REPORTABLE CASE
NO. 144/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NAMDEB DIAMOND CORPORATION (PTY) LIMITED APPELLANT

and

L VON WIELLIGH BESTER N.O. FIRST RESPONDENT

RAEL GORDON N.O. SECOND RESPONDENT

A A NIEUWOUDT THIRD

RESPONDENT

CORAM: JOUBERT, STEYN, F H GROSSKOPF, NIENABER, et OLIVIER JJA

DATE OF HEARING: 3 MAY 1995
4 MAY 1995

DATE OF JUDGMENT: 31 MAY 1995

JUDGMENT

OLIVIER JA:

This is an appeal against a judgment of Van Niekerk J in the Cape Provincial Division, dismissing with costs the appellant's claim against the first and second respondents for payment of damages in the sum of

R1 497 142. Leave to appeal to this Court was granted by the Court a quo.

The appellant, formerly known as CDM (Pty) Ltd, is a mining company which has a state diamond concession to conduct extensive diamond recovery operations along the southern coast of Namibia. The main recovery plant is situated at Oranjemund. As concessionary, it becomes the owner of all diamonds recovered within the concession area.

The first and second respondents are the joint trustees in the estate of the third respondent, A A Nieuwoudt, who is a farmer in the district of Garies.

On 24 May 1985 the appellant instituted action against Nieuwoudt whose estate had then not ye* been sequestrated. Subsequent to the institution of the action Nieuwoudt's estate was sequestrated. The first and second respondents were then substituted as joint defendants. One day after the commencement of the trial before Van Niekerk J, Nieuwoudt made his presence known at court and applied to be joined as a defendant on the basis of his reversionary interest in the insolvent estate. This application was granted, he was joined as third defendant, and for the remainder of the trial

he appeared in person.

The crux of the plaintiff's case is set out in paragraph 4 of its amended particulars of claim, which reads as follows:

"4(a) During or about 1979, the precise date being to Plaintiff unknown, and at or near Garies, Cape, Nieuwoudt orally offered to buy from one Bernardus Lambertus van Zyl, who was at the time in Plaintiff's employ as a security officer, uncut diamonds which the said Van Zyl could obtain from Plaintiff's mine at Oranjemund, South West Africa. (b) Thereafter, and pursuant to the said offer, on various occasions during the period from about 1979 or 1980 to about December, 1981, the precise date of each occasion being to Plaintiff unknown, and at or near Garies, Cape, the said Van Zyl sold and delivered to Nieuwoudt the equivalent of 23 full matchboxes and 3 half full matchboxes of uncut diamonds (which included diamonds delivered in a sock) of which uncut diamonds

Nieuwoudt took possession. (c) To Nieuwoudt's knowledge when he took possession thereof as aforesaid, the said diamonds had been wrongfully and unlawfully stolen from Plaintiff at its said mine at or near Oranjemund, and were the property of Plaintiff." It was further alleged that the said diamonds were sold by Nieuwoudt to one De Beer during the period from about 1979 to about the middle of 1982.

Originally the amount of damages claimed was R4807500. This was reduced in the amended particulars of claim to R1497142.

It is important to draw attention to the respective pleas filed by the first and second respondents and, after his joinder, by third respondent.

Initially, in their first plea, dated 5 June 1986, the first and second respondents denied all allegations made by the appellant. In their amended plea of 21 February 1992, however, they changed course. They admitted, in reply to clause 4 of the appellants particulars of claim, quoted above, that"...

during or about 1979 and at or near Garies, Cape, Nieuwoudt orally offered to buy from one Bernardus Lambertus van Zyl, who was at the time in Plaintiff's employ as a security officer, uncut diamonds," and that ... "on various occasions during the period from about 1979 or 1980 to December 1981 and at or near Garies, Van Zyl sold and delivered to Nieuwoudt certain quantities of uncut diamonds."

The aforesaid plea was probably based on their knowledge of certain facts, later admitted by the first and second respondents in terms of a pre-trial conference in terms of Rule 37, viz. that Nieuwoudt had been charged with the theft of approximately 25 matchboxes containing uncut diamonds, which were the property or in lawful possession of the plaintiff over the period December 1979 to December 1981, and that he had been convicted of the theft of an undetermined quantity of uncut diamonds. They also admitted that Nieuwoudt had been charged with, and convicted of, contravention of Sec 84(1)(b) read with sections 1, 84 and 106 of Act 73 of 1964, in that he sold uncut diamonds (approximately 5000 carats)during the period December 1979 to March 1982.

It also appears that Nieuwoudt was convicted on the aforesaid charges in the Cape Provincial Division and that the convictions were upheld in this Court on 6 June 1990.

What remained in issue between the appellant and the first and second respondents as regards the alleged theft and sale of the diamonds stolen from the appellant's mine were the origin of the stolen diamonds and the quantity and value of diamonds delivered by Van Zyl to Nieuwoudt.

When the third respondent applied to be joined as co-defendant he alleged, in a founding affidavit, that there were undistributed assets of more than R4 million in his estate in which he claimed a reversionary interest. He also averred that neither the first and second respondents nor their counsel had consulted him regarding the claim nor did they have any personal knowledge of the relevant facts. Nor had he been subpoenaed by them as a witness. He was under the impression (correctly, it seems) that they did not intend to contest the claim fully.

After his application was granted, third respondent filed a plea, in which,

inter alia, the allegations made in paragraph 4 of the particulars of claim were denied. This meant that the merits of the appellant's claim were fully and squarely put in issue.

It was common cause that when the action commenced, Nieuwoudt was not in possession of any of the allegedly stolen diamonds.

Van Niekerk J did not deal with the legal basis of the appellant's claim. In argument in this Court, reference was made to the condictio furtiva. the actio ad exhibendum and the actio legis Aquiliae.

In Roman law the condictio furtiva was reipersecutory, but in the event of the owner not vindicating his stolen property, the action lay against the thief or his heirs for recovery of the value thereof. In that form, the condictio furtiva survived through the medieval and Roman Dutch law. The precise nature of the action was, however, controversial. In Roman law it was not considered to be a delictual action, because it was actively and passively transmissible, unlike the Aquilian action. In Roman Dutch law it was seen as a delictual action, i.a. by Groenewegen (De legibus abrogatis C.4.17 paragraph 5). But

it retained a few peculiar characteristics: the owner could recover not only the value of the stolen property as at the date of the theft, but also the appreciation in its value since the theft and up to the time of institution of the action and it could be instituted for return of the property or its said value (see in general Pieter Pauw Historical Notes on the Nature of the Condictio Furtiva in 93(1976) SA Law Journal 396).

In John Bell & Co Ltd v Esselen 1954(1) SA 147(A) at 151E - H it was held that the condictio furtiva would lie against a third party, to whom a misappropriated cheque had been negotiated, if the plaintiff, the owner of the cheque, could prove that the third party knew at the time he received and cashed the cheque of the fraud practised on the plaintiff.

The condictio was seen as an enrichment action in Krueger v Navratel 1952(4) SA 405 (SWA) at 408A - 409B, but in Minister van Verdediging v Van Wyk en Andere 1976(1) SA 397 (T) it was stated that the action is a delictual one. It was noted that the action only lies against the thief or his heirs (at 400B - C). It was held that the plaintiff had to prove ownership of the stolen

property not only at the time of the theft but also at the time of the institution of the action (at 400H). It was held that as the plaintiff in that case had recovered the wreck of his stolen vehicle and, before institution of the action sold to it to a scrapyard, he could not succeed in the action (at 401B - F). In such a case it was said, the actio legis Aquiliae is available (at 401E). It was also held that an accessory is not liable under this action (at 402A - 403A). In our law, the actio ad exhibendum had changed its Roman characteristic of a remedy directing the possessor of property to bring it to court so as to enable the owner to launch a rei vindicatio. to a delictual action. It lies against a mala fide possessor who has alienated or consumed the owner's property (see Morobane v Bateman 1918 AD 460 at 465 - 466; John Bell & Co Ltd v Esselen. supra,at 153B - G; Leal & Co v Williams 1906 TS 554 at 558 - 559; Sorvaag v Petterson and Others 1954(3) SA 636 (C) at 640F - 641C). The action also lies against a defendant who has parted with the possession of property after he had notice of the plaintiff's claim to it (Aspeling. N.O.v Joubert 1919 AD 167 at 171: Vulcan Rubber Works (Pty) Ltd

v SAR & H 1958(3) SA 285(A)).

In modern law, the actio legis Aquiliae would undoubtedly be available to the owner against the thief and anyone who, with the necessary intent, participates in the process by which his property is, and continues to be, misappropriated. As such it does not matter whether the other actions may in addition be appropriate remedies. What is clear is that the plaintiff has to prove the theft of its diamonds, Nieuwoudt's complicity and the damage suffered by it.

Initially the respondents had also put in issue the appellant's ownership of the diamonds recovered at the Oranjemund mine. Evidence was led by the appellant to prove its right and title to such diamonds. The learned judge a quo found that in the absence of contradicting evidence, appellant had proved, on a balance of probabilities, that it was the lawful concessionary and owner of the diamonds recovered at the Oranjemund mine. That finding was correctly not attacked in the appeal.

The first issue remaining to be resolved at the trial was, therefore,

whether the chain of evidence offered by the appellant supported the claim that the diamonds alleged in the pleadings were stolen from appellant's mine at Oranjemund, and that the very same diamonds were delivered to and received by Nieuwoudt with full knowledge that such diamonds were stolen. Only if this issue is resolved in favour of the appellant, does the second issue, viz. the quantum of the claim, arise.

As far as the first issue is concerned, the appellant relied mainly upon the evidence of Van Zyl, Cilliers, Otto, Willemse, De Beer and two policemen, Captain Pool and Major Meintjies, who took a statement, exhibit U, from Nieuwoudt. In a nutshell, the appellant's case is as follows:

Nieuwoudt approached Van Zyl, who was well-known to him and who was a security officer at appellant's mine, to procure diamonds from the mine. As a security officer, Van Zyl did not have access to the diamond recovery operation and thus to diamonds, but if he could obtain diamonds within the mining area, he could take them out with impunity. Van Zyl agreed to Nieuwoudt's proposal and in turn approached Cilliers. Cilliers worked as a

metallurgical operator in the diamond recovery plant. He had the opportunity of stealing diamonds, but could not take them out of the mining area himself. Van Zyl's proposal to Cilliers was that the latter should steal the diamonds and leave them in a convenient spot where Van Zyl could collect them and take them out of the mining area. Cilliers agreed to the scheme, and it was put into operation. A number of deliveries were made by Cilliers to Van Zyl, who in turn sold the diamonds to Nieuwoudt. Van Zyl retired from his employment at the mine and arranged for one Otto, another security officer, to take over his role in the scheme. Otto and Cilliers, occasionally assisted by one Willemse, continued to operate the scheme, Otto delivering the stolen diamonds to Van Zyl, who sold them to Nieuwoudt. It is alleged that Nieuwoudt in turn sold the diamonds to De Beer. The aforesaid allegations were all substantiated by the witnesses Van Zyl, Cilliers, Otto, Willemse and De Beer.

Nieuwoudt denies ever having conspired with Van Zyl as alleged, or of receiving or buying diamonds from him, or of selling and delivering diamonds to De Beer.

The onus, therefore, remained on the appellant to prove, on a balance of probabilities according to the evidence of its key witnesses, Van Zyl and Cilliers, that Van Zyl sold and delivered to Nieuwoudt diamonds stolen, to Nieuwoudt's knowledge, from the appellant's mine.

The sale of the diamonds by Nieuwoudt to De Beer is not a necessary part of the appellant's cause of action, but was pleaded, and evidence was led on this aspect, with a view to raising certain probabilities in support of the appellant's case.

It is now necessary to refer to the evidence in more detail.

Cilliers gave evidence that, in approximately June 1980, he was appointed as a metallurgical operator in the Oranjemund plant where the diamonds were finally screened and recovered. Only then did it become possible for him to steal diamonds. According to Cilliers, he was then, in 1980, approached by Van Zyl with the proposal to steal the diamonds. At first he refused, but after a few months he agreed to the nefarious scheme. He started stealing the diamonds some time in December 1980 and delivered

three matchboxes full of diamonds to Van Zyl. He was paid R3000 and deposited this amount in his savings account on 17 January 1981. This was borne out by the entry in his savings book handed in as exhibit A. A second delivery of three matchboxes took place in January 1981, for which he was not paid. In February 1981 he delivered two matchboxes to Van Zyl and was paid R2000, which he deposited on 20 March 1981, as is reflected in Exhibit A. A fourth delivery took place in March or April 1981, when he delivered three matchboxes to Van Zyl and was paid R3000. He did not deposit this amount but used the money. Subsequent to this fourth delivery, Van Zyl resigned from plaintiff's employment and by arrangement Otto took his place in the conspiracy. Cilliers made a fifth delivery (the first to Otto) of four matchboxes in July or August 1981. He received R2000 which he deposited in his account on 14 September 1981 as appears from exhibit A. Cilliers made a sixth delivery (the second one to Otto) of five or six matchboxes in October 1981. He was paid R4000 for this delivery but did not deposit the proceeds in his account. On this occasion Willemse had assisted him in collecting diamonds,

and he gave Willemse R1000. Cilliers made a seventh and last delivery (the third one to Otto) in December 1981 of five, six or seven boxes. He received R4000, gave R500 to Willemse and banked R3500 on 11 December 1981, as appears from exhibit A.

Cilliers' evidence was corroborated by Otto. He confirmed that Van Zyl had resigned in April 1981 and that he had subsequently been asked by Van Zyl to take the latter's place in the chain of theft. He confirmed having received three deliveries from Cilliers between the time of Van Zyl's resignation (April 1981) and the resignation of Cilliers in February 1982. He cannot remember the exact number of matchboxes received from Cilliers.

Cilliers' evidence was also corroborated by Willemse, who testified that he assisted in the theft of diamonds in the course of 1981.

Cilliers testified that after his arrest, he was taken by detectives to Cape Town where Otto, Nieuwoudt, De Beer and Van Zyl were also detained. After their release on bail and before the commencement of the criminal trial, they all attended a braai at Van Zyl's residence and Nieuwoudt, who was present,

suggested that they should all employ the same attorneys and advocates, and that he would foot the bill for the legal costs.

Cilliers testified under cross-examination by Nieuwoudt that he first saw the latter at the braai at Van Zyl's house, and that Nieuwoudt advised all of them to plead not guilty. Nieuwoudt then put it to Cilliers that they had met at Van Zyl's house but that Cilliers had said that he was not guilty. Cilliers disagreed and stated that at the braai Van Zyl had told Nieuwoudt that the stolen diamonds had been obtained from Cilliers and that Cilliers had supplied Van Zyl with the diamonds. Nieuwoudt denied this conversation, but Cilliers was adamant that Van Zyl had made the statement and that he, Cilliers, in the presence of Nieuwoudt, did not deny the allegation.

Cilliers also testified that at the braai Nieuwoudt had a large amount of cash in his briefcase. Nieuwoudt had made an offer of R60 000 cash to Cilliers if the latter would throw in his weight with them, i.e. would testify with them, "... as ek saam met hulle stem." Nieuwoudt put it to Cilliers that this testimony was untruthful, and that Cilliers had never before given evidence to

that effect. To this Cilliers replied that he had never been asked about that particular incident; he also said that if Nieuwoudt denied having made the offer, his memory must be bad.

Willemse does not implicate Nieuwoudt, but Otto does.

Otto (who took Van Zyl's place as the recipient of the diamonds stolen by Cilliers) testified that he had always taken the diamonds to Van Zyl at Vanrhynsdorp. On one occasion he had met Van Zyl in a hotel at Vanrhynsdorp. Van Zyl had then told him that they were going to drive to the purchaser of the diamonds. They had driven to Garies and between Bitterfontein and Garies they had turned onto a gravel road. After a while Van Zyl had stopped and requested Otto to wait for him next to the road while he went to do business with the buyer. This was at night. In the head lights of the car he could see a big white shed, a cement reservoir and a homestead. He later visited the same place and ascertained that it was the farm of Nieuwoudt. Van Zyl came back, picked him up and paid him R10 000 for the diamonds he had delivered to Van Zyl. Van Zyl then told him that he was

selling the diamonds to Nieuwoudt.

Nieuwoudt attacked this latter statement in the cross-examination of Otto, on the basis that Otto had never made that statement before in any trial or affidavit.

As regards the observation made by Otto of the homestead, Otto confirmed that he could not say with accuracy how far they had stopped from the farmhouse.

Van Zyl also confirmed the occasion on which Otto had accompanied him to Nieuwoudt's farm but was dropped off a short distance from the homestead. He also confirmed having told Otto that Nieuwoudt was the buyer, but doubted whether Otto could have seen the homestead buildings.

Otto also referred to a meeting in Cape Town of Cilliers, Willemse, Van Zyl, Nieuwoudt and himself after they had been arrested. It was agreed that they would plead not guilty and Nieuwoudt would pay the legal costs. He was later convicted and sentenced to a prison term of five years of which three were suspended. He couldn't remember the braai at Van Zyl's house.

Nieuwoudt put it to Otto that in the trial of Van Zyl he, Otto, had testified that Van Zyl had offered to pay the legal costs. Otto then conceded that he could be wrong in testifying that Nieuwoudt was going to pay the legal costs.

During the cross-examination of Van Zyl by Nieuwoudt it came out that the initial deposit for legal costs was paid by Van Zyl.

Otto also testified that he had made a false statement as regards the case to the attorney Burger. This version was made up, according to him, by Van Zyl and Nieuwoudt. As far as he could remember this false story was concocted in Cape Town in a cafe.

Nieuwoudt put it to Otto that in the criminal trial of Van Zyl he had said that the story had been made up by Van Zyl during a trip to Citrusdal. The point was made that he did not then implicate Nieuwoudt. Otto responded that at that stage he had not been giving evidence against Nieuwoudt; in any event this was what he now could remember.

Van Zyl testified that he had been approached by Nieuwoudt with the proposal to commit theft towards the end of 1979. He in turn approached

Cilliers late in 1979; perhaps November or December 1979. Cilliers at first refused to participate but after a few days he agreed. Van Zyl disputed Cilliers' version, saying that the latter had not waited for months before agreeing to participate. He also disagreed with Cilliers that the first transaction occurred at the end of 1980 or early 1981. He testified it was much earlier, and the period of the transactions between Cilliers and himself was longer than the four months testified to by Cilliers. Van Zyl could remember the number of deliveries to him of diamonds stolen by Cilliers, but testified that there had been at least five occasions and he had received fewer than 15 matchboxes. These deliveries had taken place before he had resigned in April 1981 and arranged with Otto and Cilliers for Otto to take his place; all in all he had received about 23 matchboxes.

Van Zyl was adamant that he had always delivered all the diamonds stolen by Cilliers to Nieuwoudt on the latter's farm, and was paid there by Nieuwoudt, except on one occasion when the latter could not pay him immediately. They had always weighed the diamonds on a small scale kept

by Nieuwoudt in his office. This scale was calibrated in grammes, which were then converted to carats, and the purchase price was calculated accordingly. He thought that he was paid R70 per carat; in total he had received about R250 000. He had never kept any of the diamonds received from Cilliers for himself. When he was arrested, together with Otto, Cilliers, Nieuwoudt, De Beer and Willemse, his legal costs in the sum of R20 000 had been paid by Nieuwoudt. He had been convicted and sentenced to 12 years imprisonment.

In cross-examination he testified that he had received stolen diamonds from Cilliers five times and from Otto on four occasions.

Nieuwoudt put it to Van Zyl that he had lent him the aforementioned R20 000. Van Zyl denied this allegation - in fact, his evidence was that at that stage, he had considered changing his plea to one of guilty, but Nieuwoudt had paid him R20 000 to persist in his defence.

De Beer, a businessman from Margate, testified that he had been introduced to Nieuwoudt towards the end of 1979. The latter had told him that he was in possession of uncut diamonds and enquired whether De Beer was

interested in buying. Nieuwoudt had not disclosed the source of the diamonds. De Beer knew that the diamonds were not lawfully in Nieuwoudt's possession. Several transactions had then taken place - he had also, inter alia, gone to Nieuwoudt's farm in the Garies district. Nieuwoudt had searched him for hidden tape recorders. In total he had received ± 5000 carats from Nieuwoudt. Sometimes Nieuwoudt had delivered the diamonds in Durban, sometimes he had collected diamonds from Nieuwoudt's farm. The last transaction had taken place ± April 1982; the transactions between them had come to a standstill because he owed ± R30 000 to Nieuwoudt. He had paid ± R500 000 in total to Nieuwoudt; he had paid between R100 and R300 per carat and in some cases even more. Nieuwoudt had told him that he possessed a gramme scale and had to convert the gramme weight of the diamonds to carats. De Beer conceded that he did not know whether the diamonds that he had purchased from Nieuwoudt emanated from Oranjemund.

In his evidence-in-chief Nieuwoudt denied having instigated Van Zyl to

steal diamonds, or of having received or dealt in stolen diamonds. He denied having tried to convince or having paid Cilliers to testify falsely. He admitted, however, being in his company at Van Zyl's house. He also denied having dictated a false statement to Otto.

As far as Van Zyl's evidence is concerned Nieuwoudt testified that Van Zyl had falsely accused him in order to shield his own family; that all along he had had the idea of falsely implicating Nieuwoudt. It was put to Nieuwoudt in cross-examination that he had never made this accusation of Van Zyl while he, Nieuwoudt, was cross-examining Van Zyl.

Nieuwoudt admitted having had a scale calibrated in grammes which he kept in a box in his office on the farm, as testified by Van Zyl. He said Van Zyl could have seen the scale when he and his brother had come to visit Nieuwoudt on the farm, because he used it to weigh the grit in kaolin which he was then mining.

He admitted that he had been trapped in the middle of 1980 in the illicit sale of diamonds but had been acquitted in court. One Walters was the

ostensible purchaser. He then in cross-examination added an

incomprehensible explanation:

> "Ek kan nie stry dat dit diamante dalk van die eiser was nie want ek kan mos getuig dat daardie tyd toe ek dit verneem het, het Boetie Walters en Frikkie de Beer saam besigheid gehad, bote gehuur, en dit is vandag my vermoede dat hulle toe al besigheid gedoen het en dat toe Boetie met die diamante gevang word toe kom hy ook maar oordat ek daardie tyd prospekteer het seker nou maar vir my kom sê of die polisie het dit vir hom gesê. Ek het sy verklaring daar, U Edele, wat hy gesê het. Ek dink ons kan dit maar los."

He denied having sold diamonds to De Beer at all. Asked why De Beer would falsely and gravely implicate him, he accused Captain Pool of instigating De Beer to give fraudulent evidence.

He said De Beer did visit him on his farm, but merely with the object of buying options. De Beer had come for the first time in May 1980, just after the first trap occurred.

Nieuwoudt admitted having been the trap in which De Beer was caught and which had led to his conviction. Pool had first asked him to co-operate one evening when he, Nieuwoudt, was the object of a trap in which Van Zyl

had participated on his farm Rondawel and the police had turned up. That incident had occurred in June 1982. It was not disputed that he paid Van Zyl R5400,00, which the latter handed to the police. Nieuwoudt maintained that it was a loan. The diamonds had been found buried beneath his lawn after he had suggested to the police where Van Zyl may have hid them before approaching him for the loan. He had then promised to co-operate with the police. He had promised to go and see the police in Cape Town.

Pool had later phoned him and he had gone to Cape Town where he had made an informant's statement implicating De Beer. Pool had started talking to him and Meintjies later joined them. He had still not felt under any obligation to co-operate with the police, but had decided to do so. He also said a large sum had been offered to him to make the statement.

He, however, said that every word in the statement, exhibit U, was

false. The relevant parts of the statement read as follows:

> "GESPREK TUSSEN MNR A A NIEUWOUDT. MAJOOR MEINTJIES EN KAPTEIN POOL
> Kept P: Dit is vandag, Donderdag die 29ste Julie 1982 om 12h00

middag in my kantoor te Kaapstad. Teenwoordig mnr Adriaan Nieuwoudt, majoor Meintjies, kaptein Pool, Adriaan jy kan nou maar vir ons vertel N: Ek net so 'n jaar na my kennis Frikkie de Beer ontmoet deurdat hy in my omgewing na opsies om diamante te prospekteer kom soek het en so net ek met hom bevriend geraak. Ek het op 'n stadium opsies aan hom aangebied en ons het in 'n vertrouens posisie geraak waar ons in 'n later stadium begin het om ... eh ... besigheid te doen met diamante.

Maj M: Jou bron van diamante - is jy bereid om dit aan ons te gee of openbaar? N: Waar ek daaraan gekom het? Maj M: Wat jy ontvang het en verskaf het N: Ja, kyk dit is mos nou - daar is mos nou nie meer so iets nie Maj M: So ons aanvaar dat met Van Zyl se afsny - beteken dit dat jou toevoer ook daardeur afgesny is? N: Ja, kyk ek wil darem nou noem daar nog, ek vermoed daar is nog 'n saak aan die gang, en ek wil nou nie graag bale daaroor uitwei nie Maj M: Ja N: Die aangeleentheid nie maar, ek kan jou dit nou belowe dat as ... eh ... die feit dat ek nou bereid is om nou die kontak van my nou eintlik weg te gee behoort aan julle voldoende te wees om te aanvaar dat ek alle bande hoegenaamd (onduidelik)

Maj M: Adriaan, as ek jou mag vra jou, jou belangrikste bron N: Ek wil nou nie, daai is verby

Maj M: Maar ons aanvaar dit waiter myn, watter myn sou jy reken?

N: Ek sou reken nie, dit kom seker van Oranjemund af

Maj M: Oranjemund?

N: Ja - ek vermoed ook

Maj M: Want jou bron is nou afgesny sou ons aanvaar....

N: Ja - afgesny

Maj M: Adriaan, sal jy sê jy net uit jou vrye wil vanoggend hier aangekom

N: Ja, ja, definitief, dit is vrye wil

Maj M: Wanneer het jy tot daardie sienswyse gekom

N: Nee, ek het, het met my vrou daaroor gepraat en ons het besluit, ons eh is tog nou uit die besigheid, enne, ek kan maar net sover eh my kant moet bring dat 'n mens weer 'n bietjie goed kan gaan - dat ek weg van die boeke af kom enne ek wil hom darem ook help dat hy dit ook maar los (onduidelik) so dit is dan nou sover as ek kan se - verder kan ek omtrent niks se nie - ek kan, kan nie dink dat ek nog lets wil sê nie

Kapt P: Ja, ek dink dis seker nou maar genoeg - majoor?

N: Julie het my mos nou op geen manier gedreig om iets te sê wat ek gese het nie, oor ek nou eerlik gevoel het dat ek kan mos nou geen oneertike ding met die Polisie saam werk nie

Kapt P: Nee, jy's aan die regie kant Adriaan (Onduidelik)

Maj M: Hou dit so ...

N: Dis 'n sleg ding daai man, ek lê in die nag, jy weet nooit wanneer kom hier 'n man na jou toe (onduidelik)"

Pool and Meintjies were called by the plaintiff to confirm the correctness of the transcription.

At the end of the trial, Van Niekerk J granted absolution from the instance with costs. The crux of the trial judge's decision appears from the following words at the end of his judgment: "The third defendant, Nieuwoudt, had the easier task in that his version was a denial of the evidence presented. However, on every vital and important aspect of the plaintiff's case, the evidence in this court, taken with evidence given earlier, of unsatisfactory witnesses had to be weighed up against the evidence of Nieuwoudt whose version, in my view, was as probable as that of the witnesses who testified against him."

Van Niekerk J found Cilliers to be a reliable witness.

On the other hand Otto was described by the trial judge as unhelpful, unimpressive and vague. It was found that the veracity of his evidence was clearly suspect. His evidence was found to be unreliable and substantiated only to the limited extent to which Van Zyl could do so.

This criticism was based mainly on the following aspects. In the trial it was his evidence that he had opened some of the matchboxes, whereas in Van Zyl's trial he had testified that he had opened all of them. He could not remember having ever before testified that Van Zyl had identified Nieuwoudt to him as the purchaser of the diamonds. He also contradicted his evidence in a previous trial as to where Nieuwoudt and Van Zyl had coached him in giving a false statement. There is also a contradiction with his evidence at Van Zyl's trial that it was the latter who had offered to pay the legal costs of the criminal trial. Finally it was also held against him that he was one of the prisoners who were given "home leave" by Pool and Meintjies before testifying against Nieuwoudt, the implication being that his evidence is tainted and consequently unreliable. His evidence concerning the visit to Nieuwoudt's farm was said to be hardly credible.

Van Zyl came in for heavy criticism by the trial judge. It was found that his memory of the dates of the various transactions and the number of matchboxes, was vague. He had to be reminded that in another trial he had

described how he had transferred diamonds from three matchboxes to two because of the volume of gravel in the boxes. It was only under cross-examination that he was prepared to concede that he had had illicit diamond transactions with his brother-in-law. He admitted having previously made a statement to a magistrate in which he denied that he had ever sold diamonds to Nieuwoudt, and that he had given similar evidence before a judge in a criminal trial. It was also held against him that in the statement he had made at Citrusdal on 28 January 1983, he had confirmed that he had never sold diamonds to Nieuwoudt. His denial of the correctness of that statement was, by implication, rejected by the trial judge. He was also criticized for not being able to remember whether the discussion between himself and Nieuwoudt at the prayer meeting took place on the front or the back stoep or in the garden or even whether it took place on a Sunday.

Van Zyl was also criticised for a further contradiction. In the present trial he testified that he had been paid R250 000 for the diamonds by Nieuwoudt, whereas he had previously made a statement in which he put the

figure at R120 000.

The trial judge also remarked that Van Zyl was one of the prisoners given "home leave" by Pool and Meintjies; only thereafter did he implicate Nieuwoudt. His evidence contradicted that of Cilliers as regards the date and number of transactions; he had also in the course of various criminal trials given different versions as to the number of matchboxes received from Cilliers.

De Beer made a better impression as witness on the trial judge, but it was held against him that it was only after the "home leaves" that he started implicating Nieuwoudt. His estimate of the number of carats supplied to him by Nieuwoudt, i.e. some 5000, does not accord with the evidence of Cilliers or Van Zyl. He was, so it was held, extremely vague about the alleged transactions. His evidence was held to be unreliable at best.

Pool came in for particularly severe criticism. His participation in the "home leave" scheme for Otto, De Beer and Van Zyl was sternly censured. It was also held that his explanation of how the statement, exhibit U, was taken, was unacceptable. The trial judge noted that Pool had testified that he

had only exchanged greetings with Nieuwoudt, before Meintjies came to his office and the statement was taken. But the statement begins in such a way that it is clear that some discussion must have taken place previously. Pool was also criticised for not remembering that he had stated at Van Zyl's trial that, when the latter had been trapped, he had not even been aware of the role played by Otto. In the present trial he had testified to the contrary. Pool's statement that prior to the taking of the statement, exhibit U, he had been unaware of the role played by De Beer was also disbelieved. The trial judge stated that he was not impressed by Pool as a witness and found him to be evasive,

Meintjies was also criticised for a contradiction between his present testimony and that given in a previous trial as to whether he had seen Otto in person in gaol. This allegation, like Pool's that he did not know of De Beer's activities before taking the statement, exhibit U, was also disbelieved. The trial judge stated that he was not impressed by Meintjies as a witness.

As far as the evidential value of exhibit U is concerned, the trial judge

rejected the contention put forward by counsel for the plaintiff that the statement corroborated the plaintiff's version. The judge stated: "One thing Exhibit U does not show is that any diamonds emanated from the plaintiff's mine." The trial judge also rejected the argument that the information in exhibit U could only have come from Nieuwoudt's own personal knowledge. His reference to Van Zyl could, if I understand the trial judge's reasoning correctly, have emanated from news which he, being a native of the area, must have heard, of Van Zyl being trapped in the first half of 1982. The suggestion is that Nieuwoudt falsely implicated Van Zyl.

In this Court, counsel for the appellant accepted the trial judge's findings in regard to Cilliers. The rest of the trial judge's findings were subjected to concerted criticism.

The power of this Court to intervene on appeal on findings of fact is limited to situations where there appears to be a misdirection on fact by the trial judge, e.g. where he is shown to have overlooked facts and probabilities negating the reasons given for the judgment. In such an event this Court will

be able to disregard the trial judge's findings on fact, even though based on credibility, in whole or in part, and so come to its own conclusion on the matter (R v Dhlumayo 1948(2) SA 677 (A); Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk 1974(2) SA 450 (A) at 451E - H).

Counsel for the appellant argued that the trial judge had misdirected himself in respect of various factual findings. I will deal with the more substantive submissions in this respect.

(1) It was argued that the trial judge had misdirected himself in finding that Nieuwoudt was not implicated by Cilliers, the one witness who was accepted as truthful and reliable. It was submitted that Cilliers' evidence implicated Nieuwoudt in respect of the braaivleis meeting. Cilliers stated that at that meeting Nieuwoudt said that they must all plead not guilty, that they must all tell the same story, that they must all employ the same advocates and attorneys and that he, Nieuwoudt, would pay the costs. They were all co-accused at that stage.

In his evidence Cilliers said that at the braaivleis in the presence of

Nieuwoudt Van Zyl had said that Cilliers was was the person who supplied the diamonds, which Cilliers did not then deny. This evidence is significant, because when Nieuwoudt cross-examined Cilliers as to how he could advise him how to plead not guilty when he didn't know whether he was guilty or not guilty, Cilliers had responded by saying that in Nieuwoudt's presence Van Zyl had said that he, Cilliers, was the person who had supplied them with diamonds.

If this evidence of Cilliers is accepted as truthful - as it was by the trial judge - the inference can only be that Nieuwoudt was implicated in the thefts and, in order to save himself, he had to ensure the co-operation of his accomplices. That is why it was necessary for Van Zyl to assure Nieuwoudt that Cilliers was a participant in the removal of the diamonds, whose cooperation was indispensable and whose costs had to be paid by Nieuwoudt. It was submitted that the trial judge's acceptance of Cilliers' evidence, necessarily implied that Nieuwoudt was implicated, and this in turn would have changed the trial judge's whole perspective on the case.

The consistent application of the aforementioned implications, so it was argued, would also inevitably have changed the assessment by the trial judge, not only of the part played by Nieuwoudt before and after his arrest, but also of the quality of the evidence given by Otto (who said that Van Zyl and Nieuwoudt had prepared a story for him to tell to the attorney) and Van Zyl (who testified that Nieuwoudt had paid him R20 000 towards his costs in the criminal trial).

It was argued that, if these facts had been taken into account by the trial judge, he could not have concluded that Nieuwoudt's denial of any involvement in buying or selling diamonds "... was as probable as that of the witnesses who testified against him."

(2) It was argued that the trial judge misdirected himself in finding that exhibit U did not show that Nieuwoudt had acquired diamonds emanating from plaintiff's mine. I have quoted the relevant passages from exhibit U. These passages show that Nieuwoudt mentions Van Zyl as the source of the diamonds. Nieuwoudt never explained why he mentioned Van Zyl's name,

apart from saying that the whole of exhibit U was false. It was argued that that evidence in itself was totally false (a matter to which I will return presently) but, even so, why did Nieuwoudt falsely refer to Van Zyl as the source of the diamonds? There was no reason for him to implicate Van Zyl falsely - on the contrary, he made the statement after he knew that the police had caught Van Zyl and there was all the more reason not to implicate Van Zyl falsely.

(3) It was argued that the trial judge misdirected himself on the question whether exhibit U was true or false. The clear implication is that Nieuwoudt was believed on this score. But, so it was argued, the trial judge failed to take all the facts into consideration: that many of the matters mentioned in exhibit U - e.g. his contacts with De Beer, the letter's movements, his place of residence, etc. were not false. Furthermore, as he was clearly trying to win the goodwill of the police, why make a completely false statement? It was argued that there is a ring of truth in the statement. Furthermore, what is said in the statement accords with De Beer's evidence. On what basis can it be said that the statement is false, if all the facts and

surrounding circumstances are taken into account?

(4) It was argued that the trial judge misdirected himself as to the evidence of Pool and Meintjies concerning the taking down of the statement, exhibit U.

In this regard it was argued that the learned judge completely misconstrued the evidence of Pool in regard to what had occurred on 29 July 1982. The learned judge found that Nieuwoudt, after the full discussion had been taped, then refused to make a statement. Instead, the evidence was, and the court should have found, that after the discussion between Pool, Meintjies and Nieuwoudt, which discussion was not recorded, Nieuwoudt had refused to make an affidavit, but consented to give his version on a tape recording, which was then done. In Exhibit U, he was reiterating what he had already told the two policemen and it was left to him as to how he was to set about this. The learned judge failed, so it was submitted, to take into account that once Nieuwoudt had already explained De Beer's role in the transactions to Meintjies and Pool, he would start off the taped conversation by telling them

where he had met De Beer for the first time. It was argued that the judge's impression that, because of the way the statement started, the two policemen must have been aware of De Beer's existence before the meeting, is a wrong conclusion.

A Court of appeal will not go out of its way to find or construe misdirections of fact in a judgment of a court a quo. Trial judges have the unenviable task of digesting, under great pressure of work, a large number of contradictory facts and diametrically opposed versions. Regrettably, in the present case, having anxiously scrutinised the record, I have to agree with the submissions made by counsel for the appellant. In my view, the trial judge took a wrong view of the facts placed before him, for the reasons set out in the submissions summarized above.

Consequently, the evidence must be evaluated as it appears from the record.

An evaluation of the evidence given in the Court a quo should proceed from three rather obvious observations.

The first is that it has not been illustrated or argued that any of the plaintiff's witnesses had, or could have had, the slightest reason or interest in falsely testifying in the present matter. Cilliers had given the same testimony before in the criminal trials of Van Zyl and Nieuwoudt. Otto, Willemse, Van Zyl and De Beer were all prosecuted and convicted and served terms of imprisonment. Likewise, Nieuwoudt was also sentenced and convicted. The plaintiff's witnesses had no reason falsely to implicate Nieuwoudt, nor would they stand to benefit from such conduct.

On the other hand, Nieuwoudt certainly had a substantive interest in the outcome of the case. As appears from his affidavit in the application for intervention, there was an undistributed asset of more than R4 million in his estate, to which he would, by virtue of his reversionary interest, have a claim. Furthermore, he was not convinced, according to the affidavit, that the trustees were conducting a virilis defensio. He regarded his interest in the matter as so substantive that he intervened in person, obviously with an eye on the R4m undistributed asset in his insolvent estate. I do not intend to say that he did

not act properly; on the contrary. But there can be no doubt that he intervened eventually to gain a substantial benefit.

One should, therefore, in evaluating his evidence, keep this fact in mind. The absence of an incentive to give false evidence on the part of the plaintiff's witnesses and the opposite in the case of Nieuwoudt was not given sufficient weight by the court a quo.

The second preliminary observation is that there is no reason to differ from the evaluation of Cilliers' evidence by the trial Court. He was found to be a truthful and reliable witness. The trial court, despite the aforesaid finding, failed to give sufficient weight to the evidence of Cilliers where it implicates Nieuwoudt.

The third preliminary observation is that the untruthfulness of Nieuwoudt is rather obvious. His denial of having bought diamonds from Van Zyl must be a patent lie, in the light of the passages quoted above from exhibit U. Just prior to the making of exhibit U, Van Zyl was trapped by the police and used as a trap against Nieuwoudt on his farm Rondawel. This led to his making the

statement recorded in exhibit U. When he says in exhibit U that his source of diamonds has been cut off, it is perfectly true. When he says he sold to De Beer, that is also true. When he says Van Zyl was his source, that is also true. Not only is the truth of the latter statement borne out by Van Zyl's evidence, but also by Nieuwoudt's involvement in the defence of the criminal charges and his offer to stand in for the legal costs, as appears at least from the evidence of Cilliers. In particular, therefore, the learned judge a quo was wrong when he found that"... one thing Exhibit U does not show is that any diamonds emanated from Plaintiff's mine." Exhibit U proves, in my view, just that.

For the reasons stated, I hold the view that the testimony of Nieuwoudt should be rejected as false, and that of Cilliers, Van Zyl, De Beer, Otto and Willemse accepted as basically truthful and correct. There are other examples of the untruthfulness of Nieuwoudt which need not be traversed here.

I have stated that the evidence of Cilliers, De Beer, Otto and Willemse should be accepted as basically truthful and correct. As far as Cilliers is

concerned, his evidence has not been questioned and it was, in my view, correctly accepted by the court a quo as truthful and reliable.

As far as Otto is concerned, I consider his evidence as regards his participation in the theft to be correct, corroborated as it is by the evidence of Cilliers.

The same goes for Willemse.

I have some doubts whether Otto's evidence of his identification of Nieuwoudt's farm on the occasion when he accompanied Van Zyl is reliable. His evidence in a previous trial stands in stark contradiction of this evidence in the present case and it would be unjustified to rely on this part of his testimony.

Willemse's evidence relating to his participation in the thefts must, in my view, also be accepted as there is no valid criticism against it.

There is no reason to reject De Beer's evidence. It is true that his evidence as to the details of the transactions with Nieuwoudt is vague, but then it must be remembered that the events took place approximately 11 years

before the present trial. It was argued that the events to which he testified were important and decisive in his life; that he had testified to them before, and that they must have been uppermost in his mind over the years. This may be true, but it loses sight of the natural inclination to forget facts, especially when they have an unpleasant or painful connotation.

He was also criticised for coming forward to implicate Nieuwoudt after enjoying the benefits of "home leave." I consider this aspect to have been over-emphasized by the judge a quo. It has not been illustrated that De Beer was asked to implicate Nieuwoudt before he was convicted, nor that he refused to do so then. It was never shown that the "home leaves" had the effect of his giving false evidence against Nieuwoudt.

But, be that as it may, the one outstanding factor that should convince one that De Beer was basically truthful, is Nieuwoudt's statement, exhibit U, in which he confirms De Beer's evidence in essence. As I have indicated, Nieuwoudt's denial that the said statement was correct is patently false. The falseness of his evidence on this vital point corroborates De Beer's evidence

(R v Simon 1929 TPD 328).

What we have then is the following:

1. Persuasive proof that Cilliers stole diamonds from plaintiff's mine, sometimes assisted by Willemse.

2. These diamonds were delivered to Van Zyl, either directly or, on one occasion, via Otto.

3. Nieuwoudt sold diamonds to De Beer.

The link in the chain between Cilliers and Nieuwoudt is Van Zyl. The basic question to be answered is: did Van Zyl deliver the diamonds stolen by Cilliers to Nieuwoudt?

There are strong indications that Van Zyl's evidence, that he delivered all the diamonds emanating from Cilliers to Nieuwoudt, is essentially correct. A major part of his evidence, relating to the source of the diamonds and how he acquired it, is truthful: this is corroborated by Cilliers and Otto. The criticism of his evidence, viz. that his memory was vague, and that he had testified differently on some minor points in other trials, is, for the reasons

already stated, not really conclusive. The statement that he made at Citrusdal on 28 January 1983, in which he said that he had never sold diamonds to Nieuwoudt was, as he testified, patently false, it being inspired and dictated by Nieuwoudt in order to shield him as a co-accused.

More importantly, his evidence is corroborated by Cilliers who implicated Nieuwoudt as the recipient of the diamonds.

Further, there is the identification by Nieuwoudt himself of Van Zyl as his source of diamonds in exhibit U, and Nieuwoudt's false denial of the correctness of exhibit U.

Finally, taking all the facts into consideration, there are the general probabilities. If it is accepted as fact that Cilliers delivered stolen diamonds to Van Zyl; that Van Zyl says he sold them to Nieuwoudt; and that De Beer bought uncut diamonds from Nieuwoudt; why should Van Zyl be held to be untruthful? The probabilities are that he was the link in the chain between Cilliers and Nieuwoudt.

But the matter is somewhat more complicated, because three

substantive points have been raised in argument before this Court which, if sound, throw doubt on the reliability of Van Zyl.

First and foremost are the contradictions, already noted, between the evidence of Cilliers and Van Zyl and, as far as it may be relevant, those of De Beer as regards the dates of the theft and the sales of the diamonds, and the quantities involved.

Next, there is the matter of the 327 diamonds recovered by plaintiff. In its amended particulars of claim plaintiff set out the calculation of its gross loss and then explained that certain amounts must be subtracted so as to arrive at its net loss. One of the deductions relates to 327 diamonds. Paragraph 7(b) of the amended particulars of claim reads as follows:

> "The sum of R69 470,00 being the value of 327 diamonds with a mass of 278,9 carats stolen from plaintiff's mine but recovered by plaintiff falls to be deducted from the said sum of R1 566 612,00 to arrive at plaintiff's claim which is accordingly the sum of R1 497 412,00."

The respondents requested further particulars to this paragraph, to which appellant replied that the diamonds had been recovered on 17

September 1981; that they had been returned to appellant after conclusion of the magistrate's court case No. 79/81, Garies, and that they were part of the diamonds sold by Van Zyl to Nieuwoudt.

On these skimpy details the parties proceeded to trial, in the course of which the matter was never really cleared up. No particulars of the magistrate's court case were furnished, nor of the circumstances under which they were recovered. What did transpire is that, according to appellant's expert witness, a diamond valuator named Heale, the 327 diamonds were delivered to him on 12 August 1980 for valuation. Their mass was 278,9 carats and he had valued these diamonds at R69 470,00. The same particulars were given in the rule 36(9)(b) notice relating to his expert evidence. Heale was not cross-examined on this point.

On behalf of the respondents it was argued that, if Heale had already received the 327 diamonds on 12 August 1980, and because it was the appellant's case (as was expressly stated on the pleadings) that these diamonds had emanated from Van Zyl, it demonstrates that Van Zyl must

have obtained at least these diamonds from a source other than Cilliers. According to Cilliers he stole the first diamonds near to the end of 1980. Heale's evidence tends to destroy the chain between Cilliers and Van Zyl. This problem in appellant's case, so it was argued, must be seen in the light of the abovementioned contradictions between the evidence of Cilliers, Van Zyl and De Beer relating to the dates of the thefts and the further transactions.

Finally, there is Otto's evidence that he once removed two diamonds from the matchboxes emanating from Cilliers before delivering the remainder to Van Zyl. He revealed this fact to Van Zyl and Van Zyl arranged for the sale of one of these diamonds. Otto, in trying to sell that diamond , was trapped by the police. The two diamonds which he removed from the matchboxes were recovered by the police and, presumably, later handed back to the plaintiff. The plaintiff deducted their value, R14361, from its claim.

The implication of this evidence, so it was argued, is that once again the chain of evidence between Cilliers and Nieuwoudt is broken. Otto admits having removed two diamonds, but were there not more? And who can say

that Van Zyl did not follow the same modus operandi with respect to other diamonds delivered to him?

The point in issue is not primarily one of quantum. It relates, more importantly, to the credibility of Van Zyl, plaintiff's key witness. On behalf of the respondents it was argued that the discrepancies mentioned above, in particular between Cilliers and Van Zyl and the date of recovery of the 327 stones as testified by Heale, cast doubt on the truthfulness and reliability of Van Zyl. If one accepts Cilliers' evidence, Van Zyl cannot be correct as to the period during which he obtained diamonds from Cilliers. But that he did obtain and deliver diamonds in a period prior to the inception of deliveries by Cilliers, is apparently borne out by Heale's evidence just mentioned.

There is force in the argument and if the standard had been proof beyond a reasonable doubt it might well have carried the day. But of course that is not the requisite standard of proof in a civil matter and at the lower level of proof on a preponderance of probabilities there is a wealth of material which points to Nieuwoudt's direct involvement in the scheme of things. All the

witnesses implicate him. There are numerous instances of cross-corroboration in their evidence; no convincing reason has been suggested why they should have been prepared, at this late stage, to conspire together to perjure themselves to implicate Nieuwoudt. Nieuwoudt implicates himself in several respects: by his actions during the trap at his farm Rondawel (his "discovery" of the diamonds on the lawn, the unlikely "loan" of R5 400,00 to Van Zyl); by his remarks during the subsequent interview with Pool and Meintjies which were recorded and in which he mentions Van Zyl; by his conduct towards De Beer (searching him at their first meeting) and his willingness to participate in the trap set for the latter who, according to Nieuwoudt's testimony, was innocent of any illicit diamond dealing. And if Nieuwoudt was not the link between Van Zyl and De Beer, who was? No other person or persons who could have fulfilled that linking role have been suggested by anyone during any of the various trials, including this one. There are simply too many disparate points scattered throughout the evidence, linking Nieuwoudt to the theft of the diamonds, to be attributable to coincidence or conspiracy. True,

there are the contradictions between plaintiff's witnesses mentioned earlier, notably between Cilliers on the one hand and Van Zyl and De Beer on the other, as to the period when the deliveries were supposed to have occurred. Discrepancies such as these were to be expected and allowance must be made for the lag of some 11 years between event and testimony. Moreover, except for Cilliers who turned state witness, all of the witnesses were convicted thieves who, at some stage or another, were prepared to lie under oath to save their own skins. That is particularly true of Van Zyl. These are not perfect witnesses. And finally, apart from Cilliers' deposit book, there was a complete dearth of documentary evidence which could serve as reminders of or support for their evidence. That is one of the reasons why Cilliers' evidence, supported as it is by his deposit book, is to be preferred to that of Van Zyl and De Beer. But as was pointed out if Cilliers is right about the period Van Zyl and De Beer must be wrong. One possibility is that they may simply have been mistaken. Another is that all three of them may indeed have been truthful on that score but that Van Zyl may have been lying on another

i.e. that, contrary to his evidence, he may indeed not have obtained diamonds only from Cilliers. For all one knows he might have been receiving diamonds from Cilliers' predecessor at the recovery plant and he may have been lying consistently in order to protect that source. But if Van Zyl was lying about his source of diamonds before Cilliers became involved it does not necessarily follow that he was also lying about the diamonds he received after Cilliers became involved. Falsum in uno, falsum in omnibus is not part of our law. Cilliers' involvement with Van Zyl is proved by Cilliers' own evidence; Nieuwoudt's involvement with Van Zyl is proved, on a balance of probabilities, by the factors detailed earlier. The plaintiff's case is based only on the diamonds Cilliers stole and passed to Van Zyl and which Van Zyl in turn delivered to Nieuwoudt. That route has been established by the probabilities mentioned earlier. Any deliveries of diamonds prior to Cilliers' advent on the scene is strictly irrelevant to the plaintiff's case. The recovery of the 327 diamonds in August 1980 is also explicable on the hypothesis that Van Zyl, prompted by Nieuwoudt, was active in his smuggling of diamonds before

Cilliers was. But even if that hypothesis is too speculative to be convincing, the 327 diamonds referred to in the plaintiff's pleadings, read with Heale's evidence that the diamonds were given to him to value in August 1980, cannot serve to self-destruct the plaintiff's case. Heale's evidence on the date was given, as it were, in passing. Its significance in the light of Cilliers' evidence was plainly not appreciated by anyone involved in the trial at the time. It was not referred to in the judgment of the court a quo. Heale was not confronted with Cilliers' evidence and Cilliers was not recalled to deal with Heale's evidence. The date might simply have been a slip of the tongue and the concession in the plaintiff's pleadings, that the value of those diamonds is to be deducted from the plaintiff's claim, may have been incorrectly made. That one fact alone, unexplored and unexplained as it is, does not, in my view, weaken the remainder of the plaintiff's case to such an extent as to neutralise the general probabilities that Nieuwoudt was a knowing participant in the theft of the diamonds collected by Cilliers.

In my view the appellant has accordingly succeeded, on a balance of

probabilities, to prove Nieuwoudt's involvement and hence his accountability for the plaintiff's loss. Credit was correctly given for the two diamonds which Otto kept back and which were recovered by the police and handed back to the appellant. Appellant is also bound by the credit given in the case of the 327 diamonds.

The conclusion arrived at also disposes of the basic problem of ascertaining the quantum of the appellant's claim. One must take the evidence of Cilliers as the point of departure, and calculate the appellant's claim accordingly. To the extent that counsel for the appellant in argument before this Court made an adjustment in the respondents' favour where Van Zyl testified to a lesser amount, I shall follow a similar course, (i) The number of matchboxes containing diamonds that were removed from the appellant's mine, and the dates of the thefts

One can summarise Cilliers' evidence in this regard as follows:

December 1980 - January 1981 : 3 matchboxes.

January 1981 : 3 matchboxes.

February 1981	: 2 matchboxes.
March/April 1981	: 3 matchboxes.
July/August 1981	: 4 matchboxes.
October 1981	: 5 or 6 matchboxes.
December 1981	: 5, 6 or 7 matchboxes.

Taking Cilliers' lowest figure, this would give 25 matchboxes. Van Zyl puts the figure at 22, and I will take that figure, (ii) How many of the matchboxes were full?

According to Cilliers, three of the matchboxes were not full. Van Zyl testified that about two-thirds of the boxes were not full; the other boxes being half to three-quarters full. Once again, it would not do an injustice to the respondents to accept Van Zyl's figure. (iii) The range of stone sizes of the diamonds taken

Cilliers was consistent in his evidence on this aspect also. In February 1992 he indicated the smallest diamond fell into the +9 category; in 1986 he placed it in the +9 to +11 category. Otto said the smallest diamond was in the

+11 category.

One would not do an injustice to the respondents if one accepted that the smallest diamonds taken fell into the +9 category.

As regards the largest size taken, Cilliers' evidence was that he had taken nothing larger than stones weighing 15,9 carats, and the largest stones were between 6,4 and 15,9 carats. This evidence derives support from Nieuwoudt's statement in exhibit U, viz. that the largest stones he sold to De Beer were 15 carats. Otto estimated the larger stones to range from 6,4 to 12,5 carats.

A conservative assumption would be that the largest stones taken weighed 10 carats. (iv) The value of the diamonds in the matchboxes

In regard to the computation of the value of the diamonds in the matchboxes, the appellant called Prof Barr, an Associate Professor in the Department of Economic and Mathematical Statistics at the University of Cape Town. He was requested to assess statistically the value of the diamonds

stolen from the appellant.

From his evidence it appears that the mine at Oranjemund produced and sold its diamonds according to production cycles. These cycles were usually of approximately one month duration, but the prices obtained for each cycle differed, hence the calculation becomes very intricate if one has to calculate the value of diamonds stolen over a period of time.

In the period relevant to the Cilliers thefts, i.e. December 1980 to December 1981, there were 10 such cycles.

Another complicating factor is that the average weight of diamonds taken from the mine would differ from cycle to cycle. He calculated, therefore, the number of carats per cycle that would emanate from each size of diamond. He illustrated that, based on the production figures of the mine, one cycle would give 237 carats from 10 carat stones, while the next only gave 183 carats from 10 carat stones, etc.

Next he calculated the weight of a matchbox full of diamonds if it consisted only of one size, e.g. 10 carats, or 9 carats, etc. This was done by

a method known as a computered simulation. It amounts to this: the computer will select in a random way out of the approximately 250 000 diamonds produced in a particular production run, the target size (e.g. 10 carats) and, theoretically, fill a matchbox with stones of that size. The computer has been fed the weight, the value and the space taken up by a diamond of that size. The computer can then work out the total value of the matchbox full of diamonds. This value, per size, was calculated over the relevant production periods, according to the value of that particular size per production cycle. This was repeated 1000 times per size per cycle to give a reliable figure.

He then calculated the value of the matchboxes if they did not contain diamonds of one size only, but a spread of sizes, for example from +9 to 10 carats, etc. What the computer did was to simulate, 1000 times, the behaviour of an individual gathering diamonds of the postulated weight per production cycle. In each repetition, the computer was programmed to select (at random) diamonds in the postulated range to fill a matchbox. Each repetition thus

supplies one possible total value of the weight removed. By replicating the process a large number of times a representative range of possible values was obtained and probabilities for each of the values in the range were ascertained.

This calculation enables one to calculate the value for all different mixes of diamond sizes matchbox filled with diamonds taken during the period of any production cycle. If more than one matchbox is taken from any particular cycle, the value can be determined by multiplying the average value of the particular mix of diamonds by the relevant number of boxes. If one assumes that half, or any other fraction of a matchbox was taken, one would simply multiply by such a fraction. Moreover, if there is doubt as to when matchboxes were taken, an average can be obtained for any given period consisting of more than one production cycle.

Having regard to the uncertainties as to the exact dates upon which the diamonds were taken, one can rather calculate the value of the diamonds by applying an average value, with reference to the calculations of Prof Barr, over

the period that the thefts occurred.

In my view, the basis of the calculations used by Prof Barr seems to be valid and, in fact, conservative. Under the circumstances, where the diamonds were stolen before they could be identified and weighed by the appellant, the method used seems to be the best one available.

Based on Prof Barr's figures, one could calculate the appellant's damage as follows:

(i) Weighted (over cycles) average of one matchbox full, containing a mixture of +9 to 10 carats, over the period 14 November 1980 to 21 December 1981 : US$ 77 266.

(ii) 22 matchboxes, 2/3 of which were full,

giving a total dollar value of : U8$ 1 416 535.

(iii) Average exchange rate over said period

in US$per Rand : 1.168

(iv) Rand value of diamonds stolen : R1 212 787.

From this amount the following deductions must be made, as agreed between the parties or proved by the appellant's witnesses Heale, Gie and Lincoln, whose evidence was not materially contested:

(i) Value of diamonds recovered:

2 diamonds recovered via Otto and properly valued: R14 361

327 diamonds recovered, as per Heale's evidence and properly valued: R69 470

R83 831 (ii)

Costs of marketing and valuation saved, according to the evidence of Gie, i.e. 10% of value of diamonds not recovered: R112 896

(iii) Publicity costs saved on value of diamonds not recovered, according to the evidence of Lincoln: R294,00

(iv) Sorting costs saved as per the evidence of Lincoln: R2920

(v) Insurance saved as per evidence of Lincoln: R248

(vi) Export duty saved as per the evidence of Lincoln, i.e. 1/11th of value of diamonds not recovered. R102 632

(vii) Packaging saved, as per agreement between the parties: R50

Total deductions: R302 871

Deducted from the total gross loss of R1212 787, this leaves a balance of R909 916 which amount is due and payable by the first and second respondents out of the insolvent estate of the third insolvent.

The following orders are made:

4. The appeal succeeds with costs, including the costs of two counsel, the said costs to be paid by first and second respondents out of the insolvent estate of the third respondent in the order of preference provided for by the Insolvency Act 24 of 1936.

5. The order of the court a quo is set aside. Substituted for it is the following order:

"There shall be judgment for plaintiff in the sum of R909 916 and costs, such costs to include the costs of two counsel and the qualifying fees of the expert witnesses employed by plaintiff. The said sum and costs shall be paid by the first and second defendants out of the insolvent estate of the third defendant in the order of preference provided for by the Insolvency Act 24 of 1936."

P J J OLIVIER JUDGE OF APPEAL

JOUBERT JA)CONCUR NIENABER JA)CONCUR