IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 36 & 37/2012

In the matter between

DANIEL GERHARDUS ROBERTS N.O	**1ST APPELLANT**
CHAVONNES BADENHORST CLAIR COOPER N.O	**2ND APPELLANT**
CORNELIUS JOHANNES ENGELBRECHT	**3RD APPELLANT**
RESKOL DIAMOND MINING (PTY) LTD	**4TH APPELLANT**

AND

ANGEL DIAMOND MINING (PTY) LTD	**1ST RESPONDENT** (10th Respondent in the Court a quo)
THABEX LIMITED	**1st Interested Party** (1st Respondent in the Court a quo)
MARIUS WELTHAGEN	**2nd Interested Party** (2nd Respondent in the Court a quo)
JOHN ANTHONY CRUISE	**3rd Interested Party** (3rd Respondent in the Court a quo)
IZAK BENJAMIN VAN TONDER	**4th Interested Party** (4th Respondent in the Court a quo)
JEFFREY RAYMOND RAPOO	**5th Interested Party** (5th Respondent in the Court a quo)
JAN WALTER KRUGER	**6th Interested Party** (6th Respondent in the Court a quo)
MASANKI KAMWANGA	**7th Interested Party** (7th Respondent in the Court a quo)

CORAM: RAMODIBEDI, P
SCOTT JA
HURT JA

HEARD: 5 APRIL 2013
DELIVERED: 19 APRIL 2013

SUMMARY

Liquidation of company – opposed on ground that application for liquidation brought in bad faith and for an ulterior purpose – dispute of fact on affidavits resolved by consideration of whether cross-examination of witness could disturb probabilities – company deemed to be unable to pay its debts – company commercially insolvent and unable to carry on a profitable business – just and equitable to wind up – final order granted.

JUDGMENT

HURT JA

[1] Angel Diamonds (Pty) Ltd (referred to herein simply as "Angel") is a private company, formed for the purpose of prospecting and mining a diamond-rich area in Lesotho. In 2002, Angel applied to the Commissioner of Mines for prospecting rights in an area which included the diamond pipe at Kolo Ha Petlane. In 2005, a new Mines and Minerals Act was due to come into force and, to meet its requirements, the shareholders in Angel, Mr T P Mosebo and Mr C Engelbrecht ("Mosebo" and "Engelbrecht") sought the assistance of financiers who would be

prepared to provide the funding required for the further development of what is referred to in the papers as "the Kolo Project". They met Mr M Welthagen ("Welthagen") who was the managing director of a company then called Thabex Exploration Ltd (now Thabex Ltd and referred to as "Thabex"), a company listed on the Johannesburg Stock Exchange. Thabex agreed to invest in the Kolo project and gave Mosebo and Engelbrecht to understand that it had the ability to raise such additional funds as might be needed to complete the development phase of the Kolo Project. In May and August 2005, Thabex addressed two communications to the Commissioner of Mines, giving him the assurance that Thabex would, in the event of Angel being granted prospecting rights under the new Act, provide Angel with the financial assistance needed to develop a full-scale mining operation at Kolo.

[2] In March 2006, a detailed shareholders' agreement was concluded between Mosebo and Engelbrecht on the one hand and Welthagen, representing Thabex, on the other. It provided for an issued share capital in Angel of M1000, comprising 1000 ordinary shares at a value of M1 each, of which Mosebo and Engelbrecht would hold 100 shares each and Thabex the balance of 800, but subject to the stipulation that Thabex would hold 200 of these in trust against the possibility of the Government exercising its statutory option to take up a 20% shareholding in Angel in return for the grant of a mining lease in due course. In terms of the agreement Mosebo and Engelbrecht were to manage operations at the Kolo site. Thabex was to provide the necessary finances, assist in technical matters and manage the general administration of the company.

[3] In June 2006, Angel was given a prospecting licence for the Kolo area.

[4] One of the stipulations by the Commissioner of Mines as a pre-requisite to the grant of a mining lease was that Angel would (through Thabex) provide the Government with satisfactory proof of its ability to finance the development of the Kolo mining operation. For reasons which need not be dealt with here, it is common cause that Angel was not able to furnish the Commissioner with an acceptable assurance in this regard. Mosebo and Engelbrecht justifiably attributed this inability to a failure by Thabex to comply with its obligations under the shareholders' agreement, and it is clear, from the voluminous papers which have been filed in this and other applications, that the relationship between Welthagen and Thabex, on the one side, and Mosebo and Engelbrecht on the other, soured steadily during the period between June 2006 and September 2008.

[5] During June 2008, there were negotiations between Angel, Thabex and a company called Mantle Diamonds (Pty) Ltd ("Mantle") aimed at the formation of a sort of joint venture in which Mantle would invest substantial sums of money in the Kolo Project in return for shares in Angel which it would have options to take up in three tranches. If all three options were exercised, Mantle would become the sole shareholder in Angel. The total amount which would be invested by Mantle in the execution of this arrangement would be of the order of US$ 1 million plus the agreed value of Angel's business as at the date of the acquisition of the final share tranche. Mantle would also make an amount of the order of US$ 3 million available to assist with the development of the Kolo Project and the

subsequent exploitation of the mining lease once granted. An agreement to this effect ("the Mantle agreement") was concluded in September 2008.

[6] On the strength of the conclusion of the Mantle agreement, Thabex published a statement on the Stock Exchange News Service notifying its shareholders of an intention to dispose of its interests in Angel. The notice recorded that Thabex stood to recover 70% (its percentage shareholding in Angel, but including the 20% Trust interest!) of the proceeds of the sale of shares and assets in Angel and that it intended to divert these funds to the furtherance of other projects. Although the proposed agreement seems to have been a reasonably favourable one for the Angel shareholders, who were plainly in what may be described as a "tight spot", it is significant in this instance because it signalled a measure of reluctance on the part of Welthagen and Thabex to continue their relationship with Angel, and, particularly, to persist in their efforts to provide Angel with the finance which it required to pursue the Kolo Project.

[7] Although Mantle installed some equipment at the Kolo site, commenced prospecting operations and paid an amount of money on account of the first tranche of shares, the further performance of the agreement was thwarted by the refusal of the South African Reserve Bank, in February 2009, to grant statutory sanction for the transfer of funds which performance would entail. Attempts were made during 2009 to circumvent this obstacle by the conclusion of a new agreement and in the interim Mantle continued with prospecting and site development activities. However the attempts to conclude a new agreement

were unsuccessful and eventually, in November 2009, Mantle notified Thabex of its intention to withdraw from the project. It contended that, in contemplation of the proper performance of its obligations under the agreement, it had incurred expenses of £1 million (sterling) and demanded that this amount be reflected as a shareholders' loan in the books of Angel. Thabex has disputed this claim, contending that apart from the payment on account for the first tranche of shares, Mantle had incurred the expenditure entirely at its own risk. For purposes of sketching the situation of Angel at the time relevant to this judgment, viz March 2012, it will suffice to say that any possibility of Angel relying on Mantle as a source of funds had disappeared entirely by December 2009 and that there was at least a contingent claim by Mantle against Angel and Thabex for the amount of more than M10 million.

[8] In mid-December2009, the prospecting licence granted to Angel expired. Several meetings were held with the representatives of the Government with a view to persuading the Commissioner of Mines to grant Angel a mining lease or at least a further extension of the prospecting licence. One of the principal stumbling blocks in Angel's path in this connection was still the inability of Thabex to satisfy the Commissioner that it had adequate financial backing. Moreover, during the sporadic prospecting activities which had taken place during 2008 and 2009, temporary structures had been erected and various items of machinery and other equipment had been installed at the Kolo site, all of which Angel was, in terms of the prospecting license, obliged to remove and to rehabilitate the site within 60 days of the expiry of the license. None of this had been done, despite complaints by the Department of Mines.

[9] On 8 June 2010, Thabex submitted a letter dated 28 May 2010 in a further attempt to satisfy the Commissioner of Mines that there was adequate finance available to drive the mining project. The letter purported to be an undertaking by an American company, "C4 Worldwide Inc" (represented by one Kingdom William, or Williams)confirming that C4 Worldwide was prepared to invest up to US$ 40 million in the Kolo Project. Because this undertaking was in vague terms and subject to conditions, Engelbrecht's attorneys telefaxed a letter to C4 Worldwide asking for

> *"written confirmation that the sum of US$ 40 million is indeed available for the project and that Angel Diamonds (Pty) Ltd has access to the sum of US$ 40 million . . . to develop the Kolo Kimberlite Pipe . . . In the event that the sum of US$ 40 million is not immediately available, our client requires confirmation of each and every term, condition or stipulation which has to be complied with in order to release disbursement of the said amount . . . ".*

This letter was telefaxed to C4 Worldwide on 19th July, 2010. The only response received from C4 Worldwide was an e-mail dated 9th August, with the terse statement:

> *"I acknowledge receipt of your mail and respond shortly. I have been bed ridden (sic) as I recently underwent surgery."*

The promised response was not forthcoming and the Commissioner of Mines declined to accept the C4 letter as satisfactory proof on Thabex' ability to fund the project.

[10] By mid 2010, the tensions between the principal shareholders in Angel had plainly reached breaking point. A dispute arose between them as to whether the 2006 shareholders' agreement was still in force, Thabex having contended, through Welthagen, that it had terminated when the agreement with Mantle had been concluded in September 2008. There were several other aspects in regard to which the shareholders were at loggerheads and these all boiled up into a complicated application, number 333/2010, in the High Court, lodged in June 2010. The application was brought by Mosebo and Engelbrecht, citing Angel, Thabex Welthagen and Mantle as respondents. The main relief sought was a declarator to the effect that Mosebo and Engelbrecht had validly cancelled the 2006 shareholders' agreement as a result of breaches by Thabex and an order that Welthagen and Thabex be restrained from purporting to represent Angel in any of its future dealings. Thabex and Welthagen opposed the application and brought a counter-application for various relief against Mosebo and Engelbrecht. The litigation burgeoned out so that, within a matter of months in the last half of 2010, no less than nine applications (some of which included counter-applications and an application for review) between the two groups were current. I do not need to summarise the litigious cut and thrust which these matters reflect. At the lowest level it had a drastic and crippling effect on Angel's ability to conduct its business and made it improbable that the disputing shareholders would, at least

within the medium term, be able to bury their differences and act in the best interests of their company.

[11] While case number 333/2010 and its ancillary litigation were being fought out, Mosebo lodged an application on 6 October 2010, for the liquidation of Angel. A provisional order was granted but was subsequently discharged in May 2011. An appeal against the discharge was noted but apparently not finally prosecuted for reasons which are set out in the papers but need not be dealt with here.

[12] It appears that a company called Reskol Diamond Mining (Pty) Ltd ("Reskol") was formed during October. Welthagen contends that Mosebo and Engelbrecht were instrumental in its formation, and this contention is not denied. The main (if not the sole) shareholder in Reskol is a French diamond mining company trading as Batla Minerals ("Batla"). As at June 2011 Batla, through a subsidiary company, was already established in diamond mining in Lesotho. Reskol had been formed for the purpose of procuring a mining lease at the Kolo site and it apparently made application to the Commissioner of Mines for such a lease on the Kolo site during the period between October 2010 and June, 2011. On 20 July 2011, Batla announced that Reskol had been granted the lease and that Reskol would conduct mining operations as a joint venture with the Government of Lesotho and certain unidentified Lesotho investors. A condition of the grant was that Reskol pay various employees and contractors who had rendered services to Angel but had not been paid. Reskol complied with this

condition and took cession of the relevant debts which totalled M584 402.61. Reskol was thus constituted as a substantial creditor of Angel.

[13] When the petition which is the subject of this appeal was lodged on 30 September, 2011, most of the litigation to which I have referred above was still unresolved. It is not in dispute that Angel had not carried on any ordinary business since, at the latest, June 2010. Nor is it in dispute that its inability to do so was attributable, in the first place, to an absence of funding and, in the second, to the breakdown in the relationship between the principal shareholders. The petitioners were the two provisional liquidators who had been appointed subsequent to the grant of the provisional order of liquidation in October 2010. They claimed to be entitled to payment of their fees as provisional liquidators for the period from the date of their appointment to 19 May 2011, when the provisional order was discharged. They had submitted their bill, amounting to M247 175, to the Master of the High Court, who had approved it. A letter requesting payment had been sent by registered post to the directors and shareholders of Angel, including Welthagen in his personal capacity and as the representative of Thabex. No reaction having been received, a formal demand for payment, as contemplated in section 172 (a) of the Companies Act, 25 of 1967 ("the Act") and making specific reference to that section, was served at Angel's main place of business and at two different addresses, each said to be the address of the registered office, on 31 August and on 6 September 2011. The period of three weeks prescribed in s 172(a) elapsed without reaction or payment on the part of Angel and the petition for liquidation was lodged on 30 September. The main ground relied upon was that Angel must be deemed, in terms of s 172, to be

unable to pay its debts. It was also contended that Angel's liabilities exceeded its assets, that it was "commercially insolvent" and that it would be just and equitable to liquidate the company. A provisional order of liquidation was granted on 30 September 2011.

[14] Pursuant to the grant of the provisional order, Reskol and Engelbrecht applied for leave to intervene as creditors in order to support the prayer for a final order. Welthagen, Thabex and a group of minority shareholders and directors of Angel likewise sought leave to intervene for the purpose of having the provisional order discharged and for extensive further relief giving them control over the company. The shareholders and directors (the fourth to seventh respondents in this appeal) did not play an active role in the opposition procedure. As had happened in the other litigation to which I have referred earlier, the papers in this application have multiplied to an astonishing extent. There have been notices of opposition to the applications to intervene and lengthy and detailed answering and replying affidavits delivered. There has also been what seems like an endless stream of interlocutory proceedings. All of these have had the inevitable effect of clouding the real issues in the liquidation application and it seems certain that they effectively blurred the vision of Chaka-Makhooane J to such an extent that she was unable to identify, and deal with, the pertinent issues. Having heard argument on 30 March 2012 she eventually handed down a lengthy judgment seven months later on 1 November 2012, discharging the provisional order and ordering the petitioners and the intervening parties who supported the grant of a final order to pay the costs of the opposing parties. The judgment is misdirected and I think no more need be said about it.

[15] Four main issues emerge from a consideration of the papers. First, whether the petition was lodged with an ulterior motive to ensure that Angel's hitherto unsuccessful bid to be granted a mining lease would not be persisted in (what may be referred to as "the corporate advantage stratagem"). Second whether Angel should be deemed to be unable to pay its debts. Third, whether Angel was factually or commercially insolvent and fourth whether, in any event, it was just and equitable, within the scope of that expression in section 173 (g) of the Act, to place Angel in liquidation. The petitioners contended that the evidence established the second, third and fourth of these issues and disputed any suggestion that there was any ulterior motive on their part in launching the proceedings. I should note that Engelbrecht raised two additional statutory grounds, namely loss of 75% of Angel's capital and its failure to carry on business for more than a year, but because these are beset by side issues and factual disputes, I do not intend to try to resolve them in this judgment.

Analysis of the Evidence.

[16] It is convenient, before dealing with the issues, to set out the basis upon which I have approached the evidence, and, in particular, the apparent factual disputes in the papers. What I have recorded in paras 1 to 14 is either common cause or not disputed. But a large proportion of the evidence put up by the petitioners and by Engelbrecht has been put in issue by Welthagen personally and as the representative of Thabex. I consider that many of the issues thus generated are properly capable of resolution either by reliance on documentary evidence put up by Welthagen himself (for instance the financial statements prepared by

the auditors of Thabex and Angel) or where unsupported assertions by Welthagen have been refuted by objective documentary evidence (such, for instance, as communications from the Department of Mines) put up by the petitioners and Engelbrecht. Many of the "issues" in the application result from bald and unsubstantiated denials by Welthagen[1] which are unconvincing in the light of the clear evidence which they are intended to refute. I have taken the view that these denials do not create genuine disputes of fact and that they are ineffective in challenging the contentions of the petitioners and Engelbrecht. I am reassured in my approach to Welthagen's evidence in this regard, by the test propounded by **Greenberg JA** in ***Hilleke v Levy*** **1946 AD 214** at p 219, viz whether cross-examination of the witnesses might disturb the probabilities on the papers as they stand. I am satisfied, at least in relation to those aspects in which I have rejected Welthagen's denials in favour of the evidence of the petitioners and Engelbrecht, that cross-examination would only tend to strengthen that of the latter and refute the denials by the former. And, in regard to Welthagen's evidence, I find it necessary to comment on the manner in which it has been presented to the court. His founding affidavit is peppered with typographical errors, mis-spellings and incomplete or unintelligible sentences. It contains a number of denials and assertions which, on an analysis of the evidence, appear to have been made recklessly for the purpose of painting a picture which he sought to urge the court to accept as the correct one. The reader is driven to the unfortunate conclusion that Welthagen did not bother to read through his founding affidavit before he deposed to it under oath. At all events, the

[1] As to which see the judgment of **Heher JA** in ***Wightman v Headfour (Pty) Ltd*** **[2008] ZASCA 6** paras 12 and 13.

production of affidavit evidence in this slovenly way shows a deplorable lack of respect for the judges of the court to which the affidavit is addressed.

The "Corporate Advantage Stratagem".

[17] It is trite that a court will be reluctant to grant a liquidation order in a situation in which the applicant (petitioner) is using the process for an ulterior purpose. One of the main themes in Welthagen's affidavits is that Mosebo and Engelbrecht breached their fiduciary duties as directors of Angel by joining forces with Batla and Reskol in their quest for a mining lease. He points to the circumstance that Mosebo and Engelbrecht emerged as directors of Reskol in July 2011 when Reskol announced that it had been granted the lease. Elaborating on this theme, he asserts that the petition for liquidation, lodged and dealt with on 30 September 2011, was an integral part of the scheme to remove Angel as a possible competitor for the mining lease. To support this assertion he goes so far as to suggest that the petitioners were conscious participants in the scheme and points out that Mr Roberts, the first petitioner, had, until shortly before he lodged the petition, acted as the attorney for Mosebo and Engelbrecht and that the firm in which Mr Roberts is a senior partner continues to represent Mosebo and Engelbrecht in the litigation against Thabex and Welthagen. He suggests that, during their period of office as the provisional liquidators of Angel, the petitioners purposely allowed Angel's financial situation to deteriorate. These are serious allegations indeed to make concerning officers of the court in the performance of their duties. One would expect that, in making them, Welthagen would have put up some objective evidence to support his contentions, but there is no such

corroboratory material whatsoever. The petitioners deny these suggestions. They point out that they were bound to act jointly in discharging their duties as provisional liquidators, and there is no suggestion by Welthagen that Mr Cooper, the second petitioner, would have had any incentive to make himself party to such a scheme. It is highly improbable that a person in Mr Roberts' position would place his career in jeopardy by embarking on a scheme of the type suggested, and, since Welthagen would obviously be required to prove any defence based on his plainly speculative assertions, they must be rejected in the absence of supporting evidence. I hasten to add that insofar as the allegations in respect of Mosebo and Engelbrecht are concerned, it is unnecessary for the purpose of this judgment to test or even to comment on them. If misconduct on their part has resulted in the unfortunate situation in which Angel finds itself, that cannot be a basis for refusing the application by the petitioners. Such misconduct would merely be an additional factor in the consideration of whether Angel should be wound up.

[18] The petition sets out the circumstances in which the demand for payment of M247 175 was delivered in compliance with s 172(a) of the Act. Welthagen's response to the contention that the deeming provision applies can only be described as blustery and evasive. He has submitted that the petitioners were not entitled to payment because of various alleged breaches of duty on their part. He also challenges the taxation of the bill by the Master and submits that this took place behind his back. But the cold fact is that the debt was a liquidated one, approved by the Master in terms of the Act. Nothing has been done to set aside the Master's decision and have the account reappraised by him. Nor was there

any response to the statutory demand which, as I have indicated, was sent to three separate addresses to ensure that it came to the attention of Angel's directors including Welthagen. Significantly, Welthagen does not claim to have been ignorant of the existence of the demand. In the result, his denials of liability and assertions that the petitioners breached their duties as provisional liquidators cannot be regarded as a bona fide challenge to the validity of their claim. The petitioners have dealt convincingly, in their replying affidavit, with Welthagen's submissions that they were in breach of their duties. The result must be that Angel is deemed to be unable to pay its debts and, in ordinary circumstances, this consideration on its own would entitle the petitioners to a final order.

[19] It is desirable, however, in the rather unusual circumstances of this matter, to consider the other grounds for liquidation listed in para 15. It is convenient, in this regard, to consider the solvency of Angel from an overall perspective, rather than to deal separately with the individual issues of factual as opposed to commercial insolvency.

The Solvency of Angel.

[20] Angel's audited accounts for the year ending 28 February 2009 reflect a trading loss of approximately M3.5 million and an accumulated loss of approximately M5.5 million. Assets in the form of plant and machinery were valued at approximately M4.7 million. The current liabilities (i.e. excluding shareholders' loans) stood at approximately M1.68 million. The shareholders' loans are stated to amount to approximately M8.46 million. Ex facie this

statement, Angel's liabilities (totaling approximately M10 million) exceeded its assets by approximately M5.5 million. Given that Angel was in the process of prospecting preparatory to obtaining a mining lease and developing the Kolo Project into a full-scale mining operation, this technically insolvent situation was perhaps to be expected.

[21] But 2009, as has been indicated earlier, was not a happy year for Angel. The plan to call Mantle in to the rescue of the underfunded company fell through when the South African Reserve Bank refused permission for the scheme to go ahead. The attempts to reach an alternative arrangement with Mantle were unsuccessful. By the end of 2009, the prospecting licence had lapsed and Mantle was exerting pressure for recovery of its investment of more than M10 million or, at the very least, the proper reflection of Angel's obligations to it in the audited financial statements.

[22] In the meantime, a decision had been taken to "capitalize" Angel's loan indebtedness by creating a share premium account, the arrangement being that the shareholders' loans would be expunged by the issue of special shares in their stead. These shares were valued at approximately M10 000 each. The result was to convert the major loan creditors of Angel into special shareholders so that the loan indebtedness vanished and the company's liabilities, at least on paper, did not exceed the value of its assets. There are no audited accounts for the year to 28 February 2010, but the draft financial statements show that:

(a) the accumulated loss had grown by M2.2 million to M7.7 million;

(b) the value of the plant and equipment had become reduced by depreciation and removal of some of the plant, to M2.83 million compared to the previous valuation of approximately M4.7 million;

(c) the shareholders' loans of approximately M10 million had disappeared and, instead, the share premium account reflected a balance of an equivalent amount.

Obviously the creation of the share premium account, dramatic as its effect on the apparent solvency of Angel might have been, had no practical effect on Angel's difficult financial position. Presumably the decision to create the share premium account was forced upon Angel's directors by the continuing inability of Thabex to procure an infusion of capital for Angel. The situation was not unlike that where loan account creditors subordinate their entitlement to repayment of their loans to reassure other creditors that the company will not face sudden demands to pay substantial capital debts. I should also mention that a dispute arose in early 2009 (reflected in correspondence from Mantle's attorneys to Welthagen) as to whether the capitalization of Mantle's loan was in accordance with an agreement. This dispute does not seem to have been properly resolved, and there seems to be a measure of doubt on the papers as to what Angel owed to Mantle and what proportion of the Mantle debt had properly been reflected as special issued shares in the share premium account. It is unnecessary to consider the merits of this dispute.

[23] By June 2010, the accumulated loss was standing at very nearly M8 million. By this time, Angel had virtually ceased business activities and Mantle was proceeding with prospecting but in circumstances which were difficult, to put it at its lowest, because of the failure of the September 2008 agreement and the parties' inability to reach agreement on an alternative arrangement. Moreover it is apparent that, during 2010, Thabex's ability to continue operating as a going concern was in issue and its auditors insisted on giving a qualified report on their accounts for the year to 28 February 2011.Given that Thabex was looked upon as the principal financial backer for Angel, this deterioration in Thabex's financial health could only be regarded as ominous for Angel.

[24] By June 2010 also, the Government had rejected the offer of C4 Worldwide to provide funds for the Kolo development and the litigation between Angel's shareholders had commenced. In October 2010 Angel was placed in provisional liquidation. There was accordingly no question of the company being able to improve its financial position during the period from October 2010 until May 2011. But shortly after the liquidation proceedings had ended in its favour, Angel was met with the Reskol announcement of the grant to it of the mining lease. Although this grant was challenged by Welthagen by the institution of proceedings to review the Government's decision, it appears that Angel's prospects of ultimately being successful in setting aside the Reskol grant and, itself, obtaining a mining lease are remote, if they exist at all. Of course, without a

mining lease, Angel would be unable to generate funds in order to resuscitate itself financially and resume business operations.

[25] In argument before us counsel for Welthagen and Thabex was asked what Angel would do if the provisional order at the hands of the petitioners was discharged. He attempted to draw an optimistic picture which involved taking proceedings to set aside the Reskol lease, successfully applying for the lease which the Government had previously declined to grant, resolving the issues between the Angel shareholders and proceeding to exploit the valuable diamond deposits in the Kolo area. The submission has only to be stated in this way to expose its fallacy. There is no real prospect, having regard to its history and that of Thabex, that Angel would find the substantial funds which would be required to carry the contemplated litigation necessary for its reinstatement as a contender for a mining lease through to finality. There is also no basis for assuming that the Government will retrace its steps (even if its decision to grant Reskol the lease can be set aside) and resume negotiations with Angel. Counsel's suggestion that Angel will be able to recover its trading position is without merit. In ***ABSA Bank Ltd v Rhebokskloof (Pty) and Others*** **1993 (4) SA 463, Berman J** (at p 440 F - H) posed the question to be asked in regard to the commercial insolvency of a company in these terms :

> *" . . . can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and*

should, hold that the company is unable to pay its debts within the meaning of s 345(1) (c) as read with section 344 (f) of the Companies Act 61 of 1973 and is liable to be wound up."

Since Angel was virtually sunk once its hopes of procuring a mining lease faded, there is plainly no possibility of it recovering sufficient buoyancy to avoid the consequences of the test thus stated.[2]

[26] In the circumstances, it can only be concluded that Angel is in a state of commercial insolvency, whatever the comparison of its assets with its liabilities on paper might show. Indeed, counsel for Engelbrecht, Mr Edeling, submitted that a properly drawn set of accounts as at 2011 would demonstrate that the company's liabilities exceeded its assets by more than M14 million on any showing. His submissions in this regard were persuasive, but it is not necessary to examine them further.

[27] As to the question whether it would be just and equitable to grant a final liquidation order in this case, the facts speak for themselves. There is no real prospect that Angel's shareholders will be able to bury their differences in the short term and co-operate in order to try to set Angel back on a firm financial footing.

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[2] See ***Atkinson v Rare Earth Extraction Co Ltd.*2002 (2) SA 547** at p 552 E-G, and the useful collection of authorities there cited

[28] In the result, the following order is made:

(1) The Appeal succeeds and the judgment in the High Court discharging the provisional order of liquidation is set aside and the following order substituted therefor:

"(a) The provisional order of liquidation of the Company Angel Diamonds (Pty) Ltd is made final.

(b) The First and Second applicants for leave to intervene, Thabex Ltd and Marius Welthagen, are ordered jointly and severally, the one paying the other to be absolved, to pay the costs occasioned by their opposition to the grant of the final order of liquidation and the costs of C. J. Engelbrecht and Reskol Diamond Mining (Pty) Ltd."

(2) Thabex Ltd and Marius Welthagen are ordered to pay the Appellants' costs of appeal, jointly and severally, the one paying the other to be absolved

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N.V. HURT

JUSTICE OF APPEAL

I agree ______________________________

M.M. RAMODIBEDI PRESIDENT

OF THE COURT OF APPEAL

I agree ______________________________

D.G. SCOTT

JUSTICE OF APPEAL

For Appellants : Adv B. Pretorius with Adv T.R. Mpaka for 1st, 2nd, and 4th Appellants
Adv C. Edeling for 3rd Appellant

For Respondents : Adv H. Louw