IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 69 OF 2011

In the matter between:

TORO DIAMONDS LESOTHO (PTY) LTD	**1ST APPELLANT**
BATLA MINERALS SA	**2ND APPELLANT**

AND

NAMAKWA DIAMONDS LIMITED	**1ST RESPONDENT**
STORM MOUNTAIN DIAMONDS (PTY) LTD	**2ND RESPONDENT**
AFRICAN ALLIANCE LESOTHO LIMITED	**3RD RESPONDENT**
THE GOVERNMENT OF LESOTHO	**4TH RESPONDENT**
THE ATTORNEY-GENERAL OF LESOTHO	**5TH RESPONDENT**

CORAM : SMALBERGER, JA
SCOTT, JA
HURT, JA

HEARD : 12 OCTOBER 2012
DELIVERED : 19 OCTOBER 2012

SUMMARY

Interpretation of contract – extrinsic evidence of background and surrounding circumstances admissible – no distinction between the two – evidence of subsequent events admissible in absence of ambiguity if evidence led without objection.

JUDGMENT

SCOTT, JA

[1] The appellants instituted motion proceedings in the Commercial Division of the High Court in which they sought an order declaring that the first appellant and the first respondent were jointly entitled to all the shares in the second respondent, which were then registered in the name of the first respondent, subject to the rights of Lesotho citizens to subscribe to 12,5% of the shares, and an order that pending the subscription by the Lesotho citizens to their allocated shares, all the shares in the second respondent then registered in the name of the first respondent were to be registered in the names of the first appellant and the first respondent jointly.

[2] The first appellant is Toro Diamonds Lesotho (Pty) Ltd, a company incorporated in Lesotho and a subsidiary of the second appellant, Batla Minerals SA, which is a French company. The first respondent is Namakwa Diamonds Ltd. It is a public company incorporated in Bermuda. The second respondent was formed in order to serve as a vehicle for the acquisition and exploitation of the exploration and mining rights in and to a diamond concession at Kao in the Butha-Buthe district. Its name, when incorporated, was Namakwa Batla Diamonds Lesotho (Pty) Ltd. The name was subsequently changed to Storm Mountain Diamonds (Pty) Ltd. The third respondent is African Alliance Lesotho Ltd, an affiliate of the first respondent, but no relief was sought against it. The fourth respondent is the Government of Lesotho and the fifth respondent is the Attorney-General. To avoid confusion I shall refer to the first appellant simply as "Toro" and to the

second appellant as “Batla”. When referring to them both I shall refer to them as “the appellants”. I shall refer to the first respondent as “Namakwa” and the second respondent as “Storm”.

[3] By agreement between the parties the matter was referred to trial. Three witnesses were called. They were all cross-examined or re-examined at great length. In addition, a vast number of documents were handed in, many of which were duplicates or otherwise wholly unnecessary. In the result the appeal record comprised no fewer than 3082 pages bound into 21 volumes. The flooding of the record with unnecessary paper not only adds to the burden placed on the court but increases the already burgeoning cost of litigation. This practice – if it is a practice – is to be deprecated.

[4] The hearing commenced on 14 November 2011 and was completed on 21 November 2011. On 30 November 2011, Lyons AJ, with commendable promptitude given the bulk of the record, delivered judgment in which he dismissed the appellants' claims with costs.

[5] It is common cause that the Government of Lesotho has taken up and is the registered owner of 25% of the shares in Storm. It is also common cause that Lesotho citizens are entitled to subscribe to 12.5% of the shares in Storm. The dispute between the parties relates to the balance of 62.5% of the shares. The appellants contend that in terms of a written agreement headed "*Confidentiality Agreement and Memorandum of Understanding*" (to which I shall refer as "MOU2") signed by Toro on 18 November 2009 and by Namakwa on 19 November 2009, the balance of the shares in Storm are to

be registered in the names of Namakwa and Storm jointly. This is disputed by Namakwa. It contends that MOU2 did not determine the respective shareholding of Namakwa and Toro in Storm. It contends that no agreement was reached on this issue and the appellants are not entitled to the relief claimed. The Government of Lesotho and the Attorney-General make common cause with Namakwa. Before considering the various contentions advanced on behalf of the parties as to the interpretation of MOU2, it is necessary first to trace briefly the principal events giving rise to the dispute. I shall return to and consider some of these in greater detail later in this judgment.

[6] Some time in 2008 a company called Kao Diamond Mines (Pty) Ltd to which the Kao diamond mining concession had been granted found itself in financial difficulties and subsequently went into liquidation. Both

Batla and Namakwa were interested in acquiring the mining concession and lease in order to develop and exploit the mine. Mr. Jean Nel, a financial director of Namakwa, met with representatives of the Lesotho Government who suggested that Namakwa collaborate with Batla whose subsidiary, Alluvial Ventures (Pty) Ltd, was then conducting a successful diamond mining operation elsewhere in Lesotho. This led to a meeting between representatives of Batla and Namakwa on 30 April 2009 at which there were preliminary discussions regarding a possible collaboration between the two companies. Further discussions followed at a meeting on 10 June 2009. On 30 June 2009 there was a meeting at a coffee shop in Bloemfontein. It was attended by Nel on behalf of Namakwa and Mr. Michael Reynolds and Mr. Courtenay Cornelissen on behalf of Batla. Reynolds, who later became a director of Toro, was the deponent to the

appellants' founding affidavit and the only witness to give oral evidence on their behalf. His evidence, both in his affidavit and at the trial, was that at the meeting on 30 June an oral joint venture agreement was concluded between Batla and Namakwa in terms of which the parties would be equal partners and would make equal financial contributions for the acquisition of the mining lease and the subsequent mining operation. This was denied by Nel who gave oral evidence on behalf of Namakwa. He testified that while a joint venture was envisaged, the meeting on 30 June and the previous meetings involved discussions as to how the parties would structure their respective participations in the venture. He said that at that stage what was agreed was no more than that they would cooperate in obtaining the transfer or reissue of the mining lease.

[7] Lyons AJ accepted the evidence of Nel as to what transpired at the meeting and rejected that of Reynolds. The learned judge described Nel as being direct and unmoved in cross-examination. He said of Reynolds that his responses in cross-examination "tended towards being evasive, guarded and long winded" and that "he appeared to be uneasy in his demeanor . . . as if he was holding something back". Having read the record of the evidence I can find no reason to fault this finding. It seems to me in any event to be most improbable that a final and binding joint venture agreement would have been concluded at this meeting. I say this not only in the light of subsequent events but also having regard to the number of issues which had not yet been discussed or resolved but which parties entering into a joint venture of this nature would have required to be finalized before doing so. However, counsel for the appellants did not challenge the correctness

of the Court *a quo*'s finding on this issue and for the moment nothing more need be said about it.

[8] A further meeting was held on 10 August 2009. By this time the capital expenditure required was estimated at about M200 million. Batla had previously indicated that it had M50 million available and that it would have to source funding for the remainder of its portion of the capital required. Thereafter there was an exchange of e-mails in which the contribution to capital of each party was discussed as was the consequence of a party not being able to contribute its share. By 25 August 2009 the estimate of the capital requirement had increased to about M300 million.

[9] In the meantime Storm had been incorporated. Namakwa caused 999 of its shares to be registered in its

own name and one share in the name of African Alliance (third respondent). On 20 August 2009 the application for a mining lease was lodged with the Commissioner of Mines. Storm was stated to be the applicant. Its name was then still Namakwa Batla Diamonds Lesotho (Pty) Ltd. The Government of Lesotho had previously indicated that it would take up 20 to 25% of the shares and that shares would also have to be available for subscription by citizens of Lesotho. Clause 4 of the application declared that the beneficial owners of Storm were to be: the Government of Lesotho – 20-25% (subject to review), Lesotho citizens – 5% and "Namakwa Diamonds Limited and Batla Mining – 70%-75% (subject of review)". Clause 11, in turn, provided that Namakwa and Batla "will assume responsibility for the financing and liabilities associated with the lease *pro rata* to their shareholding in the licence holder", ie Storm.

[10] On 28 August 2009 Batla caused Toro to be incorporated. It was accepted by Namakwa that Toro would take the place of Batla in the negotiations.

[11] On 30 August 2009 there was yet another meeting. By this time the estimated capital requirement had risen to M400 million, which according to Namakwa would be required at the outset. The appellants could raise only M50 million. In the course of discussions at this meeting and a subsequent meeting on 2 September 2009 it was agreed that Namakwa would contribute M350 million and Toro M50 million, Namakwa would have 50,1% of the shares in Storm and Toro's shareholding would be limited to 19,9%, and that certain other terms would be included in the contract which Toro regarded as advantageous. These were provisions that Toro would be the exclusive subcontractor to Storm for conducting the mining

operation in weathered kimberlite and alluvial deposits at a price of USD1 per ton (Namakwa would be appointed to conduct mining operations in the quarry at Kao) and Toro and Namakwa would each receive a monthly management fee of not less than M100 000. A draft was thereafter prepared which incorporated the terms referred to above. It was headed "Confidentiality Agreement and Memorandum of Understanding" (MOU1) and was signed by Toro and Namakwa on 10 September 2009. MOU1 was, of course, premised on the assumption that there would be between 70% and 75% of the shares in Storm available for division between Toro and Namakwa, the other 25% or 30% being taken up by the Lesotho Government and local citizens.

[12] In early November 2009 the Lesotho Government indicated that 12,5% of the shares in Storm was to be

made available to citizen subscribers (and not 5% as previously envisaged). This meant that the shares available to Toro and Namakwa would be reduced to 62,5% or 67,5% depending on whether the Government took up 20% or 25% of the shareholding. MOU1 could therefore not be implemented as the assumption on which it was based – that not less than 70% of the shares would be available – had failed, or more correctly stated, there was a non-fulfilment of a resolutive condition that there would be no less than 70% of the shares available, see **Van Reenen Steel (Pty) Ltd v Smith NO and Another** 2002 (4) SA 264 (SCA). In the result MOU1 was of no force or effect.

[13] I interpose that in the meantime the Commissioner of Mines wrote to Storm on 31 August 2009 requesting to know "how a company can be a subsidiary of two companies, Namakwa Diamonds Ltd and Batla Minerals".

This was a reference to clause 4 of the Mining application referred to in para 9 above. On 8 September a revised application was sent to the Commissioner in which it was specified that Namakwa would own 50,1% of the equity in Storm and Toro 19,9%, being the division agreed upon at the meetings on 30 August and 2 September.

[14] Namakwa was adamant that it had to be the majority shareholder in Storm. This meant that if the Government took up 25% of the shares (as it subsequently did) Toro's shareholding would be reduced to marginally less than 12,5%. Toro was not agreeable to this. Toro proposed the establishment of a holding company in which Namakwa would have the controlling interest and which would hold the available shares but nothing came of this. There was however some urgency in producing an agreement. The liquidators of Kao Diamond Mines required an agreement

providing for the payment of creditors to submit to the Ministry of Natural Resources in order to obtain the transfer of the mining lease. (The transfer was approved on 10 December 2009). It appears that as early as 6 November 2009 a first draft of what ultimately became MOU2 was produced. The final version was signed by Toro on 18 November and by Namakwa on 19 November 2009. There were also certain other parties to the agreement (creditors and employees of Storm) who signed shortly thereafter. It is the interpretation of this agreement that became the principal issue in the appeal.

[15] Before turning to MOU2, it is necessary to say something about the admissibility of extrinsic evidence when interpreting a contract. It has long since been accepted that it is always permissible to have regard to the so-called "background circumstances". In **Prenn v**

Simmonds (1971) 3 All ER 237 (HL) at 239j; Lord Wilberforce observed:

> "The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. . . . We must enquire beyond the language and see what the circumstances were with reference to which words were used, and the object, appearing from those circumstances, which the person using them had in view."

In **Reardon Smith Line v Hansen – Tangen** (1976) 3 All ER 570 (HL) at 524d the same judge said:

> "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

In South Africa, Rumpff CJ, in **Swart v Cape Fabrix (Pty) Ltd** 1979 (1) SA 195 (A) at 202 B-C, put the position thus:-

> "What must naturally be accepted is that, when the meaning of words in a contract [has] to be determined, they cannot possibly be cut out and pasted on a clean sheet of paper and then considered with a view to then determining the meaning thereof. It is self-evident that a person must look at the words used having regard to the nature and purpose of the contract, and also at the context of the words in the contract as a whole". (The translation is that contained in the head-note).

At first blush the admissibility of extrinsic evidence for the purpose referred to in the passages quoted above may appear to be contrary to the "golden rule" of interpretation which is to ascertain the intention of the parties from the words used in the document. But the rationale of the exception to the rule – if indeed it is an exception – is that, as stated by Jansen JA in **Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd** 1980 (1) SA 796 (A) at 804 E-F, "the meaning of words, phrases and sentences may vary according to, or be qualified by, the factual context in which they are used."

[16] In **Delmas Milling Co Ltd v Du Plessis** 1955 (3) SA 447 (A) it was held that it is only if an ambiguity, whether latent or otherwise, cannot be cleared up with sufficient certainty by studying the language of the written contract may recourse be had to "surrounding circumstances". See

also **Richter v Bloemfontein Town Council** 1922 AD 57 at 70. Surrounding circumstances were said in the Delmas case to be (at 454 G) "matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements)". As the "genesis of the transaction", "the background context," "the nature and purpose of the contract" would be matters presumably present to the minds of the parties when contracting, the distinction between "background" and "surrounding" circumstances would appear to be without substance. This was acknowledged in **KPMG Chartered Accountants (SA) v Securefin Ltd** 2009 (4) 399 (SCA) at 409 J – 410 B where it was said:

> "The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice."

[17] An abiding problem is to determine where to draw the line. The modern tendency is to allow a more liberal approach to the admissibility of extrinsic evidence. But what would seem clear, at least for the present, is that evidence of actual negotiations or the parties' intentions will be admitted only in exceptional cases where recourse to surrounding and background circumstances fails to clear up an ambiguity.

[18] It has consistently been held that in the case of ambiguity, evidence may be admitted of the subsequent conduct of the parties to show how they themselves construed their contract. See **MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd** 1980 (3) SA 1 (A) at 12 F-H and the cases cited thereat. See also **Coopers & Lybrand v Bryant**1995 (3) SA 761 (A) at 768 C-E. More recently, however, in **Telcordia Technologies Inc v Telkom SA Ltd**

2007 (3) SA 266 (SCA) at para 91 it was accepted that evidence of subsequent conduct is admissible, even where the agreement is on its face unambiguous, if the parties by consent lead such evidence. In the present case such evidence was either adduced or elicited by both Namakwa and the appellants without objection. This evidence is accordingly admissible for the purpose of interpreting MOU2.

[19] It is convenient at this stage to dispose of a further issue that was raised with regard to the interpretation of MOU2. Clause 16 provides that the terms and conditions of the agreement, save for 17 specified clauses, were suspended pending the fulfillment of certain conditions. It is common cause that the conditions were not fulfilled. Counsel for Namakwa argued that when interpreting the surviving clauses no regard may be had to the clauses that

failed. In support of this contention reliance was placed on the decision in **Pritchard Properties (Pty) Ltd v Koulis** 1986 (2) SA 1 (A). In this case the court was called upon to consider whether regard could be had to the fact that the parties had deleted the word "latter" in one of the clauses and initialled the deletion. It was held that it could not, as "[the parties'] initialling of the deletion indicated unequivocally that the word deleted was to form no part of [the] contract" (at 9I-J). The present case is distinguishable. The object is to ascertain the intention of the parties at the time it was concluded. For this purpose regard must be had to the contract as a whole. At the time the parties entered into MOU2 they would have anticipated that the conditions would be fulfilled. There is accordingly no reason to disregard the terms that failed to come into effect by reason of the non-fulfilment of the suspensive condition.

[20] Against this background, I turn to the terms of MOU2. The apparent purpose of the agreement is stated in the recital, namely *"to conclude a transaction whereby [Storm] will negotiate a Mining Agreement with the Ministry to arrange for the conduct of Business Activities on the Property"*. I mention this to indicate that the stated object was not to determine the respective shareholding which Namakwa and Toro would have in Storm. The clause that was central to the debate in this Court was clause 2.4. It, too, forms part of the recital. It reads –

> "2.4 And whereas [Storm] has been formed wherein between 62.5% (sixty two point five percent) and 67.5% (sixty seven point five percent) of the shares will be issued to Namakwa and Toro Diamonds, between 20% (twenty percent) and 25% (twenty five percent) of the shares will be issued to the Government, and 12.5% (twelve point five percent) of the shares will be issued to the Lesotho Citizen Subscribers."

Reference was also made in argument, in particular, to clauses 3.1, 3.2, 4.1 and 4.4.

[21] Clause 3.1 reiterates the same allocation referred to in clause 2.4. However, it contemplates a further shareholders' agreement. It reads –

> "3.1 The Parties will start negotiating on the terms and conditions of the shareholders agreement to govern their relationship as members of [Storm] within 14 (fourteen) days after date of transfer of the Mining Lease to [Storm]. The issued share capital of [Storm] will be held as to –
>
> | | |
> |---|---|
> | 3.1.1 Namakwa and Toro Diamonds | between 62.5% and 67.5% |
> | 3.1.2 The Government | between 20% and 25% |
> | 3.1.3 The Lesotho Citizen subscribers | 12.5%" |

Clause 3.2 makes provision for the allocation of any shares not taken up by the Government to Namakwa and Toro. –

> "3.2 In the event that the Government takes up less than 25% (twenty five percent) of the shares, the shares that the Government does not take up will be divided proportionately between Namakwa and Toro Diamonds in accordance with their respective shareholding."

Clause 4.1 deals with funding –

> "4.1 The business activities, any capital expenditure and working capital will be funded by the members of [Storm] in accordance with their participation ratios, save that the Government shall be required to contribute funds towards the mining activities in terms of the terms and conditions of the Mining Lease and the Mining Agreement."

Clause 4.2 makes it clear that the obligation to provide funding extended to members who were citizen subscribers.

[22] Clause 4.4 provides for what is to happen in the event of a member being unable to comply with its funding obligations as detailed in clause 4.1. It reads –

> "4.4 In the event that the business activities [are] not or cannot be funded as mentioned in clauses 4.1 and 4.2 and/or not sufficiently funded, the portion of funding that is not contributed by the lacking Party may be contributed by the other Parties. The shareholding of the Party which did not contribute its share of the funding will be diluted in proportion to its non-contribution. The funding will take place by way of a rights offer where the non contributing Parties' rights will be taken up by the contributing Parties. The dilution provision will not apply to the Government's share."

[23] It was contended on behalf of the appellants that the clear and unambiguous wording of clause 2.4 is to the effect that Toro and Namakwa are a joint single shareholder of 62.5% of the issued shares in Storm. Such a

construction, it was argued, is supported by a reading of clauses 3.1 and clause 4 in which the parties' respective obligations as shareholders in terms of funding are spelt out, whilst also providing for a dilution mechanism in the event of one of the contributing parties failing to make its contribution.

[24] On behalf of the respondents it was contended that the ordinary meaning of the words used in clause 2.4 is simply that the remaining shares – after taking into account those to be issued to the government and the citizen subscribers – are to be issued to Namakwa and Toro in a proportion to be established. It was pointed out that the clause does not say that the shares are to be issued to Namakwa and Toro "jointly" and it was submitted that there is nothing in clause 2.4 or any other clause in the document to justify the implication of the word "jointly".

[25] This was the view of Lyons AJ who expressed himself as follows:

> *"[43] It is well settled that the first approach to be taken is to look at the words used and interpret them as to the natural useage of those words. As I read clause 2.4 it means that of the 100% of shares in Storm (formerly Namakwa Batla Diamonds) 12.5% is to go to the Lesotho citizens, 25% (as it transpired) is to be issued to Government and the balance (62.5% as it turned out) [is] simply to be issued to Namakwa and Toro. There are no quantifying (or qualifying) words such as jointly or evenly or as to a defined percentage.*
>
> *[44] As this is the case, it cannot be upheld that there is to be an even/joint dispensing of the shares. Nor can any particular ratio be used to determine the respective shareholdings. Given the absence of the usual qualifying/quantifying words, the natural and proper conclusion is that, at the time of signing MOU2, Namakwa and Toro had not agreed as to the exact percentage of their respective holdings."*

[26] Support for this interpretation of clause 2.4 is to be found in clause 3.2, quoted above. This clause, it will be recalled, makes provision for the additional shares that would become available in the event of the Government taking up less than 25% of the shares to be "divided" between Namakwa and Toro. But such a division is wholly inconsistent with a construction of clause 2.4 to mean that Namakwa and Toro were to hold the balance of the available shares as a joint single shareholder. Had this been the case there would be no need to "divide" the additional shares. Clause 3.2 is similarly inconsistent with a construction of clause 2.4 to mean that the shareholding of Namakwa and Toro was to be equal. If this had been intended the clause would simply have read that the shares were to be divided equally and not "divided proportionally between Namakwa and Toro Diamonds in accordance with their respective shareholding".

[27] Counsel for the appellants sought to avoid the obvious implication of the clause by contending, as I understood the argument, that while the agreement made provision for Namakwa and Toro to be a joint single shareholder in respect of the balance of the available issued shares in Storm, it was contemplated that there would be a dilution of Toro's shareholding in terms of clause 4.4 by reason of its inability to provide its share of the funding required and that clause 3.2 made provision for the situation that would arise in that event. Such a construction of clause 3.2 strikes me as contrived. There is nothing in the provisions of the agreement to which counsel referred to support this far-reaching interpretation of clause 3.2 or for that matter the interpretation they would place on clause 2.4. Clause 4.1 simply provides that funding by the members of Storm will be "in accordance with their participation ratios" while clause 4.4 provides that the shareholding of any member,

including a citizen shareholder, who does not provide his or its share of the funding "will be diluted in proportion to its non-contribution". The second sentence of clause 3.1 does no more than reiterate the allocation referred to in clause 2.4. The first sentence, which refers to a future negotiation of a "shareholder agreement", is admittedly somewhat ambiguous, but as I shall show, the parties did indeed begin negotiations with regard to their respective shareholding in Storm almost immediately after signing MOU2.

[28] In the result, I can find no reason to fault the interpretation placed on clause 2.4 by the court *a quo*. But if there is doubt, it is removed by having regard both to the circumstances that prevailed prior to the signing of MOU2 and to the subsequent conduct of the parties which explains their understanding of it.

[29] I begin with the prior events. As previously indicated, Reynolds was the only witness who testified on behalf of the appellants. Both in his founding affidavit and in his oral evidence he testified that on 30 June 2009 Namakwa and Batla entered into an oral joint venture agreement in terms of which they would be equal partners and would make an equal contribution to the project. (This evidence was rejected by the court *a quo*, and rightly so.) Reynolds contended that once MOU1 failed, Namakwa and Toro, in terms of MOU2, reverted to a joint venture in terms of which they were equal partners with an obligation to make an equal contribution. However, in his founding affidavit he made it clear that the primary reason for the earlier agreement that Toro reduce its shareholding to 19.9% of the shares in Storm was because of Toro's inability to contribute more than M50 million. It is necessary to quote

the passages in Reynolds' affidavit dealing with the meetings on 30 August and 2 September 2009:

> *"72 Applicants [Batla and Toro] did not have more than R50 million available (partly in cash and partly in equipment), at this time and informed the first respondent [Namakwa] accordingly.*
>
> *73 Applicants then suggested that, since First Respondent would be contributing R350 million in funding, and the First Applicant [Toro] R50 million, the First Applicant would in principle be prepared to agree to the First Respondent having shareholders' control with 50.1% of the shares in the Second Respondent [Storm] and that the First Applicant's prospective shareholding in the Second Respondent be diluted to 19.9%. The First Respondent was agreeable to this proposal."*

Paragraph 74 deals with the assumption that 70% of the shares in Storm would have been available and the narrative then continues –

"75 On the strength of these assumptions, it was agreed at the meeting that the available shareholding in the Second Respondent would no longer be held by the First Applicant and the First Respondent in equal shares, but that the First Respondent would obtain 50.1% of the shareholding in the Second Respondent, and the First Applicant 19.9%.

76 In turn, it was agreed that the First Respondent would be obliged to contribute R350 million, whilst the First Applicant would only contribute R50 million to the capital funding of the project.

77 Since a dilution of the First Applicant's shareholding in the Second Respondent would require that minority protection be provided, the parties on the 2nd September 2009 conducted further negotiations in Stellenbosch to derive the basis upon which such dilution was to occur . . . . A principal issue relating to the said dilution involved the respective roles of First Applicant and First Respondent as prospective subcontractors of Second Respondent as well as the limitation of the proposed majority shareholder's ability to extract nett profit through the levying of monthly management fees."

[30] In his evidence Reynolds sought to play down the lack of funds as the reason for Toro agreeing to the dilution of its shareholding in Storm and contended that the advantageous terms (referred to in para 11 above) were the real motivating factor for doing so. It is quite clear from the passages quoted above, however, that it was Toro's inability to contribute more than R50 million that precipitated the agreement that its shareholding in Storm be reduced to 19.9%. This was also the evidence of Mr. Japie van Zyl who attended both meetings on behalf of Namakwa. There is nothing in the evidence, or for that matter in MOU2, to suggest that between 10 September 2009 when Toro signed MOU1 and 18 November 2009 when it signed MOU2 that its fortunes had so changed that by the latter date it would have been able to contribute a sum in the region of M200 million, if not more. Had there been such a change in Toro's ability to raise this amount there would undoubtedly

have been evidence to that effect and evidence that Namakwa was informed accordingly, whether by e-mail or at a meeting. By 18 November 2009 Namakwa had already invested many millions of Maluti in the project and had committed itself to funding more. Toro had contributed nothing. (It has still contributed nothing.) In these circumstances it is highly unlikely that Namakwa would have agreed to an equal division of the available shares in Storm or that they be held jointly, given that Toro was unable to contribute its concomitant share of the funding. This all points to the interpretation of clause 2.4 of MOU2 placed upon it by Namakwa.

[31] Counsel for the appellants sought to refute the inference arising from Toro's admitted inability to contribute more than M50 million towards the funding of the project on the basis that its shareholding would on that

account be "diluted" in terms of clause 4.4 of MOU2. There is no merit in this argument. It would make no sense for Namakwa and Toro to enter into an agreement in terms of which they would be joint or equal shareholders in Storm while at the same time knowing full well that they would not be joint or equal shareholders by reason of Toro's inability to contribute its equal share of the funding required. Given Toro's lack of funds there could therefore be no reason for its shareholding in Storm suddenly to be increased from 19.9% in MOU1 to the equivalent of 31.25% in MOU2.

[32] I turn to the events subsequent to Namakwa and Toro signing MOU2. On 18 November 2009, immediately after Toro had signed MOU2, Reynolds wrote to Mr. Nico Kruger, the chief executive officer of Namakwa saying: *"We also have to get clarity on the dilution if the government takes up*

25%. We also have to tie up the agreement between us." If Namakwa and Toro were joint shareholders there would be no lack of clarity *"on the dilution"* if the government took up 25% of the shares in Storm. The statement that there was a need to *"tie up the agreement between us"* indicates, as Namakwa contends, that the question of the respective shareholding of Toro and Namakwa in Storm had not been finalized. In his reply to Reynolds' letter, Kruger indicated that he would sign MOU2 and added *"Let's box out the percentages"*, meaning negotiate the respective shareholding. On 4 December 2009 Reynolds wrote to Kruger:

> "We confirm that we agree that the 62.5% - 67.5% shareholding in [Storm] will be held in one company. The shareholding in the new company, Holdings, will be divided in the ratio of 50/20, on the assumption that you will invest R300m and we will invest R50m in [Storm]. This will mean that Namakwa will retain indirect control of [Storm]."

Namakwa did not accept that there was such an agreement; it would not budge from its insistence that its

shareholding in Storm be at least 50.1%. But what is clear from the letter is that MOU2 had not determined the respective shareholding of Namakwa and Toro in Storm and that this issue had been left to be decided later. It is also interesting to note that Toro's proposed investment was still limited to R50 million and nothing like the amount Namakwa was required to contribute.

[33] Reynolds sought to explain the correspondence immediately following the signing of MOU2 on the basis that he was attempting, albeit unsuccessfully, to negotiate an agreement along the lines of MOU1. This explanation is not only wholly inconsistent with the correspondence itself, it is inconsistent with the parties' just having reached an agreement that each would have an equal shareholding in Storm and would make an equal contribution to its funding. Indeed, as indicated above, Reynolds' letter to

Kruger on 18 November 2009 was written on the very day that Toro signed MOU2.

[34] It follows that both the "background circumstances" and the conduct of the parties immediately after the conclusion of MOU2 are inconsistent with the interpretation of clause 2.4 that the appellants would give it and confirm the interpretation contended for by Namakwa. It follows too that the appellants failed to establish that Toro is entitled as a joint shareholder with Namakwa to the available shares in Storm. Toro's claims were accordingly correctly dismissed by the court *a quo* and the appeal must fail.

[35] Counsel for the Government of Lesotho and the Attorney-General (fourth and fifth respondents) sought a special costs order against the appellants by reason of the

state of the record referred to in paragraph 3 above. In view, however, of the conclusion to which I have come on the merits and costs of the appeal, I do not consider a special costs order to be justified.

[36] The appeal is dismissed and the appellants are ordered to pay the costs of the respondents, such costs to include the costs of two counsel where two counsel were employed.

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D.G. SCOTT
JUSTICE OF APEAL

I agree:

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J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

_____

N.V. HURT
JUSTICE OF APPEAL

For the Appellants	:	Adv H.M. Scholtz SC (with him Adv J.A.L. Beyers).
For First and Second Respondents	:	Adv J.P. Vorster SC (with him Adv A.M. Heystek).
For Fourth and Fifth Respondents	:	Adv H.P. Viljoen SC