CASE NO: 430/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

in the matter between:

NAMIBIAN MINERALS CORPORATION LIMITED APPELLANT

and

BENGUELA CONCESSIONS LIMITED RESPONDENT

CORAM: E M GROSSKOPF, F H GROSSKOPF, HARMS, SCHUTZ and PLEWMAN , JJA

HEARD: 4 NOVEMBER 1996

DELIVERED: 27 NOVEMBER 1996

JUDGMENT

HARMS JA/

HARMS JA:

Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, bona fides and commercial expediency to make such agreements work. But when they are at loggerheads, it appears to be futile to consider whether they would have been able to do so. Once a court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties's initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf Pezzutto v Dreyer and Others 1992 (3) SA 379 (A)); that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation, and that the court should strive to uphold - and not destroy - bargains. (See, generally, Murray & Roberts Construction (Pty) Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A) 514.)

It is useful in this regard to quote, at some length, two extracts from judgments in Hillas & Co Ltd v Arcos Ltd [1932] All E R 494 (HL) on this subject:

> "Commercial documents prepared by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reason of their inartificial forms confront the lawyer with delicate problems. The governing principles of construction recognised by the law are applicable to every document, and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document. On the one hand the conveyance of real estate presenting an artificial form grown up through the centuries and embodying terms of art whose meanings and effect have long since been determined by the courts, and, on the other hand, the formless document, the product of the minds of men seeking to record a complex trade bargain intended to be carried out, both fall to be construed by the same legal principles, and the problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains. The principles are not in

dispute. It is in the application of them to the facts of a particular case that the difficulty arises; and the difficulty is of such a kind as often to afford room for much legitimate difference of opinion and to present a problem the solution of which is not as a rule to be found by examining authorities." (Per Lord Tomlin at p 499 G-I.)

"The document of May 21, 1930, cannot be regarded as other than inartistic, and may appear repellant to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat guam pereat. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be

> able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted." (Per Lord Wright at p 503H-504C.)

(Cf also Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators ("Pty)Ltd; 1992 (1) SA 566 (A) 579G).

The 'essential principles' a court may not violate include especially those that govern the law of contract, more particularly, the rules of interpretation and the parol evidence rule. In passing it may be observed that the adjective 'essential' in this context appears to be unnecessary since there are no inessential principles that a court is entitled to violate. In addition, the question of vagueness or otherwise of an agreement is an objective consideration and it is of no avail to have regard to the subjective intentions and desires of the respective parties; nor can one consider what a reasonable agreement would (or should) have entailed. On the other hand, I cannot agree with Conradie J's (at least implicit) approach in the court below to the effect that the good or bad faith of a negotiating party or the oppressiveness of the bargain to a party are factors that can be taken into account in judging vagueness. I do, however, agree with EM Grosskopf JA that an ambiguous contract is not for that reason necessarily vague. Vagueness or uncertainty do not as a matter of course flow from ambiguity although it may give rise thereto.

Though the first issue between the parties is the validity of their agreement, the focus is on the 'farm-in' clause and, more particularly, certain phrases therein. That focus should not, however, obscure the true investigation which is concerned with the agreement as a whole.

Namco (the acronym for the appellant) relied as its cause of action on the July agreement and argued that the 'farm-in' clause (which is contained in the March heads) was incorporated into the July agreement by reference. The correctness of that submission depends upon the construction placed on clause 4 of the July agreement that reads:

> "The laws of the Republic of South Africa shall apply. Other rights and obligations reflected in the March Heads shall remain. Matters dealt with in this agreement shall be governed by this agreement."

Initially there were no binding 'rights and obligations' in the March heads because those heads were subject to a number of suspensive conditions, as yet unfulfilled. Since these had subsequently been fulfilled or were waived by the agreement in July, there can be little doubt that the remaining 'rights and obligations' became unconditional. These included, at least, the 'farm-in' clause. The indirect reference to that clause in the July agreement does not carry with it the implication that it had been incorporated into that agreement. The use of the word 'remain' in the second sentence of the quoted clause is prima facie incompatible with an intention to incorporate the 'other rights and obligations' therein, and is consistent rather with the intention that the remnants of the March heads should survive independently. This impression turns into a conviction if regard is had to the last sentence of the clause - it can perform no other function. It may be questioned then what the purpose behind all this was because, at first blush, there does not seem to be much sense in having two interrelated contracts if one could have covered all that was agreed in one. The answer may not be all that difficult to find. It is known that Miller and Holberton had realized before the July agreement was concluded that the 'farm-in' clause, particularly insofar as the concept of 'similar attraction' is concerned, conceivably was vague and could lead to litigation. They also knew that the parties had not found it possible to agree on what a 'similar attraction' in South Africa would be and that they had planted, at the very least, a doubt in the mind of Benco (the acronym for the respondent) whether or not the March heads had created binding 'rights and obligations'. With that knowledge, and even before the negotiations had been concluded, Holberton requested his attorney to draft the July agreement. Of utmost importance to him was the retention of the 'farm-in' right. It seems reasonable to assume that, in those circumstances, the parties may well have decided not to complicate the July negotiations and to leave the 'farm-in' clause where it was, namely in the March heads. I should make it clear that I do not have to find as a fact that such a decision had been made. At this juncture the question is whether the ordinary meaning of clause 4 can be ignored or whether the clause is susceptible to adjustment on the basis that it could not have been the parties's true intention not to incorporate the 'farm-in' clause into the July agreement. All I hold is that, reasonably speaking, it may have been their intention to leave that matter to be governed by the March heads. We are then bound to give effect to the words chosen by the drafting party — the more so where this was done with legal advice. Cf SoutA African Warehousing Services (Pty; Ltd and Others v South British Insurance Co Ltd 1971 (3) SA 10 (A) at 18C-H.

Considering the 'farm-in' clause, it is convenient to quote it in full:

> "In the event that the Parties are unable to obtain CDM's consent to a further extension beyond the three (3) year period, or in the event SILVEN [i e Namco] is not satisfied by the venture returns, BENCO shall offer the right of a farm-in to SILVEN in one or more Concession Areas it holds in the Republic of South Africa of similar attraction on terms no less favourable than those stated herein."

In consequence of the rule 33(4) order, we are not called upon to interpret the contract for purposes of this stage of the litigation, but without some interpretation it is impossible to determine whether the allegation of vagueness is well-founded. Interpretation is additionally necessary in order to decide the second issue between the parties, namely whether Namco would have been entitled (had the contract not been cancelled) to 'trigger' the farm-in clause during October 1992.

The clause created a right in the nature of an option for Namco, and an obligation ficiendi on the part of Benco. Benco's obligation was to make an offer to Namco if one of two eventualities should arise. The first was if the parties were to be unable to obtain CDM's consent to a 'further extension beyond the three (3) year period'. That is a reference to the work contract between Benco's subsidiary and COM. The March heads were conditional upon an extension of that contract for an initial three year period as from April 1992. In the July agreement the parties recorded that this extension had not been obtained, that

Benco anticipated future extensions and that the joint venture would nevertheless proceed. In short and as far as the first eventuality is concerned, it could have arisen only in April 1995.

The second, and alternative, eventuality would arise if Namco were 'not satisfied by the venture returns'. A number of questions arise in this regard. On the meaning and effect of the terms 'not satisfied' and 'venture returns', I agree with the judgment of EM Grosskopf JA. Remaining questions relate to the identification of the 'venture' and the time when the dissatisfaction, for purposes of the agreement, may have arisen, thereby triggering Benco's obligation to make an offer toNamco. The 'venture' referred to in the 'farm-in' clause in the context of the March heads appears to me to be a reference to, what the parties called, 'Stage 1'. The heads anticipated financial backing by Namco of Canadian $ 1,5m in order to establish an economic mining activity for the initial three-year period of the CDM contract, i e until April 1995. After payment of operating expenses, Namco was entitled to recover this investment 'from the venture'. Following this recovery, Benco would have been entitled to a 50% share of the net after tax profits 'of the venture as represented by the investment undertaken during the said Stage 1'. A geological and technical report was required for the development of that stage only. Other matters were left for later negotiation and agreement. The July agreement did not even qualify the 'rights and obligations' relating to Stage 1 at all, and it was in any event Namco's case, according to the further particulars for trial, that the South African venture would also have had a stage 1. (That is in a sense a makeweight argument because, as far as interpretation is concerned, we are not bound by the allegations of the parties in regard thereto.) All of this leads to the conclusion that the venture referred to in the 'farm-in' clause was a similar three-year venture. And if that is so, as in the case of the first eventuality, the obligation of Benco could only have arisen at the end of the first three year period, that is during April 1995.

This conclusion finds confirmation in the following: The phrase 'not satisfied by the venture returns' does not, in the context of the March heads or the July agreement, convey to me the possibility of a lack of satisfaction with anticipated venture returns, more so if they were due to temporary market conditions. Ventures of this kind are by their very nature long-term projects and because of that it seems to me also improbable that the parties could have intended anything different. Furthermore, the phrase does not cover a dissatisfaction with the terms, application and execution of the CDM work contract. That contract, extended or not, was the cornerstone of the initial and ultimate agreement between Namco and Benco. The acceptability of the venture returns in its terms formed the basis of the agreement. It means that the ordinary operation of that agreement could not have been a legitimate ground upon which Namco could have based a dissatisfaction with the venture returns.

This interpretation (i e a three-year venture) does give rise to problems, but in my judgment any other approach inevitably leads to greater improbabilities and obscurities. To illustrate: as mentioned, the exercise of the 'farm-in' option would not have brought an end to the Namibian joint venture; in other words, upon the dissatisfaction of Namco with the venture returns and its exercise of the option, it would have become a partner in two joint ventures. It was obliged to carry on with the unsatisfactory venture. Furthermore, according to Namco's interpretation, the 'farm-in' option was to operate in perpetuity, entitling Namco to a South African joint venture if, say, after mining for a century in Namibia it became dissatisfied with the returns, it could farm into South Africa. In the meantime, Benco had to keep its South African concessions (at least those of similar attraction) sterile because otherwise it would not be able to perform, come the day of dissatisfaction. We know from the threats expressed by Miller and Holberton that that is how they purported to interpret the clause even before the July agreement had been concluded. The consequences of such an interpretation are so extreme that one has to conclude, as a matter of interpretation, that it is highly unlikely that they could have been intended. All this means that I am of the view that the phrase 'not satisfied by the venture returns', if interpreted to refer to a dissatisfaction with the three-year venture is not necessarily vague and I am prepared to assume in favour of Namco that the agreement is not void for uncertainty on this ground.

1 then turn to the phrase 'the right of farm-in . . . on terms no less favourable than those stated herein.' Inherent in my earlier finding is that the final word of the phrase, 'herein', refers to what is contained in the March heads. So read, it is clear to me that what was intended by the words 'right of farm-in' was a similar South African

joint venture, and that disposes of the contention that the term 'farm-in' is in any way vague. Accepting that the term 'no less favourable' means, in context, no less favourable to Namco (as was submitted on its behalf) what then should the terms have been that had to be offered? This exercise is necessary in order to determine whether the 'farm-in' clause could have given rise to a valid option.

The term of the anticipated South African venture is rather difficult to establish because the guiding hand of CDM and its work contract were not factors that applied to this country. The basic term of the March heads was a period of three years and it seems to me that that had to be the period that had to be offered in the option. The fact that CDM could have extended the work contract for an indefinite period could not, and therefore did not, apply to the option. The finacial arrangements do not pose any problems because what applied to Namibia could also have been made applicable to South Africa without any adjustment. Conversely, the suspensive conditions concerning CDM could clearly not have been apposite to the South African situation, but the others were, and had to be part of the option. Suspensive condition no 4 requires special consideration. It reads:

> "The entering into by the Parties of an Agreement to give full force and effect to the terms and conditions expressed herein and to more fully define the relationship, to include, inter alia, rights of transfer and assignment to associated companies[,] establishment of modus operandi in Namibia, terms and conditions of the Manager's appointment[,] basis of reporting, accounting and audit, financial structure, responsibilities and other such matters as may reasonably be required by either Party. The Parties shall endeavour to complete this Agreement within three (3) months of the date hereof."

According to Namco's further particulars for trial and its argument before us, this condition was a term that had to form part of the option because (and I paraphrase) it was relevant and capable of sensible application to a South African joint venture. The allegation and the submission, irrespective of the correctness of my earlier finding that the 'farm-in' clause had not been incorporated into the July agreement, appear to be correct. That raises the question whether these outstanding matters were of such a nature that without their resolution the exercise of the option could have given rise to certain and binding contractual obligations (cf CGEE Alsthom Equipments et Enterprises Electriques, SoutA African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A) 92A-E; Murray & Roberts supra 516-517; Van der Merwe et al Contract: General Principles par 3.3 and par 8). Since this provision was couched as a suspensive condition, it cannot, in my judgment, be said that the parties could have intended to have had a binding agreement simply upon the exercise of the option. They had expressly agreed that only a fuller arrangement would have bound them to the joint venture. Fulfilment of the condition was necessary and the condition required consensus of the parties. It is thus not a case where the exercise of the option would have given rise to a contract and that other terms would merely have been left for later negotiation and agreement. I therefore am of the view that the exercise of the option could not have given rise to a contract with certain or ascertainable terms and that on this ground the 'farm-in' clause is void for vagueness.

The last allegedly uncertain phrase relates to the definition of the South African concession area. It will be recalled that it was defined as 'one or more Concession Areas it holds in the Republic of South Africa of similar attraction'. The focus is on 'similar attraction'. A number of questions spring to mind (and not only to the neurotic as was suggested in argument). Some have a ready answer, others less so.

Beginning with the obvious, namely the meaning of 'attraction': it refers contextually to features which 'draw' a person or persons, in this case, to a marine diamond joint venture in Namibia. Attractive features are usually determined by emotional or subjective considerations, but it is safe to assume in this case that the attraction related to commercial considerations.

Initially in its pleadings Namco used the term 'similar potential' to paraphrase 'similar attraction', but it later abandoned this terminology. The particulars for trial enumerated some of the attractions of the Namibian concession area, and they were said to include the presence, within a focal point suitable for early diamond exploration, a certain reserve potential, the size of the area, the fact that the area extended out to sea for a distance of three nautical miles, and the area's overall ore reserve potential. In argument, it was submitted on behalf on Namco that (1) the Namibian standard for purposes of comparison was not the Namibian area as it turned out to be, but as it had been believed to be, (2) the South African area had to have a current (i e the date of the option) attraction which the Namibian area had held in July 1992, and (3) the 'attraction' was the sum of those qualities, actual and assumed, which drew the parties into the joint venture. In regard to the final point, reference was made to Holberton's evidence relating to the attractions but which was at some variance with the particulars for trial above referred to.

Submission (1) was accepted by Conradie J and I am content to do so too. Although the 'farm-in' clause had not been incorporated into the July agreement, it became effective during July only when the suspensive conditions were fulfilled or waived, and, somewhat hesitantly, I conclude that the date of determining the attractive features of the Namibian venture for purpose of the option was its effective date of July. Submission (2) appears to be far-reaching, implying that Namco could have been entitled, after many years and after exhausting the Kerbehuk gulley area, to a South African equivalent thereof. Since I have earlier concluded that the farm-in clause had but a limited time span, this problem does not arise and I am also prepared, in an attempt to make sense out of the agreement, to accept this submission. Concerning submission (3), it must be borne in mind that we are not called upon to decide what the Namibian attractions subjectively were or whether there was factually something similar in South Africa. Both issues were left for later determination. What has to be considered is whether the agreement, properly construed, was concerned with the attraction to both parties, to only one of them, or the objective attraction of the venture to the reasonable man in the position of an investor. It is, in the matrix of the agreement, unlikely that the 'attraction' could have been intended to be anything other than the subjective attraction of Namco to the Namibian venture: the dissatisfaction that could have triggered the 'farm-in' option was that of Namco; the clause had been inserted for the sole benefit of Namco; the parties were not concerned about what other (reasonable) investors thought of their venture; and I do not consider it likely that Namco was interested in Benco's views on the matter - it had to sell its proposition and its views to investors.

Holberton gave, as mentioned, evidence of what had attracted him (and, presumably, Namco) to the Namibian venture. It is doubtful whether this evidence was admissible because if "parties intend to make the consequences of their agreement objectively ascertainable, reference may be had only to the standard set in the agreement ... [C]ertainty is attained where the parties incorporate into their contract details contained in a specified document, or where they agree upon an objective standard for determining a performance" (Van der Merwe et al p 163). Assuming such evidence to have been admissible, problems arise concerning the operation and practical application of the option. Once the occasion should have arisen for Benco to have made the offer, it would have had to decide what to offer, and that would have involved a determination of what the attractive features of the Namibian venture were to Namco. These features were not agreed features, and they were not objectively determinable by Benco. No objective standard had been set. Should Benco have erred, whether bona fide or not, it would have been in breach of the contract. Nor would a reasonable offer have been good enough. Only one that satisfied the subjective test mentioned could have sufficed. An agreement that purports to give rise to such obligations does not create certain obligations and is accordingly void for vagueness. This conclusion makes it unnecessary to have regard to the question whether, once the Namibian parameters had been established, it would have been possible to find something 'similar' in South Africa. That inquiry (bearing in mind that even if an agreement is not void for vagueness, it may nevertheless be impossible to perform) belongs to the next leg of the litigation.

That concludes the determination of the first issue. The agreement is void for vagueness in the respects set out. The second issue, namely whether Namco would have been entitled during October 1992 to trigger the 'farm-in' clause does consequently not arise. It has, however, already been decided against Namco in the course of this judgment when I held inter alia that such event could not have taken place except during April 1995.

The appeal is dismissed with costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

F H GROSSKOPF JA) concur
PLEWMAN JA)

Case No 430/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NAMIBIAN MINERALS CORPORATION LIMITED Appellant

and

BENGUELA CONCESSIONS LIMITED Respondent

CORAM: E M GROSSKOPF, F H GROSSKOPF, HARMS, SCHUTZ

et PLEWMAN, JJA

HEARD: 4 November 1996

DELIVERED: 27 November 1996

JUDGMENT

E M GROSSKOPF. JA

2 The appellant, a company incorporated in Gibraltar, sued the first respondent, a South African company, and its chief executive officer, one Wilson, for damages in the Cape Provincial Division. The claim against Wilson has been settled and he is no longer a party before the court. The case against the first respondent (to which I shall refer hereinafter as the respondent) was based on breach of contract. When the matter came before the court a quo (Conradie J) a separation of issues was ordered in terms of rule of court 33(4). The issues to be tried first related to the validity of the alleged contract and the further question whether certain rights under the contract, if valid, could properly have been exercised in October 1992. The import of this latter issue will appear more clearly after I have discussed the facts of the case. The court a quo found in favour of the respondent both on the invalidity of the contract and on the question relating to the exercise of

rights thereunder. With the leave of the court a quo the appellant now appeals to this court.

The main facts are briefly as follows. The respondent was the holder, either by itself or through subsidiaries, of marine diamond concessions along the West coast of South Africa. It also had (through a subsidiary) a so-called "work contract" whereby it was entitled to exploit diamonds in a marine concession area along the coast of Namibia held by CDM (Proprietary) Limited ("CDM"). The respondent's rights under the work contract were to remain in force for three years after the date of signing of the contract (i e, until 10 July 1993) but could be renewed at the discretion of CDM.

The appellant was interested in participating in the exploitation of the Namibian concession. It proposed to provide finance for a joint venture. Various negotiations were held between the parties. The appellant was throughout represented by one Holberton who was resident in England.

4 On 12 March 1992 the parties signed a document headed "Heads of Agreement" relating to the exploitation of a defined part of the off-shore area covered by the Namibian work contract. I shall refer to this document as the March heads. It recorded that the appellant would "use its best endeavours to provide finance and backing up to the value of Canadian $1,500,000-00 to establish economic activity on a scale, and in a format and type, which shall be recommended by [the respondent] and approved by [the appellant]." This was referred to as stage 1, being the initial three year period of the CDM contract. The respondent was to be the project and technical manager to the venture and would be rewarded for its services. The document set out how the joint venture was to be financed after stage 1, and how profits would be shared.

The March heads were subject to a number of conditions, the main ones of which were the following. Condition 1 was

5 that CDM would grant an extension of the work contract for a

period of not less than three years from April 1992.

Condition 4 was

> "The entering into by the Parties of an Agreement to give full force and effect to the terms and conditions expressed herein and to more fully define the relationship, to include, inter alia, rights of transfer and assignment to associated companies, establishment of modus operandi in Namibia, terms and conditions of the Manager's appointment, basis of reporting, accounting and audit, financial structure, responsibilities and other such matters as may reasonably be required by either Party. The Parties shall endeavour to complete this Agreement within three (3) months of the date hereof."

Finally, condition 6 required the respondent to "confirm a precise definition of the area" in which the proposed joint venture would operate. The significance of this condition was that the respondent had granted rights to exploit a part of the area covered by its work contract to a Canadian company represented by one Stephenson, and there was a dispute about the extent of this area. In particular Stephenson claimed a part of the area earmarked in the March heads for the joint venture between the parties.

After the conditions there appeared the clause which is of primary importance in the present appeal. In it the parties are called Silven (the then name of the appellant) and Benco (an acronym of the respondent's name). The clause reads as follows:

> "In the event that the Parties are unable to obtain CDM's consent to a further extension beyond the three (3) year period, or in the event SILVEN is not satisfied by the venture returns, BENCO shall offer the right of a farm-in to SILVEN in one or more Concession Areas it holds in the Republic of South Africa of similar attraction on terms no less favourable than those stated herein."

I shall refer to this clause as the farm-in clause.

After conclusion of the March heads the parties attempted to implement it. There were, however, a number of obstacles that delayed progress. CDM was not prepared to grant an extension of the work contract. Stephenson remained obdurate in his territorial claims. In the result Holberton (on behalf of the appellant) started casting his eyes towards the respondent's South African concession areas. In this he relied on the farm-in clause. The respondent was, however, not inclined to be accommodating in regard to its South African interests. It had commenced flirting with BHP Minerals, a major mining house, with a view to a joint venture in the respondent's South African concessions.

The matter came to a head in July 1992. Holberton came to Cape Town to discuss matters with the respondent. Stephenson was also in Cape Town at the time. In the result the obstacles to the joint venture between the parties were overcome. The respondent managed to secure an agreement with Stephenson which, although it did not fully meet the appellant's wishes, nevertheless gave the joint venture an adequate unchallenged area. As far as CDM was concerned, the parties agreed to proceed without a guarantee that the work contract would be extended. Other conditions had been satisfied or were deemed to have been satisfied. A new contract was concluded, which I propose calling the July agreement.

The July agreement commenced by setting out the history of the matter. It then recorded an undertaking that the appellant would provide finance and backing to the value of Canadian $1.5 million to fund the joint venture. The agreement then adverted to each of the six conditions laid down in the March heads. In regard to condition 1 (the extension of the work contract) it recorded that CDM's agreement had not been obtained, but that the respondent anticipated that CDM might well in the future grant extensions, and that the parties had agreed that the joint venture would proceed nevertheless. As far as the area was concerned (condition 6) the July agreement provided a definition.

The terms of the proposed joint venture were set out in clause 3. The venture was to be called the Benib Joint

9 Venture. Provisions were laid down regarding its duration, purpose, management structure, funding and distribution of profits.

Clause 4 of the July agreement read as follows:

> "The laws of the Republic of South Africa shall apply. Other rights and obligations reflected in the March Heads shall remain. Matters dealt with in this agreement shall be governed by this agreement."

It was common cause before us that the "rights and obligations" referred to in this clause, were mainly, if not solely, those flowing from the farm-in clause.

The agreement was signed on 9 July 1992. Two copies of the agreement were prepared. They were both signed by Holberton on behalf of the appellant and by Wilson, the second defendant in the court a quo, on behalf of the respondent. These signatures were witnessed by one Miller (a business associate of Holberton's) and one Smith, a director of the respondent company.

Holberton still hoped that Stephenson might agree to an extension of the area of the joint venture. He therefore left his copy of the agreement with Wilson. The arrangement was that if Wilson could obtain a further concession from Stephenson, he would amend the area description in the two contracts, initial the amendments, and send the agreements to Holberton for signature.

Having settled matters, as he thought, Holberton returned home to the United Kingdom.

Soon after the conclusion of the July agreement, Wilson regretted that he had entered into it. The reason was probably that the rights granted to the appellant would complicate the respondent's negotiations withBHP concerning the South African concessions. In other words, it was the farm-in clause that was worrying him. Faced with this problem Wilson acted boldly and decisively. He tore off and destroyed the parts of the two duplicate originals of the agreements on which the signatures appeared (both copies being fortuitously in his possession), and subsequently denied that he had signed them. It is indicative of his reasons for doing so that copies of the letters to the appellant in which these denials appeared were sent also to BMP. As regards the March heads, he contended that the various conditions (and particularly the one relating to an extension of time by CDM of the work contract) had not been satisfied, and that the March heads consequently also did not grant any contractual rights to the appellant.

Wilson's denial that he had signed the July agreement, and his contention on behalf of the respondent that it was not bound by any joint venture agreement, was treated by the appellant as a repudiation of the contract between it and the respondent. It accepted the repudiation on 25 September 1992 and terminated the contract. Subsequently it instituted its claim for damages against the respondent and Wilson personally.

12 As noted above, only some of the issues raised in the pleadings are before us on appeal. The first issue is the validity of the contract. The appellant relied on an agreement that was partly in writing and partly oral. The written parts of the agreement were the March heads and the July agreement. In their original plea, both defendants denied that Wilson had signed the July agreement, and further denied that he was authorised to sign it. Moreover, it was contended that the March heads did not constitute a binding contract, and in any event, that the conditions on which its validity had depended had not been fulfilled. These were the only attacks on the validity of the contract in the original plea. It was only in later amendments to the plea that the questions of voidness for vagueness, with which I deal hereafter, were raised.

Technical evidence was led at the trial which proved that Wilson's denial that he had signed the agreement was false. The respondent thereupon amended its plea to admit that Wilson had signed the agreement. Wilson himself, in his plea, persisted in this denial to the end (he did not, however, give evidence to support his denial). As stated, he is no longer a party before us. The respondent has also abandoned the contention that Wilson was not authorized to enter into the agreement. At present the validity of the contract is attacked only on the ground that the contract is void for vagueness.

The first alleged basis of vagueness may be disposed of easily. In the July agreement the area of the joint venture is described as from the southern boundary points of the concession and northwards along the total extent of the concession (being three nautical miles in width) "to the northern boundary of Kerbehuk Mining Block". By a late amendment to its plea the respondent contended that the northern boundary of this area is not ascertainable. The

14 Kerbehuk Mining Block is an area on the land adjoining the ocean. Its northern boundary is entirely on land and does not extend into the ocean. The northern boundary of the Kerbehuk Mining Block could therefore not form the northern boundary of the sea area to be exploited in terms of the July agreement. The western point of the northern boundary of the Kerbehuk Mining Block could indeed form the eastern point of the northern boundary of the sea area to be exploited, but the July agreement does not indicate in which direction the sea boundary runs from that point.

In reply to the amendment of the plea to introduce this defence, the appellant amended its particulars of claim. It alleged that on 8 July 1992 there was an oral agreement between the appellant (represented by Holberton) and the respondent (represented by Smith) that the northern boundary of the area in which the joint venture was to operate would be a line drawn by extending, in a straight line and into the

Atlantic Ocean, the northern boundary of the Kerbehuk Mining Block, until such extended line met the western boundary of the concession. It was further alleged that this agreement was orally confirmed between the parties on 9 July 1992 when the July agreement was signed, the appellant being represented by Holberton and the respondent by Wilson.

It was common cause that evidence of the alleged supplementary oral agreement was not rendered inadmissible by the parol evidence rule (this being a contract partially in writing and partially oral) and that if the oral agreement could be proved, the respondent's objection to the definition of the northern boundary of the area would fall away. Holberton, in his evidence, confirmed that the oral agreement was concluded as alleged in the amended particulars of claim. Although both Smith and Wilson were available to give evidence, neither did. On behalf of the respondent it was argued that Holbertson's evidence in this regard, although uncontradicted, should nevertheless be rejected as untruthful. The court a quo was not prepared to do so and I can see no reason for disagreeing with this finding.

The further respects in which it is contended that the agreement is void for vagueness relate to the farm-in clause. It will be recalled that the farm-in clause was introduced into the July agreement in an oblique way by the preservation of "other rights and obligations reflected in the March heads". It was common cause in argument that the preservation of these rights pertained mainly, if not solely, to the farm-in clause and in argument both parties analysed the clause to determine whether it was capable of enforcement.

Before performing this exercise myself it is necessary to state some general principles. First, the parties clearly considered that the clause was capable of implementation. Even before the conclusion of the July agreement the appellant was claiming rights under the farm-in clause.

17 Although there were disputes between the parties about its implementation (and, in particular, on what area in the South African concessions is "of similar attraction" to the Namibian area) there was no suggestion from the respondent that the clause was too vague to be enforced. And, in August 1992 when the respondent wanted to get out of the contract, Wilson adopted the extreme expedient of mutilating the documents and falsely claiming that he had not signed them. Quite clearly he had no doubt as to the contract's enforceability. Moreover, as I have already stated, the contention that the clause was void for vagueness was inserted into the respondent's plea by amendment and formed no part of the original formulation of the claim. We are here dealing with a lawyer's point rather than a matter of practical importance for businessmen. We should not be astute to destroy a contract which the parties seriously entered into and considered capable of implementation. See Genac

Properties JHB (Pty) Ltd v NBC Administrators CC 1992 (1) SA 566 (A) at 579F-H and authorities there cited.

Second, one must distinguish between vagueness and ambiguity. If a contract can be interpreted to have two or more reasonable meanings this would not by itself render the contract void for vagueness. The correct meaning can be determined by the use of extrinsic evidence or the process of legal interpretation. It is only where the contract is not capable of any effective meaning in the circumstances that it would be too vague to be enforced.

I now turn to the clause. Reading it as a whole one has little doubt as to its general effect. The provision as to CDM's consent to an extension has clearly fallen away in the light of the July agreement. Accordingly the farm-in clause could only be invoked if the appellant was dissatisfied with the venture returns in Namibia. In that event the appellant was entitled to be offered a joint venture similar to the

Namibian one in the respondent's South African concessions.

The question then is whether this general meaning has a sufficiently precise content to be legally enforceable. The parties' counsel closely analysed various phrases in the clause and I shall do likewise.

The first was "in the event SILVEN is not satisfied by the venture returns". There was some argument in the court a quo and in the heads of argument about the words "not satisfied" but before us Mr Shaw, who appeared for the respondent in this court, accepted that these words were not too vague to be enforced. The words are ambiguous but no more. They could either require the satisfaction of the appellant as a fact (which is the natural linguistic meaning) or an implication maybe read in that the test is to be the arbitrium boni viri.(Compare Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 (1) SA 179 (A) at 187J - 188C). Of course it is implied that the satisfaction of the appellant, if that is what is required, must be an honest one. In the Benlou case (at 188C) it was suggested that a provision granting one contracting party a discretion in relation to the performance of the contract may in particular circumstances be against public policy. Mr Shaw did not contend that this was so in the present matter, and this is not the case made out by the respondent in the pleadings. In any event I do not think that such a contention would be tenable.

I turn accordingly to "venture returns". Again the general concept is clear enough. "Return" in the relevant sense is defined in the Shorter Oxford Dictionary as

> "Pecuniary value resulting to a person from the exercise of some trade or occupation; gain, profit, or income, in relation to the means by which it is produced; also (in pl.), proceeds, results."

In the present case the appellant was to provide capital for the joint venture. Its purpose was to make a profit on its investment. Whether it did so or not would be reflected in the financial results of the joint venture. And the clause could be invoked if the appellant was dissatisfied with such profit (or yield, return, gain, whatever). Of course, in theory, different items may be included or excluded in computing a profit or loss, and a profit may be determined over a longer or shorter period. I do not think that these possible differences are material. In deciding whether it is satisfied the appellant (or, for that matter, the bonus vir exercising his arbitrium) would have regard not only to the figures themselves, but to the basis on which they were compiled. The clause could obviously not be invoked if the venture suffered a loss in a particular week when an Atlantic storm raged. A decision to do so could hardly be honest. The figures may also be slanted by exceptional gains or losses. Whether, and to what extent these are to be taken into account, would be a matter falling within the discretion of the appellant or the bonus vir, as the case may be.

In its judgment the court a quo held that the appellant could not be satisfied or dissatisfied with the venture returns in Namibia if it did not know what the returns in South Africa were likely to be, and that this feature introduced a further element of uncertainty into the provision. This finding was not supported before us and I need say no more about it.

The next words to be considered are "farm-in ... on terms no less favourable ...". Now the expression "farm-in" is certainly not a common one, but in the context its meaning is clear enough. If the appellant is dissatisfied with the returns in Namibia, it is entitled to a similar joint venture with the respondent in South Africa. "Farm-in" in the context means no more than the right to participate in a joint venture in which the appellant would be able to invest with a view to exploiting the respondent's rights.

As far as the expression "terms no less favourable" is

23 concerned, the respondent's main argument was the following.

It will be recalled that the farm-in clause was introduced into the July agreement by the words "Other rights and obligations reflected in the March heads shall remain". Where the farm-in clause refers to "terms ... stated herein" it must accordingly, so it was contended, refer to terms stated in the March heads. And in fact no clear terms were there stated.

I do not agree. In the context of the parties' agreement, which, as stated above, was contained in different documents and oral agreements, "herein" in my view means no more than "in our agreement". Any other interpretation would be absurd. In this regard it must be emphasized that the March heads itself made specific provision for a further agreement to more fully define the relationship between the parties.

The position then is that the terms of the parties' joint venture were set out in the July agreement. These terms could be applied mutatis mutandis to any substituting venture in South Africa.

Finally I come to the expression "Concession Areas ... of similar attraction." The first question here is: when must the similar attraction exist? It seems to me there are only two possibilities - either when the contract was concluded, or when the appellant seeks to invoke the farm-in clause. This ambiguity does not render the provision void for vagueness, and need not be resolved for the purposes of the present case.

Then one may ask: to whom must the area be attractive? I do not think the parties intended either of them to have a discretion in this respect. The test must be an objective one. The answer would then be: it must be attractive to a businessman proposing to invest in a venture to exploit the diamonds in the area.

The more difficult question is what the criteria of attractiveness are. In the context the attraction must be a financial one. In the judgment a quo the learned judge held that the similarity required is one, not between the offered area and the Namibian area as it turned out to be, but between the offered area and the Namibian area as the parties believed it to be. I agree, but would add that it is in particular the appellant's belief which is relevant.

There is considerable evidence before us as to what the parties knew, believed and hoped about the Namibian concession area. Technical evidence could show what the attributes and potentialities are of any area offered in terms of the farm-in clause. Of course the defects in the offered area would also have to be taken into account. Whether the South African area is, on balance, of similar attraction would be determined by weighing up all the different factors. Here too I expect technical evidence would be necessary. It does not in principle seem to me to be beyond the capacity of a court to perform such an exercise. In a particular case it might of course be impossible to say on the evidence whether or not the offered area is of similar attraction to the Namibian area. In such a case the party burdened by the onus of proof would lose. I do not think, however, that similar attraction is intrinsically incapable of proof. And I would here repeat that the parties, who were intimately concerned with the technical and financial aspects of the respective concession areas, clearly entertained no doubt about the enforceability of the provision.

For the foregoing reasons I consider that the contract between the parties was valid and enforceable.

I turn now to the question whether the farm-in clause would have been exercisable in October 1992. This question arises as follows. It will be recalled that the appellant accepted the respondent's repudiation of the contract in

September 1992 and the contract was then cancelled. In calculating its damages, the appellant alleged that, but for the cancellation of the contract, it would have exercised the farm-in clause in October 1992. This allegation raises two questions to be decided now, namely

a) whether the contract permitted the exercise of the farm-in clause as early as October 1992;

b) whether the appellant would, as a fact, have been dissatisfied with the venture returns in October 1992.

I deal first with question a). In accordance with its terms, the farm-in clause is exercisable in two sets of circumstances. The first is if the parties are unable to obtain CDM's consent to a further extension beyond the initial three year period. The second is if the appellant is not satisfied with the venture returns. The respondent's contention is that the three year period, expressed with relation to the first set of circumstances, must also be read into the provisions regarding the second set of circumstances. Accordingly the respondent contends that the appellant cannot invoke the farm-in clause prior to the end of the three year period for which the work contract was granted.

The words of the clause do not support the respondent's submission. The two sets of circumstances in which the right to a farm-in would arise, are expressed disjunctively. The three year period is mentioned with relation to the first set only. On the face of it, the farm-in is exercisable whenever the appellant is not satisfied with the venture returns. The appellant consequently contended that the right of a farm-in could be claimed at any time in the future if the appellant became dissatisfied with the venture returns. Neither party alleged that there was any tacit term which would limit the time within which a farm-in could be claimed. However, it does seem to me that the appellant's attitude is probably contrary to the intention of the parties. The surrounding circumstances would seem to indicate that the parties did not intend that the right of farm-in would continue indefinitely. It seems that some tacit limitation may have to be read in. I do not however have to pursue this point because there is no complaint that the appellant waited too long to claim the farm-in. The objection is rather that it exercised the right too soon. There is no reason in my view why an implied or tacit term should be read into the farm-in clause to the effect that the clause could not be invoked before a certain time. If the appellant could show that it would honestly have been dissatisfied with the venture returns soon after the conclusion of the contract (or that the bonus vir would have been dissatisfied, as the case may be) there is nothing in the agreement to disentitle it from then claiming the right to farm-in. The parties could hardly have intended that they should actually exploit the Namibian work area, and thereby incur the loss (or inadequate profit) that was sure to eventuate, before the farm-in clause became applicable.

I turn now to the facts giving rise to the appellant's dissatisfaction. Mr Shaw did not pursue the contention that the appellant was not entitled on the facts to be dissatisfied with the venture returns and I shall therefore deal with them fairly briefly. It will be recalled that the respondent's rights in Namibia derived from a work contract between its subsidiary and CDM. In terms of this contract the subsidiary was bound to ensure production in the area "at a mutually acceptable rate". It was the intention of the parties hereto to commence operations immediately, and in an area known as the Kerbehuk gully area they could have enjoyed initial production figures of 1 376 carats per month (16 512 carats per year). Moreover, they intended moving rapidly to more sophisticated remote-controlled mining techniques and thus to expand their production. At the time of the conclusion of the contract CDM was encouraging exploitation of the area at full production. The scale of production that was contemplated by the parties was 250 000 carats per annum. On 11 August 1992 De Beers/Centenary, the parent of CDM, published half-yearly results containing the statement that the Central Selling Organization, through which De Beers and CDM sold their diamonds, would reduce its contractual obligation to take delivery of diamonds from producers by twenty-five per cent from September 1992. This was because of a down-turn in the diamond market. The appellant was concerned about this, but was told by the respondent that the cut would not affect the joint venture's operations. However, in October the appellant learnt that CDM had limited the respondent to a production limit of only 9 600 carat for the whole of its work area for 1993, which would presumably have had to be shared with Stephenson. On this caratage the proposed development could not take place and the production of such a small quantity of diamonds would probably have

resulted in a loss. There was no knowing how long this limitation, or a similar one, would remain in force.

In my view these circumstances justified the conclusion (whether by the appellant or the notional bonus vir) that the joint venture could not realise a reasonable return on capital in the foreseeable future.

I conclude therefore that the appellant would have been entitled to invoke the farm-in clause in October 1992.

For the above reasons I would uphold the appeal.

E M GROSSKOPF, JA

SCHUTZ, JA Concur