CIV/APN/394/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

SWISSBOURBH DIAMOND MINES (PTY) LTD	**1ST APPLICANT**
RAMPAI DIAMONDS (PTY) LIMITED	**2nd APPLICANT**

AND

THE COMMISSIONER OF MINES AND GEOLOGY N.O.	**1st RESPONDENT**
THE ATTORNEY-GENERAL	**2nd RESPONDENT**
THE CHAIRMAN OF THE MINING BOARD	**3rd RESPONDENT**
THE REGISTRAR OF DEEDS	**4th RESPONDENT**
LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	**5th RESPONDENT**

JUDGEMENT

Delivered by the Honourable Chief Justice, Mr Justice J.L. Kheola on the 12th day of December, 1997

The application was dismissed on the 12th December, 1997 and what follows are the reasons for that decision

This is an application for an order in the following terms.

1. Ordering the fifth respondent (the LHDA) to produce under oath, within 7 (seven) days of this order, all documents as described in (a) - (h) below and to allow the applicants to inspect and copy such documents:

(a) All loan applications by or on behalf of LHDA which were considered by the World Bank 1991.

(b) All letters, correspondence and communications between LHDA and the World Bank, relating to or concerning the applicant's or any of the applicants.

(c) All documents, correspondence, notes, memoranda, communications, memos, agreements and undertakings between the LHDA on the one hand, and any of the JPTC, TCTA, and/or Government of Lesotho, insofar as they relate to or concern the applicants or any of the applicants, for the period 1March 1991 to 6 May 1992.

(d) All agendas, minutes of meetings and solutions passed by the LHDA relating to or concerning the applicants or any or the applicants during the period 1 March 1991 to 6 May 1992.

(e) Each of the Designated Loan Instruments as listed in the table at page 2 to 4 of Trial Exhibit U2, being a subpoena to LHDA's Chief Executive and Legal Manager.

(f) All documents, correspondence, notes, memoranda, communications, reports, agreements and undertakings between LHDA on the one hand, and any of RSA Department of Water Affairs and Forestry Pretoria, or RSA Department of Water Affairs and Forestry Maseru office, or JPTC, or RSA delegates to JPTC, or Government of Lesotho on the other hand - insofar as they relate to, affect or concern the applicants or any of the applicants, during the period 1 May 1991 to 30 November 1991 and only insofar as these documents are not already disclosed under item c above.

(g) Those portions of every cost allocation report produced by the LHDA, in respect of the allocation of LHWP costs between RSA Government and Government of Lesotho, insofar as it deals with costs of and concerning all SDM litigation since July 1991 to the present, and insofar as it relates to the costs of any rentals in terms of the Land Act Lease being trial exhibit U1.

(h) all communications and reports, whether internally or externally, of LHDA in connection with the Land Act (Trial Exhibit U1) insofar as it relates to the need for such lease, negotiations therefore, determination of the amount of rental, the wording thereof, the payment of any rentals the sources of funds from which rent was paid, and the allocation of the rental costs to RSA Government and/or Government of Lesotho.

2. Ordering fifth respondent to pay the costs of this application on the attorney and client scale, in the event that the fifth respondent should oppose the relief herein

sought.

3. Granting the applicant such further or alternative relief as this Honourable Court deems fit.

It is common cause that on the 7th June, 1995 the applicants requested the 5th respondent to make discovery of certain documents. The documents described in paragraphs (a) and (b) of the present Notice of Motion were requested in the previous application of the 7th June, 1995.

In response to that application the 5th respondent replied as follows:

> "..... none of the documents requested under these items are relevant to the present issues in the application and the fifth respondent accordingly objects to inspection of these document (insofar as such documents may be in respondent's possession)."

The documents sought in paragraph (c) and (d) of the present Notice of Motion were requested in paragraph 32.1 of the previous request.

In response to that request the 5th respondent relied as follows:

> "..... no other documents requested under this item are relevant to the present issues in this application and inspection is accordingly refused".

The documents requested under paragraphs (e) and (f) of the present Notice of Motion were described in the subpoena which is Exhibit U2, in respect of which the only objections were:

(a) that the applicants had used the wrong procedure and should have used the discovery rules,

and

(b) that thee was short notice and

(c) if the documents were given the applicants would ask for even more documents.

It is common cause that the documents requested under paragraphs (a), (b), (c) and (d) were previously requested long before the trial started in 1995. The fifth respondent made an objection that the documents were not relevant to the issues before Court and that they were privileged or that they were not in its possession. No attempt had been made by the applicant to enforce the discovery notice by the time the hearing in the matter commenced, nearly a year later, on the 20th May, 1996. The case proceeded until the 14th November, 1996 after ten witnesses had been called and nineteen court days had lapsed and the 5th respondent closed its case. It follows that none of the documents now being called for were put to any of the 5th respondent's witnesses.

It seems that sometime after the 15th November, 1996 the applicants launched a counter -

application for further documents to be discovered by the 5th respondent and the Lesotho Government. Many of the documents now sought were also sought in the January, 1977 counter - application (and had been sought already as far back as June, 1995. The 5th respondent filed an answering affidavit to the counter- application on the 3rd February, 1977 in which it provided reasons why it should not be obliged to make further discovery. It is common cause that the counter - application has never been pursued.

In his replying affidavit Mr. Van Nzl alleges that since then, however, for reasons as yet unexplained the Government of Lesotho is no longer represented in these trial proceedings. For that reason **inter alia**, it has not be considered appropriate to proceed with at application against the 5th respondent and Lesotho Government, and also for those reasons it has been decided to launch the present application only against the 5th respondent, and for a more limited class of documents being those specially described in the Notice of Motion.

I find the reason given by Mr. Van Zyl rather strange and far - fetched because the Government of Lesotho has not formally withdrawn from the case. **Mr. Fischer,** counsel for Lesotho Government asked to be excused from the proceedings because the long cross-examination that was going on did not involve or affect his clients in any manner. However that did not mean that his clients could not be forced to comply with an application for discovery.

The hearing proceeded again on 5 - 7 February, 1997, 17 - 20 February, 1997, 17 - 20 March 1997, 10 - 11 April, 10 - 13 June 1997, 8 - 12 September 1997 and 23 - 29 October 1997.

During this time the applicants called three witnesses, namely General Lekhanya, Mr.

Makhakhe and Mr. Labuschagne. In all, the hearing occupied forty-nine court days.

Rule 34 (14) of the High Court Rules 1980 vests discretion in the Court to order the production of documents at any time during the course of any action or proceedings.

Mr. Viljoen S.C., for 5th respondent, submitted that this discretion must lie any other, be exercised judicially, fairly and so as not materially to prejudice a party to the litigation. The element of delay, more especially insofar as it gives rise to prejudice, is one to which the court is obliged to have regard in deciding whether to exercise its discretion. He referred to a number of cases including **Oosthuizen v. Stanley** 1945 A.D. 322 at p. 333 where Tindall, J.A. said:

> "The refusal of the first application is more important. There is no doubt that the trial Court has the power to allow a plaintiff to call a fresh witness after the defendant has closed his case and that the exercise of that power is in the discretion of that Court; see Wigmore on Evidence, ss. 1877 and 1878, **Bellstedt v. South African Railways** (1938, C.P.D.397). Several considerations have a bearing on the exercise of such discretion, for instant, (1) the reason for the plaintiff's failure to call the witness before, (2) the danger of prejudice to the opposite party owing to his being no longer able to bring back his own witnesses, and, of course, (3) the materiality of the evidence. In application for leave to lead fresh evidence in this Court the test as to materiality laid down in **Colman v. Dunbar** (1933, A.D. 141) is that the evidence

> tendered must be presumably to be believed and such that it would be practically conclusive. In a trial Court, however, in my judgement the test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty."

He submitted that in the present circumstances the delay has been unconscionable. It has in effect endured for more than two years, during most of which time (from May 1996 to October 1997) the hearing itself was proceeding. It is not alleged that the applicants only became aware of the categories of documents now sought at a later stage, so that they were prevented from following the ordinary procedures prescribed by the rules earlier. As the history of events set out above demonstrates, a great deal many of the documents were sought by applicants long before the hearing first commenced.

I am aware that **Oosthuzen's case - supra** - was a case dealing with a delay in calling afresh witness by the plaintiff after the defendant has closed his case and that the exercise of that power was in the discretion of the Court. It seems to me that the principle involved is the same even in the case regarding delay in an application for the discovery of documents. It is a fact that in the present case the applicants have completely failed to give an acceptable explanation for the delay. I have already rejected an explanation that the earlier application was abandoned because Lesotho Government's counsel was no longer attending the hearing. It must also be remembered that the first request for these same documents which are the subject matter of the present application was made on the 7th June, 1995. That application fizzled out without any final order of the Court.

In **Pitso Phakiso Makhoza v. Lesotho Liquor Distributors,** C. of A. (CIV) 34/95 (unreported) at p.10 Browde, J.A. said:

> "With regard to (c) - the submission that the court a quo erred in not ordering the respondent to file a further discovery affidavit - I am of the view that the rules of court make not provision for such an order. Rule 34(6) makes provision for the situation where a party has reason to believe that the other party has not made full discovery. That sub-section was not invoked by the appellant in this case. Mr. Wessels referred to Rule 34(14) and submitted that that indicates that a party which has made discovery can be called upon to discover again. In my view that is fallacious. As I read the Rule, sub-section 34(14) provides a mechanism whereby a party can be called upon to make discovery during the course of an action if such party has not already made discovery of the same documents pursuant to Rule 34(1), (2) and (3). As respondent made discovery on 17 July 1995 i.e. a month before the trial was to start the complaint raised at the trial that the affidavit of discovery was defective for the reason set out above can only be regarded as one of many examples of the appellant's efforts to take every technical point in order to prolong the matter."

A further question of fundamental importance is the danger of prejudice to the opposite party owing to his being no longer able to bring back his own witnesses as well as the witnesses of the opposite party. As **Mr. Viljoen** pointed out in the circumstances of the present case there

can be no doubt that the 5th respondent will suffer serious prejudice if the relief sought is granted at this stage. It will have the effect that, in the closing stages of the trial, documents which have been known to applicants to be relevant (on their version of relevance to the case) for years rather than months are introduced when the case is in its closing stages. As set out hereinabove, none of the witnesses called on the 5th respondent's behalf has had an opportunity of dealing with any such documents and whatever unfavourable inferences applicants seek to draw from them. Neither have counsel for the 5th respondent been able to put such documents in cross-examination to the witnesses already called by the applicants in order to rebut whatever unfavourable inferences applicants seek to draw from them. He submitted that at this stage of the proceedings such prejudice is grave, certainly material, and cannot be adequately remedied.

I entirely agree with the above submission. The applicants were aware of the existence of all these documents long before the trial commenced but they decided not to force the 5th respondent to comply with their request for discovery.

It is correct that early in this case and when Mr. Putsoane was being cross-examined it was brought to my attention that all Government files relating to the grant of mining leases to the applicants had been removed from the Government offices and that they could not be traced. When conspiracy to keep the applicants out of their rights was alleged, I was easily persuaded that a thorough investigation was necessary to find out how and what circumstances that all Government files relating to a particular top or matter could vanish into thin air. At the time I was unaware of the dimension to which that collateral issue would grow.

For the reasons stated above the application was dismissed.

J.L. KHEOLA
CHIEF JUSTICE

6th March, 1998

For Applicants -
For Respondents -