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

NORTHERN CAPE HIGH COURT, KIMBERLEY

Saakno: / Case number: **1058 / 2010**
Datum verhoor: / Date heard: **14 / 09 / 2010**
Datum gelewer/Date delivered: **12 / 11 / 2010**

In the matter between:

REPRESENTATION INVESTMENT (PTY) LTD
(Registration No: 1998/019941/07) First Applicant
THE FONTEINTJIE COMMUNITY DEVELOPMENT TRUST
(Trust No: IT100/09) Second Applicant

and

NEW DIAMOND CORPORATION (PTY) LTD
(Registration No: 1998:025116/07) First Respondent
THE HONOURABLE MINISTER OF MINERALS & ENERGY Second Respondent

Coram: Lacock R

JUDGMENT

LACOCK J:

1] Two applications were argued before me and I intend to deal with both these applications in this judgment.

1.1 In the main application the applicants applied for the following relief:

"*2. Interdicting, prohibiting and restraining:*

2.1 the First Respondent from proceeding with the application made by the First Respondent to the Second Respondent dated 20 May 2010 in terms of Section 11(1) of the Mineral and Petroleum Resources Development Act, No. 28 of 2002, as amended ("the Act"), and the Regulations promulgated under the Act for the cession of prospecting right (NC30/5/1/1/2/1520/213PR) from the First Respondent to NAM SA Exploration (Proprietary) Limited (Registration No. 2008/014577/07) ("the section 11 application");

2.2 the Second Respondent from granting her consent in response to the section 11 application;

pending a final determination of legal proceedings to be instituted in the above Honourable Court, alternatively, arbitration proceedings to be instituted by the Applicant against the First Respondent under the auspices of the Arbitration Foundation of Southern Africa (Reference No. R33) within a period of 30 days from the date of the granting of the order herein.

3. Directing the First Respondent to pay the costs of this application and, in addition, in the event of the Second Respondent opposing any of the relief sought herein, ordering the Second Respondent to pay the costs of this application jointly and severally with the First Respondent, the one paying the other to be absolved. "

This application came before Majiedt AJP on 30 June 2010 as an urgent application, and on that day a

temporary interdict as applied for was issued pending the final determination of the application. Dates for filing of answering and replying affidavits were determined, as well as for the serving of the intervening application by the intervening party. Costs were reserved, and the applications were postponed.

1.2 In the second application the second applicant (the intervening party) applied for the following relief:

"*1. Granting the Fonteintjie Trust leave to intervene as a Second Applicant in the urgent application already launched by Representation Investments (Pty) Ltd ("Applicant") against New Diamond Corporation (Pty) Ltd ("First Respondent") and the Honourable Minister of Minerals and Energy ("Second Respondent") before this Honourable Court under case number 1058/2010.*

2. Interdicting, prohibiting and restraining:

2.1 the First Respondent from proceeding with the application made by the First Respondent to the Second Respondent dated 20 May 2010 in terms of Section 11(1) of the Mineral and Petroleum Resources Development Act, No. 28 of 2002, as amended ("the Act"), and the Regulations promulgated under the Act for the cession of prospecting right (NC/30/5/1/1/2/1520/2213PR) from the First Respondent to NAM SA Exploration (Pty) Ltd egistration No. 2008/014577/07 ("the Section 11 application");

2.2 the Second Respondent from granting her consent in response to the said Section 11 application;

Pending a final determination of legal proceedings to be instituted in the above Honourable Court against the First

Respondent for inter alia, an anti disapatory order, monetary relief and a damages claim within a period of 30 (thirty) days from the date of granting of the order herein.

3. Directing the First Respondent to pay the costs of this application to intervene in the event of it opposing same;

4. In the event of the Second Respondent opposing this application for leave to intervene then an order directing the Second Respondent to pay the costs occasioned by such opposition;"

2] The First Respondent opposes both applications. The Second Respondent, although it filed a notice of opposition, withdrew its opposition without having filed any opposing papers.

3] For purposes of the adjudication of the issues raised in the papers, it is necessary to deal in some detail with the historical facts and circumstances germane to the filing of the applications; the particulars whereof are either common cause between the parties or not in dispute.

3.1 On 20 December 2001 a prospecting permit was issued to the first respondent (NDC) in terms of the applicable provisions of the Minerals Act, No. 50 of 1991 (the MA) to prospect for diamonds on the property generally known as the Schmidtsdrift Farm. The relevant prospecting area covers approximately 32 000 hectares. On the same date, a written permission to remove or dispose of any diamonds found in the course

of prospecting operations in or on the said property was issued to NDC in terms of section 8(1) of the MA.

3.2 On 27 November 2009 NDC concluded an off-take agreement with Unitrade 1266 CC (Unitrade) in terms whereof NDC *inter alia* agreed to sell to Unitrade "*all the diamonds produced by NDC from its various operations as contemplated in terms of this Agreement ("the Diamonds") during each month (or part thereof) of the currency of this Agreement on an ongoing and repetitive basis*". This off-take agreement is valid till and will only expire on 26 November 2013.

In terms of a written agreement of cession dated 24 July 2008, and with the consent of NDC, the off-take agreement was properly ceded to the first applicant (Representation). On this date Representation stepped into the shoes of Unitrade as a contracting party to the off-take agreement.

3.3 Prior to the cession of the off-take agreement, arbitration proceedings were instituted by Unitrade against NDC during April 2007 by reason of an alleged purported repudiation of the off-take agreement by NDC. On 29 June 2007 an award was handed down by

the arbitrator in these proceedings, Mr. Justice Kriegler, and which award was by agreement between the parties to the arbitration proceedings, made an order of the South Gauteng High Court on 11 July 2007. The order reads as follows:-

"*IT IS ORDERED THAT:-*

1. *The Respondent is directed to comply with the provisions of the off-take agreement, Annexure "FA.1" to the founding affidavit of Marius Salamon and to make available to the applicnt to purchase all the diamonds produced by the Respondent from its various operations as contemplated in clause 3 of the agreement for the remainder of the term of agreement.*

2. *The Respondent is interdicted and restrained from selling to any third party any of the diamonds produced by the Respondent from its various operations other than in terms of the agreement.*

3. *The Respondent is directed to pay the costs of the arbitration, including the costs occasioned by the application for interim relief brought by notice of motion dated 18 April 2007 and including the interlocutory arbitral proceedings of 20 June 2007, such costs to include the costs of two Counsel.*

4. *The Respondent is to pay the costs of this application.*"

3.4 On 1 May 2004 the Mineral and Petroleum Resources Development Act, No. 28 of 2002, (the MPRDA) came into operation; at the same time repealing the MA. Subsequent to the commencement of the MPRDA, NDC applied for and was granted a converted prospecting

right in terms of the provisions of section 6 of Schedule II (Transitional Arrangements) to the MPRDA. This converted prospecting right was issued to NDC on 12 April 2006 and covered the exact same prospecting area as was covered under its previous "old order" prospecting right.

3.5 NDC did not apply for permission to remove or dispose of diamonds as envisaged in section 20(2) of the MPRDA and no such permission was granted to NDC in terms of these provisions.

3.6 For some (unknown) period of time prior to March/April 2010 no mining operations were conducted at Schmidtsdrift by NDC. However, mining operations ensued during or about April 2010. A number of letters were addressed by Representation's attorneys to the attorneys of NDC demanding compliance with the terms and conditions of the off-take agreement. On 4 May 2010 NDC's attorney advised Representation's attorney that "*I have advised my clients that there should be diamonds up for tender by the end of May.*"

On 15 June 2010, and as a result of having received no

co-operation from NDC for the purchase of its diamonds in terms of the off-take agreement, Representation's attorneys wrote to NDC's attorneys,

"*Your letter and the correspondence that has emanated from your office over the past couple of months, is indicative of a modus operandi of dilatoriness, clearly designed to frustrate our client's every effort to enforce its rights in terms of the off-take agreement, with an intention best known to your client.*"

3.7 In the meanwhile, and without notifying Representation or its attorneys, NDC purported to cede its prospecting right to NAM SA Exploration (Pty) Ltd (NAM) and applied to the second respondent on 20 May 2010 for her consent in terms of section 11(1) of the MPRDA for the cession of its aforesaid prospecting right to NAM. In its covering letter to which this application was attached, Mr Garcao, the chief executive officer of NDC, requested the Regional Manager – Mineral Regulation, Kimberley, to finalise the application "*by no later than 30 June 2010.*"

3.8 Subsequent to 15 June 2010, Representation's attorney by chance stumbled upon the aforesaid section 11 application in the offices of the Regional Manager of the Department and immediately thereafter this application was prepared and filed on 29 June 2010.

4] In regard to the intervention application of the Fonteintjie Community Development Trust (the Trust), the following undisputed historical facts and circumstances are relevant.

4.1 The Schmidtsdrift Farm used to be State land which was utilised by the pre-1994 Government as a military base and a practice area for military manouvres. Pursuant to a land claim lodged by the Schmidtsdrift Tswana Community Trust (the Tswana Trust) in terms of the Abolition of Racially Based Land Measures Act of 1991, which claim was subsequently deemed to be lodged in terms of section 41(2) of the Restitution of Land Rights Act, 1994; and a land claim lodged by the Trust in terms of the Restitution of Land Rights Act, a settlement agreement was concluded on 8 April 2000 between the Interim Committee of the Schmidtsdrift Communal Property Association – representing the Trust and the Tswana Trust – (still to be registered at the time), the Commissioner of Restitution of Land Rights, Government representatives and other role

players. The parties to this agreement acknowledged and confirmed the right of the Griqua community (represented by the Trust) and the Tswana community (represented by die Tswana Trust) to a restitution of their rights in the land as previously dispossessed communities. Upon the signing of the agreement the respective land claims of the two trusts were regarded as settled in terms of section 42D(1)(a)(ii) of the Restitution of Lands Act, and the State would restore the land in full ownership to a communal Property Association (CPA) representing the beneficiary communities; such CPA to be formed and registered within 60 days of signing the agreement. It was agreed that the mineral rights in the land would be reserved in favour of the State. It was further agreed that the two communities would be entitled to equal representation on the governing body of the CPA.

4.2 A CPA, the Schmidtsdrift Communal Property Association (SCPA) was duly formed and a constitution was adopted on 6 November

1999. On 21 May 2003 the Schmidtsdrift Farm was transferred to and registered in the name of the SCPA.

4.3 On 6 August 2003 a shareholders agreement was concluded between NDC, the SCPA and Schmidtsdrift Mining Enterprises (Pty) Ltd (SME). SME was a wholly owned subsidiary of NDC. By virtue of the aforesaid agreement SCPA became a 20 % shareholder in SME, whilst NDC retained an 80 % shareholding in SME. It was further agreed that NDC would pay the SCPA a 5 % royalty on the gross value of diamonds sold. SME was the mining arm of NDC and its mining activities were conducted under the auspices of NDC's prospecting right.

4.4 Since March 2006, allegedly by reason of the forced removal of its representatives, the Trust is no longer represented on the SCPA. This issue is the subject matter of pending litigation between the Trust and the SCPA.

5] The first issue that needs to be addressed is whether the

Trust has demonstrated that it has a sufficient interest in the subject matter of the relief claimed to be joined as a party to the application. The legal approach to joinder is well known, and had been aptly formulated by Moosa, J, in **Haroun v Garlick** [2007] 2 All SA 627 (C) at paragraph 14:

"*The joinder of parties depends not only upon the nature of the subject matter, but also upon the manner in which and the extent to which the court order may affect the interests of the parties. The parties to be joined must accordingly have a direct and substantial interest not only on the subject matter of the litigation but also in the outcome thereof. A court, in the absence of a direct and substantial interest, has a discretion to order a joinder on the basis of convenience.*"

5.1 The contentions raised by the Trust and relied upon by Adv. Berlowitz on behalf of the Trust, can be summarised as follows: NDC has failed to rehabilitate the mining areas where its subcontractors conducted their mining activities; although the land is registered in the name of the SCPA, the Trust and all members of the community it represents has a residual interest in the land and in its preservation for the benefit of present and future occupants thereof; NDC is indebted to the SCPA – representing all members of the Schmidtsdrift Community – in respect of royalties in an amount of approximately R8 million, and is unable to meet this obligation; it can therefore be assumed that it is financially unable to properly rehabilitate the

mining areas; the unrehabilitated mining areas are significant and pose a danger to livestock and habitation; should NDC be allowed to cede its prospecting right, being its only real asset of substantial value, it will not only amount to an effective evasion of its monetary obligations towards the members of the SCPA, but also an evasion of its statutory obligation to rehabilitate the mining areas; and the Trust intends to institute action against NDC demanding compliance with its obligations.

5.2 Adv Joseph SC, on behalf of NDC, submitted that the Trust has no *locus standi* to litigate on these issues, since – so he submitted – the SCPA is, as owner of the property, the only party with a real and substantial interest in the land in question. Since the present management of the SCPA has consented to the cession of the prospecting right to NAM, the Trust has no standing to challenge that consent, and therefore has no real and substantial interest in the main application.

6] On the authority of **Stellenbosh Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at 235 E, I need – for purposes of this application – to accept that large mining areas had not been rehabilitated, that these

areas pose a danger to livestock, habitation and the environment as such, that NDC is statutorily obliged to rehabilitate the mining areas and has failed to do so, and that NDC is financially not in a position to presently comply with its said obligations. These allegations were not in any convincing manner challenged by NDC.

7] I did not understand Mr Joseph to submit that, had the SCPA been the party who intended to litigate against NDC on the aforesaid issues, it would lack *locus standi*. On the contrary, he submitted that the SCPA would be the only party clothed with *locus standi*. To my mind, it goes without saying that the SCPA has a real and substantial interest in these claims. What therefore needs to be decided is whether the Trust and its members have a similar interest.

8] I am of the view that the Trust has indeed a real and substantial interest in the subject matter and the outcome of the application.

8.1 If one has regard to the preamble of the Restitution of Land Rights Act, no. 22 of 1994, reading,

> "*To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land*

Claims Court; and to provide for matters connected therewith"

it immediately strikes one that the legislature had in mind that dispossessed communities and individuals should enjoy the benefits and rights catered for in this Act. Section 42D(2) of this Act, and in terms whereof the aforesaid Settlement Agreement of April 2000 was concluded, reads,

"*(2) If the claimant contemplated in subsection (1) is a community, the agreement must provide for all the members of the dispossessed community to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community to the members of the community.*"

Once again, the emphasis is directed to all members of the community.

8.2 The following provisions of the Communal Property Association Act, no. 28 of 1996, in terms whereof the SCPA had been registered, and which provisions are reflected in the constitution of the SCPA, are apposite:

Section9

"*(1) The constitution of an association shall be consistent with the following general principles:*

(a) Fair and inclusive decision-making processes, in that-

(i) all members are afforded a fair opportunity to participate in the decision-making processes of the association;

(b) equality of membership, in that-

(i) there is no discrimination against any prospective or existing member of the community, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds, namely race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language: Provided that a constitution may reflect the rules of a community with regard to the age at which a member may attend and vote at meetings of the association and the age at which a member may receive an allocation of land rights;

(d) fair access to the property of the association, in that-

(i) the association shall manage property owned, controlled or held by it for the benefit of the members in a participatory and non-discriminatory manner;

(ii) ...; and

(iii) the association may not sell or encumber the property of the association, or any substantial part of it, without the consent of a majority of the members present at a general meeting of the association;

(e) accountability and transparency, in that-

(i) accountability by the committee or committees to the members of the association is promoted;"

8.3 In various clauses of the Settlement Agreement referred to above, and which culminated in the formation of the SCPA, are reference made to the rights of members of the Trust and/or the Fonteintjie community. In the pre-amble to the Agreement, the parties acknowledged,

"*ii)* ***WHEREAS*** *the Fonteintjie Development Trust has lodged a claim for the restoration of their rights on a portion of the said land with the Regional Land Claims Commissioner in terms of the Restitution of Land Rights Act, 1994...*

iii) ***WHEREAS*** *the Interim Committee of the Schmidtsdrift Communal Property Association (still to be registered) represents the Schmidtsdrift Tswana Development Trust and the Fonteintjie Development Trust. The communities represented by the Interim Committee of the Schmidtsdrift Communal Property Association are herein after called "the claimant communities.*

v) ***WHEREAS*** *the Fonteintjie community formed part of the community residing on Schmidtsdrift at the time of the dispossession.*

viii) ***WHEREAS*** *the claimant communities have a right to restitution of their rights in the claimed land as:*

(a) they were dispossessed of their land rights after 19 June 1913;"

Clauses 2, 4, 5, 7 reads as follows:-

The State shall effect restitution of the claimant communities' dispossessed rights by restoring the claimed land as described in Annexure A hereto and as indicated on the attached map, Annexure B hereto, full ownership to a Communal Property Association or other legal entity representing all the verified beneficiaries as indicated on the attached list Annexure C hereto."

"4.

The claimant communities (inclusively referred to the restitution beneficiaries as identified and verified) shall form and register a Communal Property Association or other legal entity contemplated in paragraph 2 above within 60 days of signature of this agreement in order to take transfer of the claimed land and to hold the land on behalf of the beneficiaries".

"5.

The claimant communities jointly and severally indemnify the State against any loss, liability, damage or expense which may be suffered by them pursuant to any claim made in respect of this property by any person who proves to be an heir and/or direct descendant of a member of the original dispossessed communities".

"7.

The Schmidtsdrift Tswana Community Trust and the Fonteintjie Community Development Trust agree to settle their respective claims through this agreement, on the basis that:

-1 The two communities shall form one entity, governed by a single governance structure constituted on the basis of a Communal Property Association, 1996 (Act No. 28 of 1996); and

-2 the two communities shall each be entitled to equal representation on the governing body of the Communal Property Assocation or other legal entity."

8.4 In a Revised Constitution apparently adopted by the

SCPA in the absence and without the knowledge of the members of the Trust, during May 2007, it is recorded in the pre-amble thereof that

> "*1.14. In the interim, while the Fonteintjie dispute is being resolved, this revised Constitution contains clauses and terms to recognise and protect the residual rights of CPA members associated with the Fonteintjie Ontwikkelings Trust who seek legal separation from the CPA. These clauses, or portions of clauses, will become redundant once the dispute is settled and will be removed.*"

9] From the abstracts of the said legislation, settlement agreement and constitutions, it is clear that all members of the SCPA, inclusive of the members of the Trust, have residual rights in and to the relevant land. To my mind Mr. Berlowitz is quite correct in his submission that the contents of the Deed of Transfer in terms whereof the property is held in the name of the SCPA cannot limit or underpin these rights. A CPA is a convenient vehicle formed and registered as a legal persona in terms of the Communal Property Associations Act of 1996, for managing the affairs of a community, but the formation and registration of a CPA cannot be tantamount to the deprivation or transfer of the residual rights of its individual members to the CPA. The CPA still remains a representative body of the members of the community.

To hold otherwise can lead to absurdities and hardships certainly not intended by the legislature. The circumstances of this very matter bear this out: the Trust is no longer represented on the committee of the SCPA. The Trust as well as some 270 members of the Bathlaping Community forming part of the SCPA, wish to enforce their claims against NDC. It is alleged that the management of the SCPA is disfunctional, and that its chairman is not representing the interests of all its members. The chairman, purporting to represent the SCPA and thus the entire community, however indicated to NDC under a letterhead of the SCPA that the latter supports the cession of its prospecting right to NAM. Can it ever be said that, under these circumstances, the Trust or any other individual member of the community lacks *locus standi* to protect its residual rights in and to the property? I think not.

10] Reliance was also placed by Mr. Berlowitz on section 25(1) of the Constitution read with section 38 thereof and sections 11, 17 and 23 of the MPRDA; as well as section 32(1) of the National Environmental Act, no 107 of 1998 as further independent grounds of *locus standi*. In view of my aforesaid findings, i do not find it necessary to deal further with these submissions, save to state that same appears to be meritorious.

11] For these reasons I am convinced that the Trust has the necessary *locus standi* and interest to intervene in these proceedings. From a convenience point of view, I am persuaded that it will be more convenient and cost effective to allow the Trust to intervene as a party to the present proceedings rather than to lodge a separate similar application for the self same relief. It is not necessary for the Trust to have a common cause of action or common ground with Representation in the interdicting application, provided the right to relief is dependent upon the determination of substantially the same question of law or fact. See **Vitorakis v Wolf** 1973 (3) SA 928 (WLD) at 931D. Both parties claim identical relief *pendente lite viz* to prevent the cession of the prospecting right held by NDC.

12] Representation and the Trust seek an interim interdict *pendente lite* and must therefore establish the following to succeed *viz*:

(a) a *prima facie* right even though open to some doubt;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;

c) a balance of convenience in their favour; and

d) the absence of an alternative effective remedy.

(See **Eriksen Motors Ltd v Protea Motors & Another**, 1973 (3) SA 685 (AD) at 691).

13] Mr. Joseph did not advance any convincing submissions in regard to requisites (b) and (d) above. This is intelligible.

13.1 Should the prospecting right be ceded to NAM, Representation's right to the diamonds in terms of the off-take agreement, would be scuppered completely. According to NDC's own estimation, diamonds to the value of approximately R87,5 million per annum should be recovered on the land from now onwards. The off-take agreement will only terminate in November 2013. In view of NDC's admitted dire financial position, Representation's chances of recovering damages are negligible.

13.2 The granting of the interdict will ensure the preservation of the *status quo* between the parties. It will not detrimentally affect any of their contracting rights and/or obligations in terms of the off-take

agreement. On the other hand, should the prospecting right be ceded, it will simply denude Representation of all its rights thereto. As far as the Trust is concerned, the cession of the prospecting right will leave the community without redress in regard to rehabilitation.

13.3 It is common cause that Representation and the Trust has no other effective remedy available to protect their interests.

14] In its proposed court action and/or arbitration proceedings, Representation intends to prevent NDC from proceeding with the cession of its prospecting right and to enforce the provisions of the off-take agreement as well as the aforesaid court order granted in the North Gauteng High Court. Mr Joseph contended that Representation has failed to establish even a *prima facie* right for its proposed relief.

15] Firstly, Mr Joseph relied upon the absence of Ministerial consent for the disposal of its diamonds by NDC in terms of section 20(2) of the MPRDA. This section reads,

> "*(1) Subject to subsection (2), the holder of a prospecting right may only remove and dispose for his or her own account any mineral found by such holder in the course of prospecting operations conducted pursuant to such prospecting right in such quantities as may be required to conduct tests on or or to identify or analyse it.*

(2) The holder of a prospecting right must obtain the Minister's written permission to remove and dispose for such holder's own account of diamonds and bulk samples of any other minerals found by such holder in the course of prospecting operations."

Since no such consent had been obtained – so argues Mr Joseph – NDC is not authorised to sell its diamonds to Representation and therefore Representation is not entitled to enforce either the off-take agreement or the court order. There is no merit in this argument.

15.1 The absence of Ministerial permission has no bearing on the validity of the off-take agreement. Nothing prevents NDC from obtaining the relevant permission, and once permission is obtained, the off-take agreement can be executed. The off-take agreement was not subject to the obtaining of Ministerial consent in terms of section 20(2) of the MPRDA. The off-take agreement is not limited to NDC's Schmidtsdrift operations but extends to its other mining operations as well.

15.2 There is, however, another reason why this argument cannot succeed. It is common cause that NDC acquired Ministerial consent to dispose of its diamonds in terms of section 8 of the MA. Subsections (1), (2) and (4) of section 8 reads,

"*8. Prohibition on removal and disposal of minerals found during prospecting operations*

(1) No holder of any prospecting permit shall remove any mineral found by the holder in or on land or in tailings in the course of prospecting operations, from such land or the land on which such tailings are situated or dispose of any such mineral, excluding samples of any such mineral removed for tests thereon or identification or analysis thereof, except with the written consent of the holder of the right to such mineral in respect of such land or tailings, and with written permission granted by the Director: Minerals Development concerned, subject to such conditions in respect of optimal utilization or rehabilitation as may be specified therein.

(2) If the State is the holder of the right to any mineral, the consent referred to in subsection (1) may, upon written application, be granted by the Minister, subject to such terms and conditions as may be determined by him.

(3) ...

(4) *Any permission for the removal of a mineral granted in terms of subsection (1), shall lapse upon the lapsing of the prospecting permit to which such permission relates."*

The prospecting right of NDC did not lapse in terms of the MA when converted to a "*new order right*" in terms of the MPRDA. Sec 16 of the MA reads:

"*16. Lapsing of prospecting right or mining authorization*

Any prospecting permit or mining authorization shall lapse whenever:

a) the period, if any, for which such permit or mining authorization has been issued, expires;

b) the holder of such permit or authorization who is also the holder of the right to the mineral concerned in respect of the land or tailings, as the case may be, comprising the subject of such permit or authorization, ceases to be the last-mentioned holder; or

c) *the consent referred to in section 6(1)(b) or 9(1)(b) lapses.*"

Once converted, the right to prospect for diamonds still vested in NDC, but now subject to the provisions of the MPRDA. The right is a converted one, and not a new one granted in terms of section 17 of the MPRDA. That this is so is apparent from the provisions of section 6 of Schedule II to the MPRDA. (cf **Holcim (SA) (Pty) Ltd v Prudent Investors (Pty) Ltd & Others** (SCA case number 641/2009) at paragraphs 26 to 29).

The provisions of the MPRDA, and more particularly the transitional provisions contained in Schedule II thereof, are silent in respect of Ministerial permission granted in terms of section 8 of the MA to the holder of a prospecting right. Question is: Did that permission lapse when the old order right was converted to a "new order" prospecting right? I think not.

15.2.1 Although section 6(7) of Schedule II to the MPRDA reads,

> "*(7) Upon the conversion of the old order prospecting right and the registration of the prospecting right into which it was converted, the old order prospecting right ceases to exist*",

it is clear that the right to prospect in essence did not "cease to exist". What ceased to exist were the conditions attached to the old order right in terms of the MA and of course the written authority (the permit) as proof of the existence of that right. NDC was entitled as of right to have its old order right converted under the provisions of the MPRDA. The words "*cease to exist*" can therefor not be equated to the word "*lapse*" in section 8(4) of the MA.

15.2.2 In the absence of any statutory provision to the contrary, it follows that the permission granted in terms of section 8(2) of the MA did not lapse at the conversion of the right in terms of the MPRDA. Section 12 of the Interpretation Act No. 33 of 1957 reads,

> "*12 Effect of repeal of a law*
>
> *1) Where a law repeals and re-enacts with*

or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

3) *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."*

15.2.3 It would appear that at the conversion of NDC's prospecting right, the second respondent laboured under the same impression viz that the Ministerial permission granted in terms of the MA did not lapse.

On 25 May 2006 when the old order prospecting right of NDC had been converted, the Regional Manager: Department of Minerals and Energy, Kimberley, addressed a letter to NDC, the relevant paragraphs reading as follows:-

"*3. The Notarial Prospecting right was executed on the 12th May 2006.*

4. In terms of the provisions of clause 2.1.2 of the executed prospecting right, the applicant has a right to remove and dispose of minerals so prospected. Such holder has the right to sell the commodity in terms of the provisions of the executed right."

Par. 2.1.2 of the said notarial deed reads,

"*2.1.2 Where a written permission in terms of section 20(2) of the Act has been obtained, remove for the holder's own account, from the prospecting area, such minerals as may be required to conduct tests on it or to identify or analyse it subject to:*

2.1.2.2 The terms and conditions of this prospecting right, the provisions of the

Act and any other relevant legislation in force for the time being."

The reference to section 20(2) of the MPRDA appears to be a misnomer. No such permission could be obtained prior to the conversion of the right. This paragraph can only be interpreted intelligibly if the intention was to refer to section 8(2) of the MA, since that provision was the only provision in terms whereof permission "*has been obtained*."

16] Mr. Joseph's second argument viz that the underlying assumption on which the off-take agreement was premised, being the ability of NDC to lawfully execute the off-take agreement, having failed by reason of the absence of Ministerial permission in terms of section 20(2) of the MPRDA, is met by the same fate as the aforesaid submission.

17] Thirdly, Mr Joseph contended that since the sale of the diamonds presently held by NDC would constitute the disposal of the greater part of its assets, such sale will be hit by the provisions of section 228 of the Companies Act, No. 61 of 1973 (the Companies Act). Since no special resolution had been obtained from the members of NDC, the directors of NDC, so Mr. Joseph submitted, are not authorised to sell its diamonds to Representation, and therefore the Court

cannot enforce the provisions of the off-take agreement. To my mind this argument is equally without merit.

17.1 For purposes of this argument I will accept (without deciding) Mr. Joseph's submission that it is the actual agreement of sale of each parcel of diamonds that is hit by the provisions of section 228 of the Companies Act, and not the conclusion of the off-take agreement. I will furthermore accept that, according to the latest available books of account of NDC, the value of its assets (save as indicated herein) amounts to R982,619.29 plus the value of the diamonds in hand of R2,204,000.00, totalling R3,186,619.29.

17.2 It appears to me that the argument of Mr. Joseph fails at its inception. The relevant portions of section 228 of the Companies Act reads,

> "*(1) Notwithstanding anything contained in it's memorandum or articles, the directors of a company shall not have the power, save by a special resolution of its members, to dispose of-*
>
> *(a) the whole or the greater part of the undertaking of the company; or*
>
> *(b) the whole or the greater part of the assets of the company.*
>
> *(2) ...*
>
> *(3) ...*

(4) An undertaking or assets of a company, and the part to be disposed of, shall be calculated for purposes of subsections (1) and (2) according to the fair value of the undertaking or assets as described in financial reporting standards."

Although deponent Dina Orton, who determined the value of the assets of the company, stated that the calculation was done according to the fair value of the assets as described in financial reporting standards as contemplated in section 228(4) of the Companies Act read with the definition of "financial reporting standards" in section 1 thereof, she did not take into account the value of the prospecting right of NDC as part of its assets; neither did she attemp to explain the reason for this omission. She furthermore did not explain whether the value of this right should or should not be accounted for as part of the assets of NDC, or even how it should be valued in terms of the financial reporting standards. The mere fact that no value was attached to this right in NDC's books of account is certainly not sufficient to conclude that no value should be attached to this asset.

In reply to *inter alia* Ms Orton's affidavit, the first applicant filed an affidavit deposed to by Dr D Konar. Paragraphs 2 to 4 of this affidavit reads:-

"*2. I hold the following academic qualifications:*
Bachelor of Commerce degree (1975) – University of Durban-Westville
Post Graduate Diploma in Accounting (1978) – University of Durban-Westville
Master of Accounting Sciences (1981) – University of Illinois at Urbana – Champaign, Illinois, USA
Certificate in Tax Law (1983) – University of South Africa
Doctor of Commerce (1989) – University of South Africa

I am also a practising Chartered Accountant (SA), having qualified as a CA (SA) in 1978 (South African Institute of Chartered Accountants: Membership no. 00178946) and a Registered Auditor (Independent Regulatory Board for Auditors: Membership no. 596434.) I am also a fellow of the Institute of Directors and the member and past patron of the Institute of Internal Auditors.

3. I am considered an expert in Financial Accounting and Auditing matters, and have practised as a Consultant in these fields since 1985. I was a member of the Accounting Standards Board from 2000 to 2008. I was, for the period 1978 to 1992, a member and subsequently Professor and Head of the Department of Accounting at the University of Durban-Westville.

4. Currently I am:

4.1 The Independent Chairman of the Board of Exxaro Resources Limited (Registration no. 2000/011076/06) (a mining company listed on the JSE Limited) and have previously served as a non-executive director and Chairman of the Audit, Risk and Compliance Committee of the company from its inception to 24 February 2010.

4.2 A non-independent non-executive director and Chairman of the Audit Committee of CIC Energy Corp, a limited liability company registered in the British Virgin Islands, and which has been engaged in mining activities in Botswana since 2006.

4.3 *An independent non-executive director and member of the Audit and Risk Committee of the Board of Lonmin plc, a London Stock Exchange listed company mining platinum group metals in South Africa.*"

In paragraph 19, the following accounting practice is described in relation to mining assets,

"***Mining assets are normally long-lived assets that may have useful lives that vary and could be up to 100 years, but normally for periods of 15 to 50 years. They are accounted for as follows:***

Intangible assets
An intangible asset is recognised at cost if it is probable that future economic benefits will flow to the enterprise and the cost can be reliably measured. Amortisation is charged on a systematic basis over the estimated useful lives of the intangible assets.

Exploration costs
Research, development and exploration costs are charged against income until they result in projects that are evaluated as being technically or commercially feasible, the company has sufficient resources to complete development and can demonstrate how the asset will generate future economic benefits, in which event these costs are capitalised and amortised on the straight-line basis over the estimated useful life of the project or asset. The carrying amounts are reviewed at each financial year-end to determine whether there is any indication of impairment.

Mining development and infrastructure
Individual mining assets are depreciated using the units- of production method based on their respective estimated economically recoverable proved and probable mineral reserves.

NDC has not accounted for the assets from a consolidated point of view on the above basis."

and the deponent concluded that,

"***What Liversage, Orton and Khalil have done is to value the extracted diamonds without reference to the ore body and the remaining resources as described above. Such a narrow approach is not considered appropriate or acceptable in terms of IFRS. Through the off-take agreement, NDC is disposing, on a periodic basis, of the diamonds (inventories) that it has mined, and not the ore bearing body (mining asset or mining licence) which would constitute its asset***."

It therefore appears – at least *prima facie* – that the veracity of Ms. Orton's calculations are doubtful, and cannot be accepted on face value.

17.3 I, in any event have serious reservations whether the word "assets" as used in section 228(1)(b) of the Companies Act was intended to include the merchandise of a company. Counsel were unable to direct me to any authority in point, and i was unable in the short time available to find any. However, it appears to me that the ratio of this provision is aptly described in **Ridge Securities Ltd v IRC** [1964] 1 All ER 275 (CL) at 288 B where it was held,

"*A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividend or, with leave of the court, by way of reduction of capital, or in a winding up. They may of course acquire them for full consideration. They cannot take assets out of the company by way of voluntary disposition, however*

described, and, if they attempt to do so, the disposition is ultra vires the company."

(emphasis added)

In support of the aforesaid, the learned Judge relied on the following *dictum* of Eve J in **Re Lee, Behrens & Co Ltd** [1932] All ER 889 at 890:

"*But whether they be made under an express or implied power, all such grants involve an expenditure of the company's money, and that money can only be spent for purposes reasonably incidental to the carrying on of the company's business, and the validity of such grants to be tested, as is shown in all the authorities, by the answers to three pertinent questions: (i) is the transaction reasonably incidental to the carrying on of the company's business? (ii) is it a bona fide transaction? and (iii) is it done for the benefit and to promote the prosperity of the company?*"

If the provisions of section 228 are to apply to a company whose merchandise exceeds the value of its assets utilised or employed for producing or developing or otherwise obtaining such merchandise, it will transgress the provisions of this section every time merchandise is sold in an amount exceeding the value of its "business" assets, unless a special resolution by members had first been obtained. One can call to mind numerous examples where the application of these provisions to the merchandise of a company will result in untenable and absurd situations, which may readily

frustrate rather than promote or further the objects of a company. Accepting that interpretation of a statutory enactment is a judicial function, it is nevertheless informative to note Dr Konar's approach in this regard. Paragraph 21 of his said affidavit reads:

> "***In my opinion, it cannot be said that NDC is disposing of the major assets of the company at this juncture in terms of Section 228 of the Companies Act. The reference thereto in the Affidavits of Liversage and Orton are ill-conceived and not in consonance with the facts and accounting practices followed in terms of Generally Accepted Accounting Practice (International Financial Reporting Standards)***.
>
> *In my opinion, the directors of NDC, by selling mined diamonds on a periodic basis (as mined monthly) are disposing of the inventory (diamond stock as mined) and not the ore body which produces the diamonds being sold in terms of the Off-take Agreement. Had the ore body been sold or the mining licence, this would represent the disposal of an asset of the company. In IFRS and accounting terms, the disposal of the diamonds represents NDC's stock-in-trade and not its productive asset (the ore body), and does not represent the disposal of its major asset."*

17.4 Even if I am wrong in my aforesaid interpretation of section 228 of the Companies Act, NDC is nevertheless faced with the obligation to sell its diamonds to Representation. The provisions of section 228 has no bearing on the validity of the off-take agreement. Nothing prevents NDC to sell diamonds to the value of less than half the value of its other assets to

Representation at a time, or to secure the necessary special resolution to sell its diamonds to Representation. It appears to me that, *prima facie*, the obtaining of the special resolution – if necessary – can at least be regarded as a tacit or implied term of the off-take agreement.

18] Once all is said and done, NDC is still bound by the terms of the aforesaid court order in terms whereof it is obliged to sell its diamonds to Representation. It was open to NDC to raise all the aforesaid defences in the arbitration proceedings, but it failed to do so. It would therefore appear that the matter became *res judicata* between the parties to the off-take agreement. It is common cause that no application was brought and neither is one pending for the setting aside of the said court order.

19] Mr. Joseph advanced two further technical points.

19.1 Firstly, it was submitted that, since NDC had already submitted its section 11(1) application and nothing further is required from NDC in terms of the MPRDA, the relief sought against NDC viz to prevent NDC from "proceeding" with the application is incompetent.

19.2 Secondly, it was submitted that, since the Minister is in terms of section 11(2) obliged to consent to the cession, provided the cessionary has complied with the statutory requirements, this Court is not empowered to interdict the second respondent from assenting to the cession.

19.3 It requires no more than a moment's reflection to realise the fallacy in these arguments. To "proceed" with the section 11 application certainly means "to bring to finality" in the parlance of the relief claimed. Section 11(2) and (4) of the MPRDA reads,

> "*(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of-*
>
> *(a) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and*
>
> *(b) satisfies the requirements contemplated in section 17 or 23, as the case may be.*
>
> *(4) Any transfer, cession, letting, subletting, alienation, encumbrance by mortgage or variation of a prospecting right or mining right, as the case may be, contemplated in this section must be lodged for the registration at the Mineral and Petroleum Titles Registration Office within 60 days of the relevant transaction.*"

Clearly the Minister has to satisfy herself that the cessionary has complied or is capable of complying with the requirements mentioned in Subsection (2)(a) and (b). This may require further steps or submissions from either the cessionary or the cedent (NDC). To be effective, the cession needs to be registered in terms of subsection (4). This in itself would require further action. I could find no indication in the MPRDA ousting this court's jurisdiction to interdict the Minister from proceeding with her statutory duties and/or obligations. It is trite

> "*that the Court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration...*"

(**Welkom Village Management Board v Leteno**, 1958 (1) SA 490 (AD) at 502H)

20] His fuel tank not being exhausted yet, Mr. Joseph finally submitted that the application was brought prematurely since the Minister has not yet granted the section 11 application and may even refuse same. What Representation should have done, so argues Mr. Joseph, is to await the Minister's decision whereafter, if consent is granted, that decision can be appealed or taken on review in terms of section 96 of the MPRDA.

20.1 The short answer hereto is that this application and the intended actions are not levelled against the administrative action of the Minister or the question whether that administrative action was lawful or reasonable or fair. The purpose of the litigation is primarily to prevent NDC from escaping its contractual obligations in terms of the off-take agreement and its statutory obligations of rehabilitating its mining areas. Section 96 of the MPRDA therefore finds no application to the present litigation.

21] My findings hereinbefore that the Trust has a real and substantial interest in the outcome of the application, disposes of the question whether the Trust has a *prima facie* right in its proposed action, and I do not deem it necessary to once again traverse that reasoning.

22] NDC in a somewhat unusual manner applied for the striking out of certain averments in the affidavit of attorney Shapiro's supporting affidavit to Representation's replying affidavit. Since those averments are immaterial for purposes of my judgment herein, I find it unnecessary to deal with that application.

23] Mr. Subel requested me, in the event of the application succeeding, to award the costs of the application to Representation by reason of NDC's alleged *mala fide* attempt to rid itself of the consequences of the off-take agreement. Mr. Joseph requested me to make the usual costs order in applications of this nature.

I am inclined to agree with Mr. Joseph. The outcome of the proposed litigation may prove any one of the parties hereto right or wrong, and it may therefore be unjust to burden any party with costs as this juncture.

24] Wherefore the following order is made:

1. **PRAYER 2 OF THE MAIN APPLICATION IS GRANTED.**

2. **PRAYERS 1 AND 2 OF THE SECOND APPLICANT'S APPLICATION ARE GRANTED.**

3. **THE COSTS OF BOTH APPLICATIONS ARE RESERVED FOR DETERMINATION AT THE HEARING OF THE PROPOSED LEGAL PROCEEDINGS.**

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HJ Lacock
JUDGE

On behalf of First Applicant:	**Adv. Subel SC**
On behalf of Intervening Party:	**Adv. Berlowitz**
On behalf of Respondent:	**Adv. Joseph SC**