CIV/APN/384/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

KOLO MINEWORKERS DIAMOND CO-OPERATIVE

V

G FLORIO
SODI PROPERTIES CC

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 16th day of January 2001

On the 17th October 2000 applicant moved an *ex parte* application before this court on a certificate of urgency for an order:

1. That the normal rules of service of process be dispensed with, and that this application be heard on an urgent basis.

2. That a *rule nisi* be granted calling upon 1st respondent, together with all and any of its representatives, agents or associates to show cause why they may not be[1] interdicted and restrained from setting foot at Kolo Diamond Mine or its

precincts, which operation is under the administration or jurisdiction of the Kolo Diamond Cooperative and is situate at the Kolo area.

3. (a) that a *rule nisi* be granted calling upon first respondent together with all or any of its representatives, agents, or associates, to show cause, if any, why they may not be ordered immediately to account to applicant for all their business transactions in relation to Kolo Diamond Mine and in particular to account for the following diamonds which were left in the custody of Mr G Florio:

(i) One 24 carat diamond

(ii) One 19 carat diamond which Mr G Florio claimed to have submerged in an acid receptacle for purification

(iii) One 15 carat diamond and

(iv) One 13 carat diamond

(b) 1st respondent, its representatives, agent or associates be directed to return one Mercedes Benz 12 cubic metres tipper truck and one excavator both of which had been taken for repairs at their instance.

(c) 1st respondent and/or his representatives, agents or associates are

called upon to indicate how and when an amount of M1,128,186.30 which 1st respondent claims is owed to it by Kolo Mineworkers Diamond Cooperative was disbursed

4. That 1st respondent together with its representatives, agents or associates be directed to pay costs of this application in the event that they will oppose it.

5. That this application be heard on Friday 20th October 2000 at 9.30 hours of the clock or so soon thereafter as the parties may be heard.

6. Prayers 1 and 2 hereof operate on an interim interdict with immediate effect pending the outcome of this application.

7. Granting applicant further and or alternate relief.

The court made it clear to Mr *Moruthane* counsel for applicant that it could not grant such drastic orders without hearing the other side. Consequently the court ordered that:

(a) Both respondents be served with this application and accompanying papers.

(b) On account of urgency, the ordinary rules are dispensed with.

(c) this application will be heard at 2.30 p.m. on the 20th October, 2000.

On the 20th October 2000, Mr *Moruthane* for applicant and Mr *Matooane* for respondents postponed the matter to the 31st October 2000, to enable applicant to file replying papers. Respondents had filed their answering papers on the 19th October 2000. On the 31st October 2000 the matter was ready for hearing. But applicant found that among the points in limine taken by respondents was that there was no resolution that authorised applicant to bring this application. Mr *Moruthane* for applicant asked for a postponement. This application was opposed.

Among the things Mr *Matooane* for first respondent said in opposition was that all documents relating to the company were before court. He then pointed at a heap of thick files which were before court and said first respondent was willing to account to applicant about the mining operations that were the subject of this application. I asked applicant whether the matter should not stand down so that the respondents could account to applicant. Applicant told the court that it was missing the point, accounting was a peripheral issue. Applicant asked for leave to file the resolution authorising the institution of these proceedings since he had made a mistake in this regard.

It turned out that even the resolution "KMWD7" on which applicant relied, merely authorised the chairman and the secretary of applicant to terminate the agreement with second respondent, but nothing was said about the institution of legal proceedings. Furthermore this

resolution which was dated 14th October 2000 had been filed with the replying affidavit and not with the founding papers as it should have been. The application was granted but applicant was directed to pay the respondents' costs. The matter was then postponed to the 28th November 2000.

Argument began on the 28th November 2000 and the court noted that there were disputes of fact on some of the issues in prayer 3 of the Notice of Motion. This prayer involved accounting for diamonds mined, business transactions that occurred in relation to Kolo Diamond Mine. The last issue was the M1,128,186.30 that first respondent claimed applicant owed them.

1. Dispute of Fact

First respondent's main attack was that applicant has brought a highly disputed application. Indeed if it had, then the court should dismiss this application to discourage the abuse to which application proceedings are put. The normal way of bringing legal proceedings is by way of action - and the issuing of summons. Applications for interdict and other interim remedies are designed for application proceedings if they are of an urgent nature. Nevertheless the High Court has allowed (over the years) litigants to proceed by way of application in matters suitable for action proceedings if facts are not disputed - or a dispute of fact is not foreseeable.

In this case, applicant a co-operative of mineworkers had a diamond mining or

prospective area. This co-operative brought first and second respondents as financiers to help them mine diamonds in the Kolo Diamond Mine which belonged to them. An agreement "KMWD1" was entered into in terms of which respondents would finance mining operations by buying equipment and running the mine. In return applicant would surrender its rights to a company which would be formed which was to be known as Octa Diamonds (Pty) Ltd, alternatively shares would be bought into that company in stipulated proportions. It was not revealed in the agreement that such a company already existed although Mr SC Buys the attorney for second respondent should have been aware that it existed - because he had witnessed its formation. The impression was given that Octa Diamonds (Pty) Ltd would be formed, although there was an ambiguous wording that could be interpreted to mean shares in agreed proportions could be bought into such a company. This was later to cause disagreement.

Mining operations began. It appears that applicant already had a Mercedes tipper truck and an excavator. Operations stopped in September 1999 according to "KMWD5" a fact which seems to be common cause. Applicant now wants respondents to be interdicted from coming anywhere near the Kolo Diamond Mine as applicant seems to be in the process of bringing another financier. Applicant also wants first respondent and his representative and associates to account for all business transactions, account for diamonds, return applicant's truck and excavator and finally to show how respondents claim to be owed M1,128,186.30.

Respondents correctly say accounting for business transactions is a matter applicant should have forseen would be highly disputed. They have annexed some documents to their answering affidavit and brought a heap of files which I was made to understand contain the details of what is contained in their annexed papers. It is to this leg of applicant's prayers that respondents concentrate. They made no attempt to substantiate their claim of M1,128,186.30. They also do not even try to show that as financiers they ploughed in a substantial amount of their money in terms of the agreement. They only show diamond sales in which first respondent and his daughter were purchasers.

It seems as if this portion of the application of applicant is for an interim remedy. They want unhindered use of the mine and that respondents should be restrained from interfering while it is decided if respondents deserve being compensated for what they have put in the mine. Respondents had been previously asked to show how the M1,128,186.30 was arrived at, but respondents did not co-operate. Hence the attempt to force respondents to co-operate through a court order.

Herbstein & Van Winsen *Civil Practice of the Superior Courts of South Africa* 4th Edition at page 367 has said:

> "Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his

> right, when he is bringing an *ex parte* application in which relief is claimed against another party, he must make full disclosure of all material facts that might affect the granting or otherwise of an order *ex parte*. The utmost good faith must be observed by litigants making *ex parte* application in placing material facts before the court, so much so that if an order has been made upon an *ex parte* application and it appears material facts have been kept back, whether wilfully and *mala fide* or negligently, which might have influenced the court whether to make an order or not, the court has a discretion to set aside the order with costs on grounds of non-disclosure."

In this application applicant cannot be accused of non-disclosure. Applicant put before the court the entire facts including those against him. Mr *Matooane* for respondents was not aware that facts that are on the annexures to an affidavit are part of the founding affidavits. He took the view that applicant had not disclosed enough facts on the founding affidavit.

It seems that applicant was seeking an interdict restraining respondents from going to the Kolo Diamond mine while also asking for a mandatory interdict compelling the respondent to supply the information he was withholding from applicant to enable parties to settle the matter, if possible. It is against this background that the third prayer in which first respondent was to account for business transactions should be viewed. During argument this was not clear, but on reflection this seems to be the position.

The real argument centred on prayer 2 of the Notice of Motion. Applicant wanted first respondent together "with all and any of its representatives, agents or

associates to show cause why they may not be interdicted and restrained from setting foot at Kolo Diamond Mine and its precincts". The thrust of applicant's application was that first respondent had perpetrated a fraud on applicant. A company known as Octa Diamonds (Pty) Ltd was never formed in terms of the agreement. Because Octa Diamonds (Pty) Ltd according to the Deputy Registrar General's letter dated 4th September 2000 was not registered, this strengthened a conviction in applicant that they were taken for a ride. Applicant further argued that they were coerced and enticed to participate in the opening of a bank account and signing cheques of Octa Diamonds (Pty) Ltd., because of economic deprivation or the threat of it. The agreement "KMWD1" was based "on deception and unequal bargaining position *ab initio* and therefore had become null and void", according to applicant.

This court had to deal with this application and resolve those issues which could be resolved on papers (as applications are intended to be). Dismiss the application where a dispute emerged which should have been forseen.

2. Whether Octa Diamonds (Pty) Ltd exists?

Applicant further argued that they note that Octa Diamonds (Pty) Ltd does exist and that it was incorporated 17th May 1991, as the Certificate of incorporation shows, but that was not the end of the matter. The members of applicant were never made shareholders of that Octa Diamonds (Pty) Ltd of 1991 after the signature of their agreement of 2nd December 1996. To this day there are no share certificates or minutes

of Octa Diamonds (Pty) Ltd. They were only made to give their signatures to the bank and thereafter to sign cheques.

It turned out from the papers of respondents that Octa Diamonds (Proprietary) Limited did in fact exist and that it was registered in the Companies Registry in terms of the *Companies Act* 1967 under number 91/128. It had been registered on the 17th May 1991, consequently the Deputy Registrar General's allegation that no such a company existed was erroneous. The Memorandum of Association was annexed to the papers of the respondents and marked AF2(b). There were no Articles of Association, although the cover disclosed they had been filed in the Companies Registry along with the Memorandum of Association. I noted that one thousand shares of M1.00 each out of four thousand had been taken by Daniel Motaung and Simon Thulo. Mr. SC Buys (an attorney) who was appearing for second respondent had witnessed the signatures of Daniel Motaung and Simon Thulo on the 10th May 1991.

As there were no Articles of Association of Octa Diamonds (Pty) Ltd, it was not possible to know who the directors of Octa Diamonds (Pty) Ltd were at the time of its registration in May 1991. The only directors of Octa Diamonds (Pty) Ltd by operation of the law were D Motaung and S Thulo - see Section 140(3) of the *Companies Act* 1967. It was also not possible to know how Octa Diamonds (Pty) Ltd was run or governed because of the absence of its Articles of Association. Applicant did not refer to it, and indeed ignores its existence save to say it was never established in terms of

the agreement between the parties.

Mr *Matooane* argued that first respondent was wrongly sued. He was merely an agent of Sodi Properties CC (the second respondent). The agreement between applicant and the second respondent dated the 2nd December 1996 never based everything between the parties solely on the registration of Octa Diamonds (Pty) Ltd. Applicant had misread clause 1 of the agreement which provides:

"1 REGISTRATION OF COMPANY
The parties agree to cause the registration of a company under the name and style of Octa Diamonds (Proprietary) Limited, or to obtain the issued share capital in such company and in which company all the parties will hold shares as follows:

1·1 the individual members of KMWD, 3% (three per cent) each, plus 10 (ten) shares to be held by chairman and secretary in equal shares on behalf and for the benefit of all members jointly;

1·2 the financier 50 (fifty per cent) of the issued shares in the name of the individual to be named by the financier or in the name of the corporation.

1·3 each party shall be entitled to nominate two (2) persons to the Board of directors of Octa Diamonds (Pty) Ltd, to represent them and their respective interests.

1·4 the main objects of the company will be to mine, prospect for, buy, sell and polish diamonds and other semi-precious stones in the Kingdom of Lesotho.

Mr *Matooane* argued that applicant's argument was based on a partial reading of the registration clause of the contract. Applicant has omitted the following words in clause 1:

"..., or to obtain the issued share capital in such company and in which company all parties will hold shares...."

The applicant (Mr *Matooane* argued) had in conformity with this alternative mode of procedure in the contract been issued shares in the existing company of Octa Diamonds (Pty) Ltd. It was therefore incorrect that the sole method of proceeding was the formation of Octa Diamonds (Pty) Ltd. It was therefore not correct that no company was ever formed as provided for in the contract. The contract envisaged the obtaining of the issued share capital of Octa Diamonds (Pty) Ltd, which implied that such a company already existed. What happened was to issue shares in Octa Diamonds (Pty) Ltd which is an existing company in terms of the contract.

This submission of Mr *Matooane* instantly created a problem for first respondent. This is because for a contract to have taken place, the parties must agree on the same thing. It seems clear that the parties agreed that a new company should be registered. Indeed this was put in 'KMWD1" in bold capital letters. This alternative of obtaining "the issued share capital of such company" is vague and not clear. **Wille** in *Principles of South African Law* 8th Edition at page 146 puts what parties must agree on for a valid contract to exist as follows:

> "The parties must have a *consensus ad idem*, that is, they must be of the same mind or understanding as to the essential or material factors of their agreement."

In order to determine this, in this particular agreement, the court has to read the

agreement as a whole. It is only significant that this term of the agreement is not very clear. The obscurity of this portion is enhanced by the fact that the contract clearly states that as from the date of signature, the assets of applicant in the Kolo DiamondMine belong to Octa Diamonds (Pty) Ltd. It seems therefore that the intention of the parties has to be worked out by the court reading the document as a whole and examining what parties did after signing the agreement.

Mr *Matooane* further argued that the Kolo Diamond Mine no more belongs to applicant but to Octa Diamonds (Pty) Ltd. If it had made losses and the company was bankrupt, applicant could not exclude respondents from the mine so that applicant could look for another investor. This was what first respondent had said, as more fully appears in the letter from first respondent's attorney to applicant marked Exhibit "KMWD2". In the circumstances first respondent had said to applicant about the Kolo Diamond Mine,

> "These assets do not belong to you, they belong to Octa Diamonds (Pty) Ltd and it is to the detriment of shareholders in the event of you disposing of assets which belong to the company."

Mr *Matooane*'s argument made good sense because in terms of the contract the agreement stipulated the following:

"2. TRANSFER OF RIGHTS: PROSPECTING LICENCES

2·1 KMWD shall immediately after signature hereof, negotiate with all the individual members and cause rights to prospect at Kolo to be transferred to the company, or make such rights lawfully and irrevocably available to the company.

2·2 Obtain the consent of the Mining Commissioner to the transfer or facilitation of the prospecting licences to the company.

2·3 All the members of the KMWD hereby individually, jointly and irrevocably cede and transfer, *in rem suam*, all their rights, title and interest in the assets to the company OCTA DIAMONDS (PROPRIETARY) LIMITED and OCTA DIAMONDS (PROPRIETARY) LIMITED hereby accepts such transfer and cession of rights to the aforesaid assets.

2·4 KMWD acknowledge and warrant that as from the date of signature hereof, all the rights as to the ownership or otherwise in assets referred to, have been lawfully transferred to OCTA DIAMONDS (PROPRIETARY) LIMITED, and they have legally disposed of any interest and ownership they may have had.

2·5 The individual members warrant that they will not, after commencement hereof, grant any over-riding, or pre-emptive rights or licences they have, nor will he have the right to alienate his rights. Each member individually warrants that he will each year timeously apply for renewal of his prospecting licence.

If indeed Octa Diamonds (Pty) Ltd now owned all the assets and the Kolo Diamond Mine, then applicant had no case and its application ought to be dismissed. Problems arose when I did not find any resolution of Octa Diamonds Pty Ltd in terms of which the bank account which all sides agreed was opened was not among the papers. At paragraph 5·2 Antonella Florio had deposed: "I attach hereto for the honourable court's attention marked Annexture "AF3" a resolution of the Board of Directors of Octa

Diamonds as well as the instructions to the bank and specimen signature of signatories to the account. The signature of the deponent and S Monethi appear on these documents". I perused the papers and found "AF3" was a bank statement of Octa Diamonds (Pty) for the period 3rd November 1997 to the 30th November 1997. The resolution of the Octa Diamonds (Pty) Ltd did not exist. I asked Mr *Matooane* who the directors were, I was not given a clear answer. I asked him to refer to the bundle of files to which he had been referring to when he was showing his willingness to account for the mining operations. He could not produce any minutes.

It was at the stage (when I could not be given names of Directors and minutes of Octa Diamonds (Pty) Ltd) that I asked for evidence that Octa Diamonds (Pty) Ltd had done any business through its board in any manner apart from the cheques that were signed by S Monethi and P Mosebo who are members of applicant. I ordered the parties to go to find this at the company's file at the Registry of Companies. I felt that ordering parties to check the actual memorandum and articles at the office of the Registrar of Companies was not introducing new evidence. There is a constructive notice in terms of which every one dealing with a company is deemed to be aware of the provision of its public documents (in particular its memorandum and its articles). At page 121 in the first footnote Cilliers & Bernade *Company Law* 4th Edition in describing public documents say:

> "The memorandum and articles of association definitely qualify and possibly also returns with particulars of directors and special

resolutions filed with the Registrar...."

In the circumstances, this court could not permit itself to be misled about what is deemed by law to be in the knowledge of the public, during argument.

I met considerable resistance from first respondents' counsel Mr *Matooane,* He did not want me to compel them to check the Registrar of Companies' file for me. I had to do this because annexure "AF2[a]" of respondents (which was printed on Stanbic Lesotho Ltd form for the appointment) had been signed by SC Buys as both chairman and secretary of Octa Diamonds (Pty) on the 3rd December 1996. What worried me further was that in terms of Section 38 a private company cannot have any one just signing its document. Section 38 of the *Companies Act 1967* provides

> "A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under seal."

There is nothing that suggest that Mr Buys was ever a director or officer of the company or that he was duly authorised. If he was one of the parties to the agreement "KMWD1", it might have been understandable. I therefore do not understand how he came to sign this document which has now become important because of the facts of this case. In any event, even if Mr SC Buys was Secretary of the company (which he does not appear to have been the case) he could not have operated as chairman (who is a director) and secretary of the company at the same time. This is because Section

140(4) of the *Companies Act* 1967 provides:

> "Any provision requiring or authorising a thing to be done by or to a director and the secretary shall not be satisfied by being done by or to the same person acting both as director and as or in place of the secretary."

Clearly annexure "AF2[(a)]" violates the provisions of Section 140(4) of the *Companies Act* 1967, therefore what was done in opening the bank account in Stanbic Bank in the name of Octa Diamonds (Pty) was irregular. I noted that "AF2[(a)] and the bank statements never had the words Ltd. The bank referred to the bank account as Octa Diamonds (Pty) throughout. It never referred to it as Octa Diamonds (Pty) Ltd.

There seemed on the papers to exist no evidence any where that there was ever a meeting of the board of Directors of Octa Diamonds (Pty) Ltd. What later worried me further was that the agreement on the basis of which Octa Diamonds (Pty) Ltd had been given ownership of Kolo Diamond Mine had been signed the previous day which was the 2nd December 1996. Mr SC Buys was first respondent's attorney who was also his nominee in the signature of cheques. I became even more puzzled that neither S Monethi and P Mosebo, who are members of applicant, had not signed the appointment of Bankers form on the 3rd December 2000, although they must have been there or at least nearby. There is the letter or form directed to the Manager Barclays Bank dated 3/12/96 which is part of annexure "AF2[(a)] in terms of which Mr SC buys collected the signatures of S Monethi and P Mosebo. This form whose photo-copy appears below is signed by Mr SC Buys below.

On the papers before me, it now appeared that the signatures of S Monethi and P Mosebo had been first taken on 3/12/96 on a paper that did not even specify the name of Octa Diamonds (Pty) Ltd. Other specimen signatures were taken on a Stanbic Bank Lesotho Ltd form which is undated. I therefore felt it would be unfair to draw any conclusions lest Octa Diamonds(Pty) Ltd had in fact operated in terms of the *Companies Act* 1967, mistakes here and there notwithstanding.

I ordered Mr *Moruthane* for applicant, Mr *Matooane* for first respondent and Mr *Buys* for second respondent to go and check from the Registrar of Companies file whether Octa Diamonds (Pty) did file annual returns in terms of Section 96 of the *Companies Act* 1967 in order to discover who the Directors and officers of Octa Diamonds (Pty) Ltd were. I was also anxious to know whether or not Octa Diamonds (Pty) Ltd had been in business from the annual returns in the Companies Registry and had ever begun to trade or whether it had remained dormant from the date of its incorporation in 1991. I asked Mr *Matooane* to check his bundle of files to find the shares register of Octa Diamonds (Pty) Ltd, because applicant was saying no share certificates were ever issued. No such share certificates or register existed.

It is always possible for omissions of one kind or another to occur. I felt information that is readily available should be brought to avoid unnecessary delays. I therefore ordered parties to go to the Companies Registry. I had first asked them to produce their copies of the annual returns filed in the Companies Registry in the forms

appearing in the 5th Schedule of the *Companies Act* 1967. In my view this would have been easy because first respondent's counsel Mr *Matooane* had been inviting the court and applicant to peruse the heap of files he had brought. When those annual returns could not be produced, I ordered both sides to go and check the file of Octa Diamonds (Pty) Ltd at the Deeds Registry and the court adjourned for lunch.

When the matter resumed after lunch, there was considerable delay because Mr *Moruthane* came an hour after the appointed time. He claimed he was alone at the Companies Registry, there was a delay in finding the information I was asking for. Mr *Matooane* told the court that the Companies Registry records show that no annual returns were filed for Octa Diamonds (Pty) Ltd since its incorporation on the 10th May 1991. None of the parties before court are disclosed in the Companies Registry as being shareholders or directors of Octa Diamonds (Pty) Ltd. It became clear to me that according to the Companies Registry records Octa Diamonds (Pty) Ltd was a dormant company which never belonged to either the applicant or the respondents. The shareholders of Octa Diamonds (Pty) Ltd remain Simon Thulo and Daniel Motaung, both of whom are not parties in the agreement "KMWD1". Their combined shares that have been issued and taken remain 1000 out of a total of 4000 shares - see pages 5 and 6 of annexture "AF2(b)" of respondent. It is these people who are also the Directors of Octa Diamonds (Pty) Ltd in terms of Section 140(3) of the *Companies Act* 1967.

In resisting applicant's application restraining them from having access to Kolo

Diamond Mine, respondents rely on clause 3 of the agreement "KMWD1" which provides:

> "KMWD warrants that it will give free and unhindered access to KOLO MINE site, at all times, to all shareholders of Octa Diamonds (Proprietary) LIMITED."

Daniel Motaung and Simon Thulo are not parties in this case nor were they expected to be shareholders of Octa Diamonds (Pty) Ltd in terms of "KMWD1". They were also not expected to be shareholders along with members of applicant. It seems to me that either the respondents intended to acquire the dormant Octa Diamonds (Pty) Ltd and use it for mining operations at Kolo DiamondMine or had in fact acquired it. If they had already acquired it, the question arises - why pretend Octa Diamonds (Pty) Ltd was still going to be formed, when it already existed? This becomes puzzling (even more) because it was Mr SC Buys who had witnessed the memorandum of Octa Diamonds (Pty) Ltd on the 10th May 1991 and also witnessed the signature of all members of applicant and the respondents on the 2nd December 1996 when the agreement "KMWD1" was signed.

It remains puzzling why on the 3rd December 1996 (i.e. the following day) Mr Buys irregularly opened a bank account for applicant and respondents at Stanbic Bank in the name of Octa Diamonds Pty. I do not have to solve this mystery. It remains

strange that Octa Diamonds (Pty) Ltd was given a mine that belongs to applicant's members when it had not yet been formed - or if it had not been at the disposal of applicant and respondent to acquire shares in it in terms of the agreement. Every indication is that applicant's members were not aware that Octa Diamonds (Pty) Ltd already existed. I can only say, without hesitation, that to make a generalisation that any of the participants acted fraudulently throughout would be a dangerous oversimplification. Each level of operation must be dealt with separately. Where fraud exists, the court must determine it. Proof of fraud will often call for *viva voce* evidence unless it is so patent that such evidence is not called for.

Respondent in proving the existence of Octa Diamonds (Pty) Ltd did not go far enough to answer applicant's case. They merely showed it exists in the Companies Register but did not show that any of the parties were shareholders in it. The agreement ("KMWD1") which mentioned Octa Diamonds (Pty) Ltd was a pre-incorporation agreement, alternatively it was an agreement that authorised the buying off of the existing share-holders in Octa Diamonds (Pty) Ltd and the distribution of shares among applicant's members and respondents in a pre-determined manner. Respondents' papers merely disclose an Octa Diamonds (Pty) Ltd that still belongs to Daniel Motaung and Simon Thulo despite their averments to the contrary. They did not do anything that links them or applicants with Octa Diamonds (Pty) Ltd. They only showed that Mr SC Buys signed as Secretary and Chairman a Stanbic Bank form that a resolution had been purportedly taken to open a bank account for Octa Diamonds Pty

contrary to the provisions of **Section 140(4)** of the *Companies Act* 1967, and that this account was operated by applicant and respondent. What is on record *ex facie* showed they operated a bank account in the name of **Octa Diamonds (Pty)** with its applicant's knowledge, because applicant subsequently signed several cheques. There is nothing that directly associated applicant with that company. Applicant's members only gave their signatures to the Manager Barclays Bank on the 3rd December, 1996 in a form that does not disclose the name of the company, because where the name should have been, a date was inserted.

Respondents were permitted and given a chance to close this gap by finding documents or even minutes in their pile of files before the court to show that Octa Diamonds (Pty) had anything to do with the parties before me, they failed. On the papers before me they seem to have irregularly operated a bank account along with the applicant. The name **Octa Diamonds (Pty)** did not conform with the provisions of the *Companies Act* 1967 if such a company was limited by shares. The account of **Octa Diamonds (Pty)** was not a bank account of a company limited by shares with the meaning of Section 10(1)(i) of the *Companies Act* of 1967 because it states in no uncertain terms that

> The name of a company (unless a licence has been granted under Section 23), must contain "limited" as the last word in the name and which, if the company be private company, must contain the term (**Proprietary**) preceding "Limited".

It would seem that the bank account which forms the basis of respondents' case that Octa Diamonds (Pty) Ltd existed was not a bank account of that company, because the company that had been envisaged by the parties to "KMWD1" was a company limited by shares. In the light of the other aforementioned irregularities, it becomes difficult to hold otherwise. I therefore hold that the bank account that was operated at the Stanbic Bank was not a bank account of Octa Diamonds (Pty) Ltd. In any event that company as already stated had nothing to do with the Kolo DiamondMine.

At paragraph 12·2 of applicant's replying affidavit, applicant says that, "it is first respondent who introduced the chairman and secretary of applicant to its bankers". In both the founding affidavit and the replying affidavit first respondent G Florio is referred to as "it" rather than a "he". I note further that the only document which was signed on behalf of applicant which is part of annexure "AF2$^{(a)}$" which is directed to the manager of Barclays Bank PLC dated 3/12/96 does not disclose the name of Octa Diamonds (Pty) Ltd. Where the name should have been, it is written 13/12/96. This tends to support applicant when it claims, first respondent introduced it to his bankers. The cheques seem to back up applicant's story. The cheques signed by S Monethi and P Mosebo do not show the name of Octa Diamonds (Pty) Ltd. See AF7, AF8, AF9, AF11, AF11(a).

3. Personal liability directors in respect of Sodi Properties CC

Once applicant sued first respondent personally, they were in effect putting

themselves under an obligation to prove that first respondent acted in a manner Sodi Properties CC could not have authorised. Alternatively they were implying that first respondent knowingly became a party to reckless and fraudulent carrying on of business of a close corporation and was therefore liable for the debts and obligations it incurred thereby -*Du Plessis NO v Osthuizen en 'n Ander* 1999(2) SA 191.

Our law has no closed corporations. Our courts follow South African case law time and again because our laws are often similar, if not identical. In this case this court cannot strictly speaking interpret South African law on close corporations because it should not be deemed to have any idea of foreign law - more especially when it has concepts of corporate personality that are unfamiliar. This court did not have the benefit of experts on South African law on close corporations. There are nevertheless principles of corporate law and legal personality that are common to both Lesotho and South Africa and which have become part of business law - it is these principles on which this court will rely. Our company or corporate law (like the South African one) was received and even later copied from English law - therefore time and again reference has to be made to English law in interpreting our law.

In *Fisheries Development Corporation of SA v Jorgensen & Another et al* 1980(4) SA 156 at 165F Margo J said:

> "To determine whether there was negligence in any conduct alleged, it is necessary to have regard to relevant aspects of a director's duty of

> care and skill. In England certain principles have emerged from decided cases on that duty. There has been a relative paucity of cases in South Africa, but the essential principles of this branch of company law are the same, and English cases provide valuable guidance."

In other words, the fact that first respondent claims he acted for a body corporate does not of itself exonerate him from personal liability. Everything depends on the way the mandate of the company was exercised, the allegations made against him and the facts of the case.

It will be observed that first respondent had entered into an agreement with applicant and its members to form a company known as Octa Diamonds (Pty) Ltd on behalf of Sodi Properties CC (the second respondent). In this company applicant would have a plus or minus fifty per cent of the shares while Sodi Properties CC would have the fifty per cent of the shares. It is common cause that such a company was never formed. Clause 1 of the agreement "KMWD1" shows an awareness that Octa Diamonds (Pty) Ltd was already in existence from the way it is drafted. Respondents in their papers show they were aware of this fact. The puzzling fact is why first respondent allowed the drafter of the agreement to make it a conditon precedent of the operation of the Kolo Diamond Mine that Octa Diamonds (Pty) Ltd would be formed. Why conceal the existence of Octa Diamonds (Pty) Ltd) of which he was aware in verbiage?

I cannot assume there was any fraudulent intent. Perhaps there was an

expectation that Octa Diamonds (Pty) Ltd was going to be acquired and its shares distributed as per "KMWD1". There is this alternative implied though not expressly stated. If that is probable, then unfortunately first respondent did not form Octa Diamonds (Pty) Ltd so that it could acquire the Kolo DiamondMine. It remained with its original owners.

Mr *Matooane* for first respondent had submitted that applicant and second respondent had actually acquired shares in Octa Diamonds (Pty) Ltd as per agreement "KMWD1". Once public documents in the office of the Registrar of Companies had been checked and that company was found to be still dormant, and Mr *Matooane* had checked his bundle of files - this argument was not persisted in. Indeed the respondents answering papers only made that bare allegation very vaguely. The Memorandum of Association of Octa Diamonds (Pty) Ltd which respondents had annexed to the papers showed that Octa Diamonds (Pty) Ltd still belonged to its founders. It had never changed its shareholders. It therefore remained clear that in respect of the shares of Octa Diamonds (Pty) Ltd there had never been an *animus transferendi dominii* in respect of its original shareholders Daniel Motaung and Thulo and an *animus accipiendi dominii* on the part of the members of applicant and second respondent. As Traverso J noted in *Watt v Sea Plant Products Ltd & others* 1999(4) SA 443 at page 448 for ownership of shares to change hands:

> "All that is therefore required is that the transferor must have the *Animus transferendi dominii* and the transferee the *animus accipiendi dominii*".

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In this case none of these occurred because Daniel Motaung and Simon Thulo have remained as sole shareholders and directors of Octa Diamonds (Pty) Ltd and there is nothing on record to show they intended or attempted to change the position in the company.

Mr *Matooane* was authorised by the court to (look through the heap of documents that respondents displayed) find any evidence of share certificates being issued in favour of either Sodi Properties CC or the members of applicant. He could find none, not even a minute book of Octa Diamonds (Pty) Ltd that involved the litigants before me.

The agreement "KMWD1" imposed the management side of the operations on Sodi Properties CC (the second respondent) represented by first respondent, because Sodi Properties CC was to be the financier. It is common cause that applicant delivered its mine to first respondent in terms of the agreement. It is also common cause that mining operations began under the management of first respondent and his daughter until they stopped for an unspecified reason. It now turns out that first respondent who claimed to represent Sodi Properties CC (the second respondent) never formed or caused to be formed Octa Diamonds (Pty) Ltd (or acquired it in terms of the agreement) to take ownership of the Kolo Diamond Mine from the applicant. The mine remains the property of applicant. If this has not happened, it is because first respondent or second

respondent failed to do its managerial duties.

It appears (from the affidavit of first respondent's daughter) that she was unaware that Octa Diamonds (Pty) Ltd never came into the picture - otherwise she would not have vigorously asserted that this application had no merit and asked for costs on an attorney and client scale. If she knew, then she was bluffing in the hope that the veil of incorporation would cover everything. Since she and first respondent were managing the operation, a lot more is expected of them than applicant and its members.

First respondent's position, in terms of "KMWD1" is summed up by Margo J as follows:

> "The extent of director's duty of care and skill depends to a considerable degree on the nature of the company's business and on any particular obligations assumed by or assigned to him.... In that regard there is a difference between the so-called full time or executive director, who participates in the day-to-day management of the company's affairs or of a portion thereof, and on a non-executive director who has not undertaken any special obligations. The latter is not bound to give continuous attention to the affairs of the company.... He is entitled to accept and rely on the judgment, information and advice of the management, unless there are reasons for querying such." —Vide *Fisheries Development Corporation v AWJ Investment* 1980(4) SA 156 at page 165G-166C.

In short, as first respondent undertook to manage the mining operation on behalf of Sodi Properties CC, if things went wrong he was a necessary party to join in legal proceedings, in case Sodi Properties CC is found not liable.

Applicant accuses first respondent of fraud, intimidation and oppression. These accusations are levelled at first respondent personally. It seems it was proper to do so and to join Sodi Properties CC as second respondent in case it associates itself (or authorised) the activities complained of. As it turned out first respondent never made Sodi Properties CC a party to the operations although first respondent had signed an agreement on behalf Sodi Properties CC that this would happen. He never took steps to see that Sodi Properties CC because a shareholder in Octa Diamonds (Pty) Ltd which should have become the owner of Kolo Diamond Mine. In short the second respondent has been properly nominally cited because of the interest it should have had but eventually did not have because first respondent personally failed to carry out the agreement (KMWD1").

The failure of first and second respondents, who were in management of the Kolo Diamond Mine, to register or acquire Octa Diamonds (Pty) Ltd to take over the mine and to receive money from the financier could be interpreted as a breach of contract. They did not fulfil the obligations of second respondent (Sodi Properties CC) under the contract. First respondent and his daughter ran the mine for their own personal benefit when they should have brought Octa Diamonds (Pty) Ltd into the mining operation to buy the diamond produce of the Mine. They are major shareholders of second respondent and have resolved to make second respondent liable for what they did. **Wessel**'s *Law of Contract in South Africa* by Roberts (1937) paragraph 1346 at page 450 say this about such conduct:

> "To interfere wrongfully with the fulfilment of the condition is considered in law as a breach of the contract..., the court must find the debtor wrongfully prevented the occurrence of the event, for otherwise no liability will attach."

This passage is extracted from a portion on contract where a promisor prevents the happening of a material event in a contract. Such a condition is deemed to have occurred. In the case before me, respondents prevented or neglected the formation or the take-over of Octa Diamonds (Pty) Ltd to the prejudice of applicant so that first respondent and some members of Sodi Properties CC could personally profit from a business and assets that should have belonged to Octa Diamonds (Pty) Ltd. Despite this breach of contract, respondents want to continue to benefit from the assets of applicant.

It does not appear that they were keen to have Octa Diamonds (Pty) Ltd to be in the picture. The impression that is given is that they only used corporate law as a shield when it suited first respondent. For an example when applicant wrote the letter "KMWD2" to him personally, a reply came from Messrs Du Preez, Liebetrau & Co attorneys to the following effect:

> "We act herein on behalf of Sodi Properties CC and the major shareholder of Octa diamonds (Pty) Limited who has a financial interest in the diamonds mine at Kolo."

Before this, neither Sodi Properties CC and Octa Diamaonds (Pty) Ltd seem to have

featured anywhere in the mining operations and transactions. Octa Diamonds (Pty) Ltd was a dormant company under its original shareholders. It had nothing to do with the parties in this case - it so remains to this day.

I have no hesitation in saying applicant was right in suing first respondent personally and joining Sodi Properties CC as an associate if it has a definite interest at all.

4. Respondents' account for business transaction and M1,128,186.30

On the sale of diamonds however, the brokers notes AF14 to AF16 show that first respondent bought diamonds of 270.27 carats for M18,000.00 from Kolo Diamonds Co - on 1st September 1997. There seems at this stage to be no transactions in the name of Octa Diamonds (Pty) Ltd although a bank account had been opened on 3rd December, 1996. Indeed there are no banking statements of an earlier date among the papers filed by respondent. It is said by the first respondent that he became ill. From the 29th September 1997, the diamond buyer becomes the daughter of first respondent. She issued brokers' notes in her own name of Antonella Natasia Florio licensed diamond dealer AF 15 a brokers note for 276·20 carats for the sum of M232,000.00 and AF 16 for 26·89 carats for M27,000.00. The brokers notes are issued first in favour of Octa Diamond Mining Ltd - see AF 15 and Octa Diamonds (Pty) Ltd - see AF16.

Although payment is acknowledged in the broker's notes, there is only one cheque that has been drawn and which corresponds to a broker's note. It is one cheque number EA6493 drawn by AN Florio which coincides with a definite brokers note. Cheque No EA6492 does not coincide with any brokers note.

It becomes difficult to work out the true picture from information received because as part of AF15 there is at page 81 of the record a short statement of account which shows that an amount of M23,200-00 was deducted as first respondent's salary and bonus. First respondent on the 29th September 1997 made out a cheque of M213,300-00 to Octa Diamond Mining Pty Ltd. This cheque and the other one I was advised was signed Antonella Florio the daughter of first respondent. I noted that there are only two cheques numbers EA6492 and EA6493 that were issued in favour of Octa Diamond Mining (Pty) Ltd and signed by Antonella Florio. They were issued on the 29th September 1997. Both these cheques (on their face) never went through any bank because they do not bear any bank rubber stamp. I do not appreciate the significance of this fact with the information that respondents supplied. In any event it is not for the court to deal with accounts, all it needs is a general picture.

In looking at annexures of respondents, it seems the mining operations yielded about 573·36 carats of diamonds which realised the sm of M490,300-00 (if we include the M213,300-00) which is not accompanied by a brokers note. The buyers of the diamond produce of the mine were first respondent and his daughter AN Florio. If we

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take a cash deposit of M25000.00 shown in the bank statement "AF3". The money that was made possibly from mining operations is M515,300-00. The expenditure shown is about M114,747-79. Clearly this is not the true picture and I do not think respondents expected this to be regarded as such, they expected applicant to go through the heap of files they brought before court. Even so no realistic attempt has been made to give the court a summary of the contents of a heap of those files. Mr *Matooane* said the annexures summarise those contents crisply - for purposes of determining this application, the court has to accept this.

The problem I had was that respondents have not shown a substantial investment which they made as financiers as they were expected to make in terms of "KMWD1". It seems as if even if they brought or hired no equipment, there is no evidence that they were using any equipment other than what they found on the mine site. It also puzzles me that G Florio (the first respondent) bought 270·27 carats of diamonds for M18,000-00 from Kolo Diamonds Co - see "AF14". While AN Florio (the daughter of first respondent) bought 276·20 carats of diamonds for M232,000-00 see AF15. Why this disparity in prices? I can only conclude that perhaps it is because of the difference in the value of diamonds. Even so AN Florio paid M27,000-00 for 26·89 carats of diamonds - See "AF16". It could in this case be because of differences in value on this occasion too. First respondent is accused of not accounting for four diamonds of 24,19,15 and 13 carats which make a total of 61 carats. This puzzling issue has not been addressed in respondents papers. It appears from the papers that there are no

complaints in respect of diamond transactions between applicant and first respondent's daughter. It would therefore have been a great help if first respondent had dealt with those complaints.

It is common cause that the mine is not operational because it made losses - at least that is what I was told in argument. I have noted that both first respondent and his daughter claim to have administered the mine. What surprises me is that they became diamond buyers contrary to the agreement "KMWD1". It was Octa Diamonds (Pty) Ltd that was supposed to be diamond buyers. Could it be because had Octa Diamonds (Pty) Ltd been operational (it could have been in the way) therefore, first respondent and his daughter could not have operated as diamond buyers? In terms of the agreement, Octa Diamonds (Pty) Ltd was expected to be a diamond buyer as well. Could it be that if Octa Diamonds (Pty) Ltd had taken over in terms of the contract, that might not have suited first respondent and his daughter? I have observed the disparities in their prices and have noted that perhaps diamonds that father and daughter bought differed in value. No attempt has been made to account for four diamonds of a total of 61 carats. This conflict of interest between directors (or people acting for the company) violates the fiduciary duty of first respondent or his daughter to Sodi Properties CC and Octa Diamonds (Pty) Ltd (which first respondent prevented from coming into being) and playing its role in terms of "KMWD1".

Against this background of a failed mining venture, first respondent claim

M1,128,186-30 compensation to surrender the interest and share of second respondent in that mining venture. No attempt has been made to justify this claim. Mr *Matooane* said first respondent and second respondent claim nothing. That is not correct because they do not deny that Exhibit "KMWD2" issued by first respondent which is part of paragraph 5 of the affidavit of applicant's deponent (Peter Mosebo). It is therefore clear that on the papers respondents want to profit even where there is an apparent loss from the diamond mining venture. Even assuming they had paid M1000.00 per month to the 12 members of applicant for the thirty six months that there was activity in the mines, nothing justifies their claim. The diamond sales and the amount of money realised could have covered the M360,000 plus the M1000,000-00 that the respondents deposited if they complied with the agreement. It is not very helpful for respondents not to have disclosed their investment in the mine. They also scrupulously avoided disclosing to applicant how the amount of M1,128,186.30 is arrived at.

5. Absence of the veil of incorporation

I have already shown above that (on the papers before me) as far as the operations of Kolo Diamond Mine are concerned, no company known as Octa diamonds (Pty) Ltd was incorporated in terms of the pre-incorporation agreement. I have also shown there is no evidence that shares were ever acquired in Octa Diamonds (Pty) Ltd or that such a company was taken over - and its shares distributed among members of applicant and Sodi Properties CC in proportions agreed between the parties. Octa Diamonds (Pty) Ltd remains a dormant company belonging to its original share holders

and directors as they were 17th May 1991. Furthermore none of those people have been shown to have any connection with the parties in this case and the operations of the Kolo Diamond Mine. Indeed up to the 1st September 1997 the first respondent was still buying diamonds from Kolo Diamond Co., there was in "AF14" no mention of Octa Diamonds (Pty) Ltd.

It was the daughter of applicant AN Florio who first bought diamonds on the 29th September 1997 from **Octa** Diamond Mining (Pty) Ltd and wrote two cheques EA 6492 and EA 6493 in favour of that company for M213,300-00 and 208,500-00 respectively dated 29th September 1997. On their face those cheques do not seem to have been deposited in any bank account. S Monethi and P Mosebo have signed a broker's note "AF 15". It is interesting that there is no company called Octa Diamond Mining (Pty) Ltd. First respondent himself had less than a month before been dealing with Kolo Diamonds Co - Why the bank statements of September and October 1997 were not included so that the court can know whether cheques EA6492 and EA6493 did in fact get into the account of Octa Diamond Mining (Pty) Ltd I do not know. I also do not know why the bank statement "AF3" was selected among other statements. The only diamond selling transaction that was done by AN Florio with Octa Diamonds (Pty) Ltd was in the brokers note "AF16" dated 29th June 1999. Even here too I have already shown that Octa Diamonds (Pty) Ltd was a dormant company which had nothing to do with the Kolo Diamond Mine and the people operating it. The use of that company's name was used by first respondent irregularly - if not fraudulently.

As **Cilliers & Bernade** *Company Law* 4th Edition at page 4 have said of a company:

> "The corporate entity as such lacks tangible substance. It enters into transactions by means of its directors, managers, employees and representatives, acting on its behalf."

Octa Diamonds (Pty) Ltd (as far as the Kolo Diamond Mine is concerned) has no directors, managers, employees and representatives that entered into any transactions on its behalf in respect of Kolo Diamond mines's operations because it is a dormant company that has nothing to do with this case. Its name has been used without any legal justification. **Cilliers & Bernade** take the matter further at page 105 and say:

> "Furthermore the memorandum and articles of association constitute a contract between the company and a member and between the members *inter se*...."

As already stated, Octa Diamonds (Pty) Ltd has no contract or connection with applicant and applicant's members, nor has it been shown (on the papers) to have any relation or connection with respondents.

Even assuming Octa Diamonds (Pty) Ltd had anything to do with the parties in this case, it should have authorised them by resolution to act on its behalf. It has not been shown in the papers to have authorised respondents or applicant to enter into a contract on its behalf. If there was a pre-incorporation agreement (where Octa

Diamonds (Pty) Ltd had not been formed) it had in terms of Section 33 of the *Companies Act* 1967 to be ratified by that company as soon as it came into existence.

Everything about this case shows there is no veil of incorporation to lift or pierce. Activities of applicant and respondents were never clothed with the veil of incorporation by forming a company or buying shares in an existing one. An attempt to create a bogey man of pretending that Octa Diamonds (Pty) Ltd became a company of respondents' and applicant failed. The only thing respondents ultimately proved was that there was such a company, but it did not have anything to do with any of the parties.

Dealing with the veil of incorporation **Gower** in *Company Law* 2nd Edition at page 183 said:

> "...it must be emphasised that the veil of incorporation never means that the internal affairs of the company are completely concealed from view. On the contrary, the legislature has always made it an essential condition of the recognition of corporate personality that it should be accompanied by the widest publicity."

While I have felt it would be unfair to straight away hold that the entire conduct of respondents was clearly fraudulent—I have no hesitation to hold that their conduct was improper and that some of their activities were fraudulent. **Gower** in *Company Law (supra)* at pages 203 and 204 of improper or fraudulent conduct:

> "Thus the courts will not allow company promoters to conceal the profits which they are making by operating through dummy companies.... But perhaps the best illustration is afforded by *Gilford Motor Co v Horne* [1933] Ch 935 CA.... The company was described in the judgments as 'a device, a stratagem' and as a 'mere cloak or sham'.... In effect, the court treated it as Horne's **alter ego**."

The motives of respondents of interposing **Octa Diamonds (Pty) Ltd** which they have-not even brought within their ambit of operations was undoubtedly improper. I will not go into their motives in this application. That would require more evidence, what is clear is that they rendered the creation of a joint company with applicant abortive. The veil of incorporation was only a lot of noise, it did not exist, respondents and applicants were unclothed, all the words in affidavits and argument achieved was attempting to blow dust into my eyes.

In *Latigan & Another NNO v Boyes & Another* 1980(4) SA 191T Le Roux J at 201 H said:

> "I have no doubt that our courts would brush aside the veil of corporate identity time and again where there is fraudulent use of the fiction of legal personality."

I do not have the problem of lifting or piercing the veil in respect of **Octa Diamonds (Pty) Ltd** (because its veil, even if respondent had it in their possession) they forgot or omitted to clothe their operations in the Kolo Diamond Mine with it.

First and second respondents have made no attempt to show that they had made

substantial investments in the Kolo Diamond Mine to help me to determine the balance of convenience. They have showed on the documents annexed to court papers that the mine paid its way, and that when it could not they stopped operation.

It is clear therefore that the Kolo Diamond Mine remains the property of applicant. If indeed respondents had Octa Diamonds (Pty) Ltd, in their possession, their failure to give applicants shares in it was a flagrant breach of the agreement, and applicants were entitled to terminate the mining operations as they did. The simple reason being that the mining operations were not being carried out in terms of the agreement "KMWD1". If however respondents did not have a colour of right to the existing Octa Diamonds (Pty) Ltd, their agreement with applicant (especially because they knew of its existence) strikes me as fraudulent and *mala fide*. I will at best find respondents to have been capably remissive in not creating the company machinery envisaged in the agreement, consequently they cannot claim any rights to Kolo Diamond Mine.

6. Whether applicant has made a case for an interdict

It was Mr *Matooane*'s case that applicant has not made a case for an interdict. He did no doubt that an interdict should be granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs, but his argument was that not all three requisites of interdict were present. See **Prest** *The Law and Practice of Interdicts* page 47.

He argued that applicant had no clear right, all rights to the Kolo Diamond Mine now belonged to Octa Diamonds (Pty) Ltd. We have seen that Octa Diamonds (Pty) Ltd has nothing to do with the mine. First respondent who must have known that company had been dormant took no action to obtain it or take it over so that members of applicant and second respondent could have shares in it.

Mr *Matooane* also argued that there was no act of interference because the mine was not operational because of the losses it had made and first respondent was not going there. There was therefore no invasion of applicant's right to the mine. I had difficulty with the argument. If first and second respondents were claiming the mine belonged to Octa Diamonds (Pty) Ltd a company in which they have shares and their interest in the company should be bought for M1,128,186.30 and no other financier could be brought into the mine, they were interfering with the rights of applicant to protect an interest they claimed to have. If furthermore the respondents in "KMWD2" were saying to applicant:

> "You are hereby informed that you have no right to enter into an agreement in this regard for the disposal of the machinery, mining and prospective rights, the accumulated diamond bearing soil or the stock pile of washed aggregate or other assets to a third party.... These assets do not belong to you.... Action will immediately be instituted against the third parties from Pretoria from interfering with the business affairs

of Octa diamonds...."

I think this passage clearly shows interference, especially when they knew that they were not shareholders of Octa Diamonds (Pty) Ltd, and that Octa Diamonds (Pty) Ltd (Daniel Motaung and Simon Thulo were the only shareholders of that company. Octa Diamonds (Pty) Ltd had no right and interest to Kolo Diamond Mine.

Prest in *The Law and Practice of Interdicts* page 44 says,

> "In *Setlogelo v Setlogelo* the words 'injury actually committed or reasonably apprehended' are used. The word 'injury' is not an exact or even an appropriate equivalent for *eene gepleegde feiteligkheid*, and authorities clearly use the word meaning an act of interference with, or an invasion of the applicant's right and resultant prejudice."

It seems therefore interference and injury collectively capture what is required to be shown for an interdict to be granted. Respondents actually threatened the people applicant was going to bring from Pretoria in the following words on page 2 of "KMWD2" "these people are foreigners to the jurisdiction of the courts of Lesotho and we will apply for a warrant of their arrest as soon as they enter the Kingdom of Lesotho". I cannot therefore agree that respondents were not interfering with applicant's rights over Kolo Diamond Mine.

It was not strongly argued that there was an alternate remedy to the respondents' action of sitting over the Kolo Diamond Mine like a dog in a manger and violating

applicant's right to bring other financiers to help them operate the mine - which respondents were no more operating. They were not operating the mine and by menace and false pretences pretending that the Kolo Diamond Mine belonged to Octa Diamonds (Pty) Ltd when they should have known it did not. Applicant were undoubtedly suffering prejudice in not being able to use the diamond mine as they saw fit. Respondents preferred a stalemate unless they were given over a million Maloti which they did not even attempt to substantiate even partially to show where the balance of convenience lies.

ORDER OF COURT

In the light of the aforegoing, it seems to me that the respondents have other remedies, if indeed they have invested money in the mine of applicant. They have so far avoided showing that they did, or that they kept their part of the "bargain" by investing money in the mine. They have chosen to block or threaten to block applicant's use of the mine, when they have failed for a year to operate the mine. The papers as they stand reveal that first respondent and his daughter AN Florio completely disregarded the agreement "KMWD1", avoided or neglected to form Octa Diamonds (Pty) Ltd so that Sodi Properties CC and applicant's members could have shares in it. What they did was to mine diamonds from the Kolo Diamond Mine and buy them for themselves as independent diamond buyers, see "AF14", "AF15" and "AF16". First respondent left applicant in full ownership and legal possession of the mine and neglected their obligations to Sodi Properties CC and for that they are legally liable to Sodi Properties for their breach of their fiduciary duty to it. As things stand, Sodi Properties CC have no right to the

diamond mine that should have belonged to it, had first respondent and his daughter not elected to concentrate on operating the mine and buying diamonds from the Kolo Diamond Mine for themselves and use their own diamond dealer licences for their sole benefit.

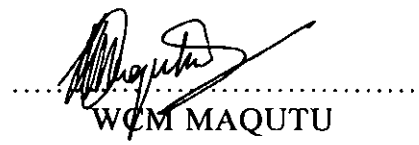
It seems to me that I do not have to dismiss applicant's prayer that first respondent should substantiate his claim of M1,128,186.30, account for 61 carats of diamonds and return a Mercedez truck and excavator. The reason this prayer was made was to compel first respondent to supply information that had long been asked for - which respondent was refusing to supply to enable a settlement to be reached if possible. Respondent by withholding this information from the court, have created a situation in which the court can grant the main interdict without feeling that respondents will be significantly prejudiced - if at all. The view I take is that granting the main interdict will suffice. It is up to respondents to claim what might be due to them in other proceedings (if they feel they have a case) from their participation in Kolo Diamond Mine.

It seems to me that first respondent in effect only made the second respondent (Sodi Properties CC) into a mere associate rather than a shareholder in a company that was supposed to own the mine that belongs to applicant. From what is on the papers Sodi Properties CC associates itself with the actions of first respondent, consequently it cannot escape liability. I say this well aware that applicant's papers are far from perfect.

IT IS THEREFORE ORDERED THAT:

(a) First and second respondents together with their associates be and are hereby restrained from setting foot at Kolo Diamond Mine or its precincts, which mine is under the administration of applicant the Kolo Mineworkers Diamond Cooperative in the Kolo area.

(b) First and second respondents are directed to pay the costs of this application.



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WCM MAQUTU
JUDGE

For applicant : Mr TJ *Moruthane*
For 1st respondent : Mr *Matooane*
For 2nd respondent : Mr SC *Buys*