order, alternatively a provisional one. This case has been thoroughly ventilated. The affidavits are supported by documentation from both sides or from the respondent but predominantly from the applicant. I see no point in delaying the inevitable by granting a provisional order. Any likely contribution, if it could be so termed, that could be forthcoming from the respondent would be to tempt it to perjure itself. In the circumstances of this case I consider myself to have a wide discretion on whether to grant a provisional or final winding up order. In **Johnson v Hirotec** (supra) 935B the Supreme Court of Appeal stated:
"The respondent opposed the granting of a winding-up order in the Court a quo and in this Court. The issues have been fully ventilated and the respondent has put nothing forward to

pursued us that further relevant facts would be forthcoming if a rule nisi were issued."

[33] For the record this application has been properly served on:

- The South African Revue Service (SARS).
- The National Union of Mine Workers (NUM).
- Solidarity Trade Union (Solidarity).

I therefore make the following order:

1. The respondent is placed under final winding-up order.

2. The costs of this application are costs in the winding-up.

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F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

On behalf of the Applicant:	Adv. Vorster SC
Instructed by:	Van Der Waal & Partners
On behalf of the Defendant:	Adv. Solomons SC
Instructed by:	Du Toit - Bomela