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

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

Case No: 642/2009
Heard: 24/11/2009
Delivered: 26/02/2010

In the matter between:

RUSLYN MINING & PLANT HIRE (PTY) LTD **Plaintiff**

and

ALEXKOR LIMITED **Defendant**

JUDGMENT

KGOMO JP

[1] The plaintiff, Ruslyn Mining & Plant Hire (Pty) Ltd ("Ruslyn"), a limited liability company with its place of business at George, Western Cape, is suing the defendant, Alexkor Limited ("Alexkor"), a public company with its principal place of business at Alexander Bay, Northern Cape, for an amount of R15 693 969,74 in respect of Claim B. Claim B was initially advanced in the alternative to Claim A; however Claim A was abandoned by Ruslyn at the inception of the trial because a cause of action could not be sustained. By consent the abandonment attracted no costs and no adverse inference is to be drawn from such procedural step. Merits and Quantum were separated by agreement.

[2] In Claim C Ruslyn claims from Alexkor the sum of R 8 923 065-00 for the alleged unlawful impoundment by

Alexkor of Ruslyn's trucks, machinery and other equipment used in the performance of the contract relating to Claim B. This claim will not be dealt with in this judgment for reasons that will become apparent.

[3] This judgment deals with two issues: First, the application for absolution from the instance by Alexkor in respect of Claim B only, at the close of Ruslyn's case. Secondly, the opposed application for leave by Ruslyn to amend its answers to Alexkor's Request for Trial Particulars dated 07 April 2008.

AN OVERVIEW OF PLAINTIFF'S CLAIM.

[4] Ruslyn conducted screening operations for Alexkor from 2001 to June 2003 at Alexander Bay in accordance with several agreements renewed from time to time. During its earlier operations Alexkor had erected large overburden dumps[1] which dumps contained some diamondiferous material[2]. At the instance of Alexkor, Ruslyn would screen the material in these dumps using several screening machines. These machines separate a particular size of material which would render diamonds extractable from it. Alexkor would convey the screened material[3] to its Noordsif treatment plant[4] for the extraction of diamonds thereat.

[5] In terms of the contracts alluded to in para 4 above Ruslyn was remunerated for its screening operations at a fixed rate

[1] **Overburden dump** – Overburden dumps are created when overburden is removed from a mine block to access the underlying ore. The overburden material is then generally dumped adjacent to or in close proximity to the mine block.

[2] **Diamondiferous material** – Diamond bearing gravel derived from the screening process (screened material).

[3] **Screened material** – Diamond bearing gravel obtained from the infield screening process and delivered to the processing plant for treatment.

[4] **Treatment Facility** – Treatment facility through which the screened material is passed to obtain a concentrate that contains the diamonds.

per ton[5] of dumped material fed into the screening machine. Ruslyn was paid R5,95 per ton. Remuneration was calculated through a survey that was conducted monthly buy Alexkor's surveyers. Through this process Ruslyn was not privy to how many carats[6] of diamonds Alexkor recovered from the screened material at its Noortsif plant or how profitable the screening operations were from Alexkor's perspective. This was called the Fixed Price Agreement.

[6] Before June 2003 Alexkor put its infield screening[7] contract out to tender. At that stage Ruslyn's infield screening contract was subsisting on a month-to-month basis. Ruslyn won the tender. A written contract was concluded between the parties in June 2003 which came into effect on 01 July 2003. It is this agreement, called Profit Share Agreement, which had to endure until 30 June 2005, that aggrieved Ruslyn and precipitated this litigation.

[7] Ruslyn's case as pleaded during the trial is that the probable diamond yield was misrepresented to it by Alexkor during the negotiations preceding the conclusion of the Profit Share Agreement in the manner set out in these paragraphs of its Particulars of Claim:

*"**The misrepresentation**:*

18. During the negotiations which preceded the conclusion of the Profit Share Agreement:

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[5] **Tons** – Measurement of the weight of material in a given source or as extracted for processing. In the instant case a factor of 1.8 is used to convert from tons to m^3. This factor is equal to the density of the material, e.g. tons of material is divided by 1.8 to arrive at m^3 of the same quantity of material (i.e. the weight is divided by the density to determine the volume).

[6] **Carat** – Measure of the weight of diamonds. One carat is equal to 0.2 grams.

[7] **Infield screen** – Mechanical device positioned close to the mining area and used to reduce the volume of mined material by selectively retaining particles within a desired size range (i.e. the screened material).

18.1 Defendant was aware of the following material facts and circumstances of which Plaintiff was, to Defendant's knowledge, unaware:

18.1.1 Defendant had suffered severe losses pursuant to the agreements annexed as "A" and "B" hereto, in that the net revenue from diamonds recovered from the diamond gravel screened by Plaintiff in terms of the aforegoing agreements had been exceedingly insufficient to cover the amount of Plaintiff's remuneration in terms of the agreements annexed hereto as "A" and "B".

18.1.2 Defendant had knowledge, due to its historic mining activities:

a) What the net revenue from the diamond yields of the dumps to be mined by Plaintiff in terms of the Profit Share Agreement had been, and what it was likely to be in future per ton of material mined from the dumps;

b) What grade[8], and how many carats of diamonds, had been recovered from each of its dumps in the past, and what the yield of such dumps were likely to be in future;

c) That it was not possible for Plaintiff to conduct the operations called for by the Profit Share Agreement profitably;

d) That the written proposal (annexed hereto marked "D") furnished by Plaintiff to Defendant during the negotiations containing a suggested feasibility of the contract for both parties was exceedingly inaccurate, particularly as it related to the carats of diamonds that could reasonably

[8] **Grade** – Measurement of number of carats of diamonds occurring in a given amount of material. Expressed either as carats per hundred cubic metres (cphm^3) or as carats per hundred tons (cpht).

be expected to be recovered per ton of screened material from the dumps[9];

e) That the net effect of the Profit Share Agreement would be that Plaintiff would in effect be bearing the cost of Defendant's duty to rehabilitate its mining areas.

18.2 Defendant had a duty to disclose the aforegoing facts and circumstances to Plaintiff during the course of the aforegoing negotiations, but intentionally, alternatively negligently, failed to do so.

18.3 Defendant further represented to Plaintiff that:

18.3.1 Defendant had achieved on average a recovery of 950 carats of diamonds per month at its Noordsif facility from diamond gravel recovered by Plaintiff from Defendant's dumps.

18.3.2 That in the event that Plaintiff concludes the Profit Share Agreement, it could reasonably expect a recovery of diamonds at a similar rate, and that the Profit Share Agreement would be profitable to Plaintiff; and

18.3.3 The Plaintiff could expect to recover, during the subsistence of the Profit Share Agreement, the number of carats and screened grade per mining area set out in the proposal (annexure "D" hereto) in the rows indicated as 'Exp. Screened Grade (cphm^3)[10]' and 'Expected carats.'

18.4 The aforesaid representations were to the knowledge of the Defendant false, alternatively the Defendant should have known that the representations were false, in that:

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[9] **Dump** – Man made heap of waste material obtained from pervious mining activities. As a result of inefficient mining and/or treatment processes, these dumps may contain diamonds.

[10] **Cphm^3** - Measurement of the number of carats of diamonds occurring in one hundred cubic metres of material. Can relate both to *in situ* or screened material.

18.4.1 Defendant never recovered 950 carats from its Noordsif facility per month from gravel mined by Plaintiff;

18.4.2 The possible yield of the Defendant's dumps did not allow a recovery of diamonds in the ratio referred to in paragraph 18.3.1 hereinabove;

18.4.3 The number of carats and screened grade of diamonds recoverable per ton of screened material which Defendant had represented were not achievable.

19. The aforesaid misrepresentations were material and were made by Defendant to induce and entice Plaintiff into concluding the Profit Share Agreement with Defendant.

20. Relying upon the truth of the aforegoing misrepresentations Plaintiff entered into the Profit Share Agreement.

21. Had Plaintiff been aware that the representations were false Plaintiff would not have concluded the Profit Share Agreement.

22. As a result of the aforegoing, Plaintiff is entitled to rescind the agreement, as it elected to do, alternatively as it does herewith.

23. By virtue of Defendant's fraudulent, alternatively negligent misrepresentations aforesaid, Plaintif has suffered damages in the amount of R15 693 969-74."

The manner in which the amount claimed is computed is then set out, but is irrelevant for purposes of this judgment.

[8] Alexkor in its plea denied that it made the representation referred to in para 7 above, or at all, and put Ruslyn to the proof thereof.

[9] Ruslyn tendered the evidence of three witnesses and closed its case. They are Mr Nkanyiso Buthelezi, Ruslyn's director of operations at the time and the two experts, Messrs Peter Crawford, a Fellow of the Institute of Chartered Secretraries, and Andre Fourie, a registered professional geologist and a member of the Geological Society of South Africa. Immediately after the closure of Ruslyn's case Alexkor launched its absolution application respecting to Claim B.

[10] After Mr Gess, for Alexkor, had completed his absolution address and when Mr Beyers, for Ruslyn, was at the tail-end of his argument in opposition of the absolution Mr Beyers intimated that he was unable to complete his argument before seeking certain amendments to sustain his argument. As the proposed amendments were substantial and were not going to go through unopposed, the case was postponed for this reason for a substantive application.

APPLICATION BY RUSLYN FOR LEAVE TO AMEND CERTAIN OF ITS ANSWERS TO ALEXKOR'S REQUEST FOR TRIAL PARTICULARS.

[11] The courts have over the years steadily moved away from a fastidious adherence to technicalities and prefer issues to be properly ventilated because the function of the pleadings is merely to define properly such issues between the parties. See: **Shill v Milner** 1937 AD 101 at 105 where the Court held: *"The importance of pleadings should not be unduly magnified. "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this*

instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been." *Robinson v Randfontein Estates G.M. Co. Ltd. (1925 AD 198). In another case, Wynberg municipality v Dreyer (1920 AD 443), an attempt was made to confine the issue on appeal strictly to the pleadings, but it was pointed out by INNES, C.J., that the issue had been widened, in the court below, by both parties.* "*The position should have been regularised of course,*" *said he,* "*by an amendment of the pleadings; but the defendant cannot now claim to confine the issue within limits which he assisted to enlarge.*" ”

[12] Twelve amendments in this regard are sought by Ruslyn. Its counsel argues that the purpose of the amendments is to bring Ruslyn’s Trial Particulars in line with the fully canvassed, “but uncontested,” evidence presented by Ruslyn in the course of the trial. The amendments sought are dealt with below and emanate from the affidavit of Mr George Whitehead attorney for Ruslyn.

[13] Whitehead stated that the Trial Particulars were prepared on 07 April 2008 by counsel without having had the opportunity to consult with Mr Buthelezi as regards his involvement in the events relating to the conclusion of the Profit Share Agreement. Instructions were merely obtained from Mr Rusty Van Loggerenberg (“Van Loggerenberg”) and his son Eugene who were under the impression at the time that the representation set out in paras 18.3.1 and 18.3.2 (quoted in para 7 of this judgment) had been advanced on more than one occasion by various employees of Alexkor and received by various employees of Ruslyn and that only after consultation with Mr Buthelezi in preparation for trial in February 2009 was the “correct factual situation established.”

[14] It is difficult to fathom this explanation. Van Loggerenberg was the CEO and the directing mind of Ruslyn. The case that Ruslyn sought to make out in its evidence is that the representation made by the relevant employee(s) of Alexkor came about after the existence of Annexure "D" to Ruslyn's Particulars of Claim. Annexure "D" is the Mine Plan[11] prepared by Ruslyn and then submitted to Alexkor. It is common cause that Annexure "D" was already in existence on 13 May 2003, and was in the possession of Mr Johan Truter ("Truter"), who was employed by Ruslyn as mine manager from September 2002 to 10 June 2003, when he departed under a dark cloud. On the evidence Ruslyn's case is that the fraudulent information was imparted by Alexkor to Buthelezi and other specified employees of Ruslyn after 13 May 2003 but before 20 June 2003 and that Buthelezi relayed this fraudulent information to Van Loggerenberg in George between those dates. Ruslyn maintained that this relayed fraudulent information induced Van Loggerenberg, the decision maker, to enter into the Profit Share Agreement with Alexkor on 20 June 2003.

[15] After this aforegoing extended prelude (in paras 13 and 14) the question can be justifiably asked how is it possible that Van Loggerenberg would not inform Ruslyn's counsel on or about 07 April 2008 that his knowledge is second-hand and that Buthelezi is the source of his information. For counsel then not to consult with Buthelezi would be, to say the least, a recipe for disaster.

[16] The puzzle does not end there though. Mr Gess correctly points out that Ruslyn could have raised the amendment issue

[11] **Mine Plan** – Schedule denoting the sequence of mining and processing of ore from defined mine blocks/dumps. A mine plan contains details of tons/m^3 to be mined and treated as well as the expected carats to be recovered. A mine plan may also include a profit analysis based on the anticipated amount of diamonds recovered.

on 04 February 2009 at the second pre-trial conference or when the trial commenced a few days thereafter. Ruslyn's attitude must raise the eyebrows because in its own words it established the "correct factual situation" when counsel consulted with Buthelezi, the only Ruslyn employee who testified, in February 2009. Buthelezi completed his evidence during the same month where-after the case was postponed.

[17] The trial resumed some eight months later, on 19 October 2009. Ruslyn called two expert witnesses, the said Mr Peter Crawford and Mr Andrè Fourie, and closed its case without amending. When I enquired from Mr Beyers why even at that stage no amendment application was forthcoming he said there was no need to do so until, in my view, past the eleventh hour. Mr Gess contended that as there was no explanation for the approach adopted by the plaintiff the reason can only be tactical and designed to ambush Alexkor.

[18] The Courts have made the following enunciations on the amendment subject:

18.1 In **Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Ltd & Another** 1967(3) SA 637 (D) at 640H the Court said:

"The amendment will be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It is only in this relation, it seems to me, that the applicant for the amendment is required to show it is bona fide and to explain any delay there may have been in making the application, for he must show that his opponent will not suffer prejudice in the sense I have indicated."

18.2 In **Zarug v Pavathie** NO 1962(3) SA 872 (D) at 876 C-E the Court remarked:

"An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course if the application to amend is mala fide or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted."

18.3 In **Greyling v Nieuwoudt** 1951(1) SA 58(O) at 91H the court held:

"(T)o prevent abuse, certain safeguards have been imposed which suggest that the line of approach should in each case be an inquiry into whether the application is bona fide in the sense that material new factors have arisen or have come to the notice of a party, thereby making the application necessary; whether the application was thereupon timeously made and whether any injustice would be caused by the amendment which cannot be avoided by a postponement or compensated by costs."

[19] Mr Gess makes a valid point with the contention that many events took place prior to the signing of the Profit Share Agreement and as there were many participants it was important to establish through the Trial Request on what dates or time frames the alleged fraudulent or negligent misrepresentation took place and who represented the parties

at the relevant stage. Amongst these events, important for the chronology as well, are the following:

19.1 The events of 6 November 2002 during which a proposal was put forward by Ruslyn to Alexkor (pursuant to which Ruslyn proposed a part Fixed Rate and part Revenue Split contract), and Alexkor indicating that the proposed contract would have to go out to tender in accordance with its policy;

19.2 The occasion of 03 February 2003 when tenders were invited;

19.3 On 28 March 2003, Ruslyn submitted its tender documents, as did a competing tenderer;

19.4 On 09 April 2003, when part of a Noordsif production report[12] was faxed by Truter (then in the employ of Ruslyn) to Ruslyn's representatives in George, Western Cape.

19.5 In April 2003 Ruslyn was informed by Alexkor that it would be required to prepare a Power Point presentation;

19.6 The occasion preparation by Ruslyn of a detailed Mine Plan (Annexure "D" to Ruslyn's Particulars of Claim), which was presented to Alexkor at or about the time of the Power Point presentation which took place on 13 May 2003;

19.7 On 13 May 2003, when the Power Point presentation was made to various members of Alexkor by various members of Ruslyn, led by Truter, then General Manager of Ruslyn at Alexander Bay;

19.8 Mid-May, when Ruslyn was informed that it was the successful tenderer and that a contract would be awarded to it, subject to terms and conditions to be

[12] **Production reports** – Monthly report by dump/block showing on a daily basis the run of mine, number of diamonds and carats obtained with a monthly screened grade shown per dump/block.

agreed, and the unsuccessful tenderer being informed that it would not be awarded a contract; and

19.9 On 20 June 2003, when the contract was finally signed.

[20] In my view, should the amendment be granted it will bear the effect that Ruslyn has largely presented a fresh case in evidence which Alexkor is now required to meet at this late stage. Alexkor prepared and came to Court to deal with alleged representations which are said to have been made prior to the preparation of Annexure "D" which predates 13 May 2003, and not the representation purportedly made after the conclusion of the tender process but immediately before the signing of the contract on 20 June 2003.

[21] The conclusion reached in para 20 must be correct for the two reasons:

21.1 First, Ruslyn now wishes to rely exclusively upon representations allegedly made after 13 may 2003, and in particular only those allegedly made on 20 June 2003, as testified to by Buthelezi;

21.2 Secondly, Ruslyn also now wishes to abandon all reliance upon representations allegedly made by Messrs Rain Zihlangu and Johan Meyer of Alexkor and relies upon an event when neither of these persons was present, but only Mr Johan Oosthuizen, also of Alexkor. It also abandons any reliance placed upon representations received by Van Loggerenberg, Johan Opperman and Truter and seeks to rely on those allegedly made to Buthelezi and in addition to Eugene Van Loggerenberg (who was not previously pleaded as having been a recipient of any representations). The abandonment of Truter as a recipient is particularly significant, as it places the representations after his

suspension by Ruslyn on 10 June 2003. Truter left Ruslyn in acrimonious circumstances and all indications point to him exhibiting a hostile attitude towards Ruslyn. It is therefore unsurprising that Ruslyn circumvented calling him and thereby seeks to avoid attracting an adverse inference or to engender a more understanding view by the Court.

[22] Mr Beyers has contended that the only prejudice that Alexkor might have suffered is self-created. According to him when Alexkor decided not to challenge the substance of Buthelezi's evidence in respect of Alexkor's represented diamond yield of 950 carats, significantly higher than the average of 483 achieved, it took a calculated risk and that any possible prejudice resulting from such failure must be ascribed to the realization of that risk and not Ruslyn's departure from its Trial Particulars. For this proposition he relies on **EC Chemia and Sons CC v Lamè and van Blerk** 2006(4) SA 574 (SCA) where this was stated by Brand JA (at 580 E-G):

"A third reason why the defendant's reliance on prejudice is, in my view, unsustainable flows from the failure by the defendant's counsel to raise any objection at the trial when Da Silva gave his evidence regarding the conversation of 12 March 2002. If counsel really believed that this evidence was irrelevant and thus inadmissible because it was not covered by the pleadings, he should have objected there and then. The plaintiff could then have tried to persuade the trial court that the evidence was indeed covered by the pleadings or, otherwise, sought an amendment. A party cannot be allowed to lull its opponent into a false sense of security by allowing evidence in the trial court without objection and then argue at the end of the trial, or on appeal, that such evidence should be ignored because it was inadmissible. It seems to me that

when the defendant's counsel decided not to challenge both the admissibility and substance of Da Silva's evidence, he took a calculated risk and any possible prejudice resulting from such failure must be ascribed to the realisation of that risk and not to the plaintiff's departure from its pleadings."

[23] Mr Beyers is stretching out of context the issue that the Learned Judge sought to resolve. His remarks cannot be construed as abrogating a longstanding principle so eloquently articulated in cases cited in paragraph 18 hereinbefore. In this case Ruslyn has certainly not led the entire body of evidence available to it. More pertinently the amendment sought is aimed at excusing Truter and Van Loggerenberg from testifying. The latter was present inside court throughout the proceedings. Unlike in the case at hand in the **EC Chemia** matter no new case was sought to be made out. On the contrary, in the circumstances of this case, it is Ruslyn that "cannot be allowed to lull its opponent [Alexkor] into a false sense of security."

For these reasons the application for amendment is refused.

THE APPLICATION FOR ABSOLUTION FROM THE INSTANCE.

[24] Needless to say, the rejection of plaintiff's application to amend its Trial Particulars has weakened its case considerably. In fact there is an ineluctable but unexpressed capitulation on the part of the plaintiff that absent the amendment its case is as good as dead in the water (See also in this regard para 10 of this judgment). I will deal only saliently with this part of the judgment as it must be construed in the context of the aforegoing amendment segment.

[25] It was common cause that Claim B, under discussion, is a distinct and discreet claim which is determinable separately from the other claims. This is so as the merits relating to this claim all relate to what transpired prior to the conclusion of the Profit Share Agreement on 20 June 2003. In contrast in respect of Claim C, the alleged wrongful impounding by Alexkor of Ruslyn's trucks, machinery and equipment, and Alexkor's Claim-in-Reconvention all relate to and depend upon events after 20 June 2003.

[26] Emanating from Ruslyn's recited Particulars of Claim in para 7 (above) it is evident that Claim B has its basis in delict, as opposed to contract, the contention being that Alexkor made a fraudulent or negligent (the non-disclosure) misrepresentation to Ruslyn which induced Ruslyn to conclude the Profit Share Agreement with Alexkor.

[27] The trite test for absolution was described in these terms by **Hams JA** in **Gordon Lloyd Page & Associates vs Riviera & Another** 2001(1) SA 88 (SCA) at 92 E-G (para 2):

"The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G - H in these terms:

'. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173;

Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T) .)'
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This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93)."

[28] As pointed out earlier Van Loggerenberg, the CEO of Ruslyn, did not testify. Mr Gess contended that Buthelezi, the sole witness to the event, was not in a position to testify as to whether the alleged misrepresentation by Oosthuizen influenced Van Loggerenberg's mind and conduct in concluding the contract with Alexcor, or his agreeing to particular terms thereof and, if so, to what extent. He maintained that only Van Loggerenberg could give such evidence. In R H Christie, the Law of Contract in South Africa, 5th Edition at p284 under the heading "The misrepresentation must induce the contract" the Learned author states:

*"**The misrepresentation must induce the contract***

*The victim of a misrepresentation cannot be permitted to rescind the contract unless he can show that he was induced by the misrepresentation to enter into the contract. A post-contractual misrepresentation therefore cannot justify rescission: (**Investec Bank Ltd v Lefkowitz** 1997(3) SA 1 (A) 9A-B). When the victim is a company it must show the effect of the misrepresentation on the mind or understanding of the individual who decided or advised that the company should*

*enter into the contract: (**Alliance Assurance Co Ltd v Lewis** 1958(4) SA 69 (SR) 76F-77B). The requirement has been expressed in different ways: he must have acted upon the misrepresentation in entering into the contract: (**Roorda v Cohn** 1903 TH 279 283; **Josephi v Parkes** 1906 EDC 213 217); he would not have entered into the contract but for the misrepresentation: (**Phathescope (union) of SA Ltd v Mallinick** 1927 AD 292 300; **Dutch Reformed Church Council v Crocker** 1953(4) SA 53 (C) 61D); acting with the ordinary prudence and discretion, he would not have entered into the contract if he had known the truth: (**Woodstock, Clairmont, Mowbray and Rondebosch Councils v Smith** (1909) 26 SC 681 701; **Wiley v African Reality Trust Ltd** 1908 TH 104 112). Each of these phrases bears a slightly different meaning, and one may be more appropriate than the others on the facts of a particular case."*

[29] Truter and Andrè Taljaard, both then employees of Ruslyn, were instrumental in the preparation of the Profit Share Agreement. Taljaard attended to the technical aspects and calculations relating to the screening and yields of the dumps in the tender document. The document was compiled, so Mr Beyers contended, with the aid of some information gleaned by Truter from Alexkor, on the instructions of Mr Buthelezi. In light of the fact that Truter did not testify Mr Beyers has asked me to infer that Alexkor would have been the most probable source of information in regard to certain parts of the tender document.

[30] In order to persuade me to find that Ruslyn has made out a *prima facie* case Mr Beyers lays the following basis. Truter furnished Buthelezi with the relevant documentation (Exh D1, pp 166A and 166B) as being a report from Alexkor in relation

to diamonds recovered at Alexkor's Noordsif facility. The information was provided to Buthelezi to verify the figures in the tender document, to assess the accuracy of that information, to verify the grade and to evaluate how sound a business proposition was to be embarked upon based on how Alexkor was doing. Based on the information so provided, Beyers proceeded, Buthelezi was presented with a picture showing Alexkor's budget of 964 carats recovered from Ruslyn's gravel and in addition there was the figure of 779 carats that Ruslyn understood had been achieved for a portion of a month. This picture satisfied Buthelezi that a good recovery had been achieved from the Ruslyn material because it was his mandate to Truter to obtain information relating to Ruslyn's gravel only.

[31] As Alexkor kept all information in relation to diamonds recovered from Ruslyn's material Alexkor (in particular Buthelezi, as he testified) would have expected the senior management team of Alexkor (Messrs Zihlangu, Meyer and Williams) who attended the Power Point presentation, piloted jointly by Truter and Taljaard, to point out serious discrepancies in relation to the data portrait in the Power Point presentation on 13 May 2003. More pertinently, Mr Beyers argued, the figures were never questioned by them. It has to be borne in mind that less than a month later (on 10 June 2003) Ruslyn and Truster parted ways acrimoniously.

[32] It was common cause, to use Mr Beyers' own wording, that "Mr Buthelezi and Eugene Van Loggerenberg did not enjoy the necessary authority to conclude the Profit Share Agreement on Ruslyn's behalf without having received the express authority in this regard from Mr Rusty Van Loggerenberg who was Ruslyn's CEO at the time.

[33] Buthelezi testified that Van Loggerenberg indicated that prior to him providing to Buthelezi *et al* authority to sign the Profit Share Agreement he wanted to satisfy himself that the yields and the carat information that had been supplied to Van Loggerenberg by Truter were in fact authentic, because Truter proved or was at least perceived to be an unreliable character. It is for that reason that Buthelezi and Eugene Van Loggerenberg were dispatched to consult with the management of Alexkor, who was principally represented by Mr Johan Oosthuizen.

[34] According to Buthelezi Oosthuizen produced a production report for the second or third week of that month (month-to-date report) and maintained that the figures were already running in the region in excess of 700 carats and that at that rate more that 1000 (one thousand) carats would be recovered from Ruslyn's material. In addition Oosthuizen stated that from the overburden dumps Alexkor has been achieving an average of 950 carats per month from the Ruslyn material. Based on this information and assurances, conveyed telephonically to him, Van Loggerenberg gave the go-ahead to sign the contract.

[35] Mr Beyers has correctly contended that in order for Ruslyn to succeed in its claim it need only prove any one of the many misrepresentations it relies upon, as long as all the requisite legal elements of the delictual claim for damages are met. Ruslyn seems to anchor its claim chiefly on the alleged deliberately or recklessly inflated diamond recovery claim of 950 carats. Counsel urged me to find that Buthelezi's evidence, as bolstered by the expert evidence of Messrs Andrè Fourie and Peter Crawford, was sufficient to constitute the

misrepresentation, and concomitantly the establishment of a *prime facie* case.

[36] In my view the approach urged by Mr Beyers is too simplistic and ignores other important factors and their impact on a holistic decision. The reasons for this statement will emanate from what follows.

[37] The letter dated 09 April 2003 (Exh D1–166B) that Buthelezi claims to have contained incorrect information was in fact produced and presented by Ruslyn's own employees. I have to agree with Mr Gess that there is no evidence that Alexkor made any misrepresentation to Ruslyn, or for that matter to Truter, as to what that document sought to manifest. What complicates matters is that only Truter, who was not called, could explain how and under what circumstances he acquired the document and whether any deception on the part of Alexkor accompanied its obtaining.

[38] Plaintiff's two aforementioned experts agreed that the document gives a correct reflection of the month-to-date carats achieved from the Noordsif Plant. This concession was readily made by Ruslyn's counsel. Of great import is also the fact that Truter, having previously been the production manager at the Noordsif Plant, was in a position to understand, appreciate and evaluate fairly accurately what the data was which was contained in Exh D1-166B. Truter's presentation thereof to his colleagues cannot therefore conceivably constitute a misrepresentation by Alexkor to Ruslyn.

[39] Ruslyn's case is partly that the documentation mentioned in para 38 (above) was sourced by Truter from Alexkor and

supplied to Andrè Taljaard, his co-presenter of the tender Power Point. These documents have not been discovered by Ruslyn. Their nature and contents therefore remain a mystery. More pertinently it is not known whether Van Loggerenberg had sight thereof and if so whether they influenced his decision to contract or to what extent they did so. The answers lie buried in the latter's bossom.

[40] There is a further factor which is indicative of the fact that Van Loggerenberg had already made a firm decision before 20 June 2003, the date on which the contract was clinched and signed, to conclude the Profit Share Agreement. The documentation discovered by Ruslyn show that already on 16 June 2003 Van Loggerenberg had instructed a transporter to deliver a newly acquired machine required for the performance of the Profit Share Agreement to Alexander Bay. In addition two days before Profit Share Agreement was signed, being on 18 June 2003, Van Loggerenberg signed two Hire Purchase Agreements for a new truck and Finlay 683 screen to the value of around R3 million and dispatched them to Alexander Bay where they were used for the performance of the Profit Share Agreement. Mr Gess has submitted that the only reasonable inference is that already on 16 June 2003 Van Loggerenberg had decided to enter into the Profit Share Agreement and to consummate it. Mr Beyers has countered that Mr Buthelezi was not cross-examined on this issue (See: **President of Republic of South Africa v South African Rugby Football Union** 2000(1) SA 1 (CC) at paras 58 to 65). That is so. However, Mr Fourie the expert was. Ruslyn's attention was accordingly sufficiently drawn to the issue and still had Van Loggerenberg at its disposal to call as a witness, which did not happen. There is quite obviously no duty on Alexkor to call this witness.

DUTY TO DISCLOSE

[41] I now deal with the issue of a duty to disclose. Mr Beyers submitted that a legal duty rested upon Alexkor to make full disclosure to prospective tenderers, including Ruslyn, the data in its possession relating to the infield screening operations that had been conducted in respect of the dumps that would be screened in terms of the Profit Share Agreement and the profitability of the operations. According to him the following information that Alexkor failed to disclose to Ruslyn constitute a misrepresentation by omission:

41.1 That, on average, no more than 483 carats had been recovered by Alexkor from Ruslyn's material during the 2003 financial year;

41.2 That the infield screening operation had become unprofitable for Alexkor, and that this fact, together with Alexkor's expectation that the dumps would exhibit less favourable grades in future, prompted Alexkor's decision to change the contractual regime to a Profit Share Agreement.

41.3 Alexkor should have disclosed what the headfeed grades[13] had been in respect of the dumps that had been screened in the past, which would form the subject-matter of the screening operation in terms of the Profit Share Agreement; and

41.4 That accordingly, the carat yield projections in Ruslyn's tender, Power Point presentation and Mine Plan, were not reasonably achievable, and had never been achieved in the past.

[13] **Headfeed Grade** – Diamonds recovered as measured relative to the material excavated from the dump/block and subsequently processed though the treatment facilities, i.e. Noordsif and Final Recovery.

[42] What should not be lost sight of is that Alexkor did not furnish Ruslyn with any warranty. See **Herschel v Mrupe** 1954(3) SA 464 (AD) at 490G. It also appears that Ruslyn spurned an opportunity to conduct tests on the dumps before signing the Profit Share Agreement nor did they demand to do so as a precaution. This cavalier approach seems to have been informed by the fact that Truter jumped ship (from Alexkor) to join forces with a competitor (Ruslyn). In **Felton Skead & Grant v Port Elizabeth Municipality** 1964(4) SA 422(E) at 425A the Court, after referring to authority, held that the primary duty of a tenderer in respect of a contract for the performance of work "in the lump" rather than by measure or by time is to satisfy itself of all the material facts relating to the tender. At 425E-G the Court went on to say:
"It seems to follow that it is for the tenderer to satisfy himself as to the nature and extent of the work to be done regardless of the cost and inconvenience involved in thus satisfying himself.

It therefore affords the applicants in this case no argument to say that for them to have had to make an independent and exhaustive investigation into the extent of the work involved for the purposes of submitting a tender would have entailed considerable time, expense and effort. The question is whether they were in this case entitled to rely on the information supplied by the respondent for the purpose of tender without independent enquiry so as to satisfy themselves as to the nature and extent of the work involved."

Whilst this was said in a different context (*locatio conductio operis*) the principle remains apposite.

[43] The gravemen of Ruslyn's complaint relates to the screened grades and not the headfeed grades (diamond yield per ton screened). Andrè Fourie's evidence was to the effect that the screened grades contained in the Mine Plan (Annexure D) were, assessed on an individual dump basis, in line with the past achievements and also that other dumps displayed the hallmarks of never having been sampled. Ruslyn alleges that the Mine Plan was exceedingly inaccurate. However, this document was compiled by Ruslyn's own employee, Truter. Mr Gess makes a valid point by arguing that Ruslyn has not led any evidence pertaining to the circumstances under which this Mine Plan was furnished to Alexkor, to whom at Alexkor it was furnished or the immediate reaction to its receipt. Be that as it may, I am not persuaded that Ruslyn established that the report relative to the screened grades as contained in the Mine Plan was exceedingly inaccurate or why the blame for its alleged inaccuracy must be placed at Alexkor's door.

[44] JP Vorster (on "Misrepresentation") says the following in **LAWSA, Vol 17(2), 2nd Edition** para 318 (p272):

"The content of the legal duty in the case of negligent misrepresentation is to take all reasonable steps to prevent loss through deception. Reasonable steps include steps which ex post facto appear to be reasonable and practicable. In this regard it is important to distinguish between the test for wrongfulness and the test for negligence. The test for wrongfulness is whether it is reasonable to expect the defendant to provide correct information. Thus a representation will be a wrongful misrepresentation if it is reasonable to expect the defendant to provide correct information and the defendant does in fact supply incorrect information. The test for negligence, on the other hand, is

whether the representor took reasonable care to ensure the correctness of the information supplied."

In **Absa Bank v Fouche** 2003(1) SA 176 (SCA) at 180H -181D (para 4 – 6) Conradie JA stated:

"It is by now settled law that the test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure (Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) at 568F - I and 570D - G). In each case one uses the legal convictions of the community as the touchstone (Carmichele v Minister of Safety and Security and Another 2001 (1) SA 489 (SCA) at 494E - F applying Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 317C - 318J).

[5] The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context - a non-disclosure - have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (Speight v Glass and Another 1961 (1) SA 778 (D) at 781H - 783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful (BOE Bank Ltd v Ries 2002 (2) SA 39 (SCA) at 46G - H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management) 1965 (3) SA 410 (W) at 418E - F).Conradie JA

[6] Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the contract. In the case of a fraudulent misrepresentation, that must have been the result intended by the defendant (Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T) at 103F- J).”

[45] Ruslyn in some way further complicated matters and in the process further weakened its own case by its failure to call as witnesses its CEO, Mr Rusty Van Loggerenberg, and Mr Johan Truter, its mine manager, who crossed the floor from Alexkor to it.

[46] In the premises I am satisfied that Ruslyn, the Plaintiff, has failed by a long way to present evidence on each essential allegation necessary to establish Claim B, and that concomitantly has not made out a *prima facie* case. (Quantum stood over for later adjudication, if at all).

[47] **I therefore make the following order:**

1. **The Plaintiff’s (Ruslyn Mining & Plant Hire (Pty) Ltd’s) application to amend its Answer to the Defendant’s (Alexkor Limited’s) Request for Trial Particulars dated 07 April 2008 is dismissed with costs.**

2. **Absolution from the Instance against the Plaintiff is granted in respect of Claim B, with costs.**

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F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

On behalf of the Plaintiff:	**Adv. J A L Beyers** **Adv. W Jonkers**
Instructed by:	Van der Wall & Partners
On behalf of the Defendant:	**Adv. D W Gess**
Instructed by:	Towel & Groenewaldt Attorneys