THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 917/10

In the matter between:

RUSLYN MINING & PLANT HIRE (PTY) LTD **APPELLANT**

and

ALEXKOR LIMITED **RESPONDENT**

Neutral citation: *Ruslyn Mining & Plant Hire v Alexkor* (917/10) [2011] ZASCA 218 (29 November 2011)

Coram: HEHER, BOSIELO and WALLIS JJA

Heard: 15 November 2011

Delivered: 29 November 2011

Updated:

Summary: Contract – misrepresentation – sufficiency of evidence.
Practice – absolution from instance – at end of plaintiff's case – when granted.
Practice – uniform rule 21 – further particulars for trial – not pleadings – departure from in evidence – amendment – when necessary.

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ORDER

On appeal from: Northern Cape High Court (Kimberley) (Kgomo JP sitting as court of first instance):

1. The appeal succeeds.
2. The orders of the court a quo are set aside and replaced with the following:

‘(a) The application for amendment of the plaintiff’s trial particulars is refused. In this regard each party is to pay its own wasted costs.

(b) The application for absolution from the instance is refused with costs.’

3. The costs of the appeal are to be borne as follows:

(a) Each party is to bear its own costs in relation to the application to amend.

(b) Save as aforesaid the respondent is to pay the costs of the appeal not including the preparation of that part of the record containing the application for amendment of the trial particulars.

4. All costs are to include the costs of two counsel where such were employed.
5. The matter is referred back to the court a quo to continue the trial.

JUDGMENT

HEHER JA (BOSIELO AND WALLIS JJA concurring):

[1] This is an appeal with leave of the trial judge (Kgomo JP) against orders made by him after the close of the plaintiff’s case in which he dismissed with costs an application by the plaintiff (‘Ruslyn’) to amend its trial particulars and granted absolution from the instance with costs in respect of its Claim B.

[2] The respondent (‘Alexkor’) is a state-controlled entity that carries out and oversees the mining of diamonds on land and at sea in the area of Alexander Bay in the Northern Cape. From May 2001 until June 2003 Ruslyn screened gravel and diamondiferous overburden from dumps at various sites under a series of contracts

concluded with Alexkor at a rate per ton of material fed into the screens. In November 2002 the latter decided to put out to tender the same activities on a number of alternative contractual options, one of which was a revenue-sharing scheme.

[3] Ruslyn was the successful tenderer and on 20 June 2003 concluded an infield screening contract with Alexkor on the basis of a 71.2:28.8 split of net revenue in favour of the former. From its point of view, the profitability of the undertaking depended in the main on its ability to recover diamonds from the dumps in sufficient quantity and quality (by caratage) to cover its costs of screening, loading, crushing and transporting diamondiferous sand and gravel sediments from the mining areas, and, in addition, leave it with a realistic surplus from its profit share.

[4] The venture was not a success. Ruslyn very soon concluded that it could not turn a profit from the contents of the dumps. About January 2004 it abandoned the attempt but was apparently prevented for some months from removing its earthmoving equipment and screens by Alexkor's intervention.

[5] In August 2004 Ruslyn issued summons against Alexkor. Of its original three claims, the first (Claim A) was abandoned before the trial commenced and the third (Claim C, for damages based on loss of rental income in respect of the impounded equipment and screens) remains unresolved. This appeal concerns only Claim B in which Ruslyn claimed payment of R15 693 969.74 as damages arising from various alleged fraudulent or negligent misrepresentations said to have been made by Alexkor and to have induced Ruslyn to enter into the infield screening contract.

[6] As Kgomo JP, in delivering judgment on the application for absolution, found that the appellant had 'failed by a long way to present evidence on each essential allegation necessary to establish Claim B' and had not made out a prima facie case, it will be necessary to revisit both the substance of the claim and the evidence led in support of it. Before that, however, it is appropriate to dispose of the appeal in relation to the refusal of the amendment of Ruslyn's particulars for trial.

The further particulars for trial

[7] The material allegations of misrepresentation relied on by the plaintiff included both positive misrepresentations about the yields from the dumps and misrepresentations by non-disclosure of information in Alexkor's possession that Ruslyn said it owed a duty to disclose. In its particulars of claim these were stated as follows:

'18. During the negotiations which preceded the conclusion of the profit sharing agreement:

18.1 Defendant was aware of the following material facts and circumstances of which plaintiff was, to Defendant's knowledge, unaware:

18.1.1. Defendant had suffered severe losses pursuant to the agreements annexed as "A" and "B" hereto, in that the net revenue from diamonds recovered from the diamond gravel screened by Plaintiff in terms of the aforegoing agreements had been exceedingly insufficient to cover the amount of Plaintiff's remuneration in terms of the agreements annexed hereto as "A" and "B".

18.1.2. Defendant had knowledge, due to its historic mining activities:

a) What the net revenue from the diamond yields of the dumps to be mined by Plaintiff in terms of the profit sharing agreement had been, and what it was likely to be in future per ton of material from the dumps;

b) What grade, and how many carats of diamonds, had been recovered from each of its dumps in the past, and what the yield of such dumps were likely to be in future;

c) That it was not possible for Plaintiff to conduct the operations called for by the profit sharing agreement profitably;

d) That the written proposal (annexed hereto marked "D") furnished by Plaintiff to Defendant during the negotiations containing a suggested feasibility of the contract for both parties was exceedingly inaccurate, particularly as it related to the carats of diamonds that could reasonably be expected to be recovered per ton of screened material from the dumps;

e) That the net effect of the profit sharing agreement would be that Plaintiff would in effect be bearing the cost of Defendant's duty to rehabilitate its mining areas.

18.2 Defendant had a duty to disclose the aforegoing facts and circumstances to Plaintiff during the course of the aforegoing negotiations, but intentionally, alternatively negligently, failed to do so.

18.3 Defendant further represented to Plaintiff that:

18.3.1. Defendant had achieved on average a recovery of 950 carats of diamonds per month at its Noordsif facility from diamond gravel recovered by Plaintiff from Defendant's dumps;

18.3.2. That, in the event that Plaintiff concludes the profit sharing agreement, it could reasonably expect a recovery of diamonds at a similar rate, and that the profit sharing

agreement would be profitable to Plaintiff; and

18.3.3. That Plaintiff could expect to recover, during the subsistence of the profit sharing agreement, the number of carats and screened grade per mining area set out in the proposal (annexure “D” hereto) in the rows indicated as “Exp. Screened grade (cphm^3)” and “Expected carats”.

18.4 The aforesaid representations were to the knowledge of the Defendant false, alternatively the Defendant should have known that the representations were false, in that:

18.4.1. Defendant never recovered 950 carats from its Noordsif facility per month from gravel mined by Plaintiff;

18.4.2. The possible yields of the Defendant’s dumps did not allow a recovery of diamonds in the ratio referred to in paragraph 18.3.1 hereinabove;

18.4.3. The number of carats and screened grade of diamonds recoverable per ton of screened material which Defendant had represented were not achievable.

19. The aforesaid misrepresentations were material and were made by Defendant to induce and entice Plaintiff into concluding the profit sharing agreement with Defendant.

20. Relying upon the truth of the aforegoing misrepresentations Plaintiff entered into the profit sharing agreement.

21. Had Plaintiff been aware that the representations were false Plaintiff would not have concluded the profit sharing agreement.’

[8] Alexkor filed a lengthy request for further particulars in December 2006. Although this was said to be in relation to the amended particulars of claim, it is apparent that it was intended as a request in terms of uniform rule 20 and it was answered on that basis by Ruslyn in April 2007. The aim of the request was largely to obtain information about the dates when the positive misrepresentations were made and the persons by and to whom they were made. The reply identified a date prior to 13 May 2003 and identified Messrs Oosthuizen, Meyer and Zihlangu as the representors and Messrs J I van Loggerenberg, Buthelezi, Opperman and Truter as the representees.

[9] Despite the references to a number of potential witnesses in its particulars for trial, Ruslyn called only one witness to testify as to the events surrounding the conclusion of the revenue sharing agreement and the alleged misrepresentations. He was Mr Eustace Buthelezi who joined the company in 2003 shortly before the

conclusion of agreement. Mr Truter, referred to in the particulars, the general manager for Ruslyn's operations in Alexander Bay in the first half of 2003, had apparently been fired in unpleasant circumstances during June of that year. He was, unsurprisingly, not exposed to the rigours of testifying despite the important role played by him in preparing and presenting the tender to Alexkor.

[10] Mr Buthelezi testified that he had made it clear to Mr Truter that he needed him to get information from Alexkor for the purpose of preparing Ruslyn's response to the invitation to tender. On 9 April 2003 he received a letter from Mr Truter in the following terms:

'**SUBJECT: ALEXKOR SCREENING**

Noordsif[1] at this stage +127% above target (169 carats above month to date).

Their budget for April 2003 is 964 carats. They already achieved 779.

Please see the attached schedule.'

[11] On 22 April 2003, Alexkor, having received the tender, invited Ruslyn (as well as a competing tenderer) to do a powerpoint presentation on its essential proposals at Alexander Bay on 13 May. A written outline of that presentation was included in the exhibits at the trial. The second page of the document read as follows:

'**Past Performance**

The Average Tons of R.O.M.[2] for the past 5 months were 231 000 tons per month.

Year to date diamonds recovered: 9 324 ct's.

99.7% of budget.

Information

The capacity of Noordsif Plant at present is 20 000m^3 per month of screened product.

The dumps in the Noordsif Area normally screen out at 10-15% of the Run of Mine.

Therefore the Headfeed to the various screening plants need to be 200 000m^3 (360 000 tons) using a screen factor of 10%.

At an average grade of 6ct/100m^3 of screening product will result in a carat production of 1200 carats per month.

The average stone size of Noordsif Area is 0.90.'

According to Mr Buthelezi's testimony the reference to the recovery of 9 324 carats in the year to date must have come from information obtained from Alexkor. As he put it,

1 Noordsif was Alexkor's diamond recovery plant at which all material sifted by Ruslyn and other contractors was treated.

2 Run of the Mine ie the gravel etc after sifting.

such information was ‘very relevant’ because ‘we had to evaluate the different scenarios and without the production numbers coming through from Alexkor we would have actually have been in the dark’. As he understood it, the production number stated in the document was the total of the tons screened by Ruslyn. Alexkor was represented at the presentation, according to Mr Buthelezi’s recollection by its CEO, Mr Zihlangu, Mr Johan Oosthuizen, its production manager, and Mr Willie Meyer, its mine manager. The production and yield numbers in the powerpoint presentation were not queried by the representatives of Alexkor.

[12] On 14 May 2003 Alexkor notified Ruslyn that, subject to the consent of its board of directors, it was prepared to enter into a contract on terms and conditions to be agreed.

[13] After the suspension of Mr Truter in early June, the CEO of Ruslyn, Mr Rusty van Loggerenberg instructed Mr Buthelezi to confirm that the reports apparently received from Alexkor through Mr Truter concerning carat production were ‘authentic’. As a result Mr Buthelezi and Mr Eugene van Loggerenberg met with Mr Johan Oosthuizen, whom Mr Buthelezi described as ‘the production manager at the time for the Noordsif plant’ seeking ‘some sort of comfort’. As to this meeting Mr Buthelezi testified as follows:

‘So actually I think that must have been – I cannot quite remember the days but very close to the signing, I think actually the same day when we actually signed, we spoke to him at length about the production and everything and he said to us you know you guys you are actually very slow, you should have signed this thing a long time ago and he pulled out a production report which actually showed us that, I think it must have been in the second or third week of production and already think the figures were running at round about 700 and something. So to which we said but what do you actually expect normally you know, from this dumps you know on average, and he gave us a number of 950 carats as an average. After that we obviously had to report back. I must be quite honest. I mean I think we actually quite comfortable with that kind of information coming straight from a production manager of Alexkor. So we called the CEO Mr Rusty van Loggerenberg and told him about this. I think he was also excited about that. So we said look we believe that we need to sign this thing, because Alexkor as well, they want to have this matter concluded so that they can actually carry on with their work. So he actually sent us a letter of authority you know, giving both Mr Eugene van Loggerenberg and

myself authority to sign the contract on behalf of the company. . . But obviously he [Oosthuizen] knew that we are actually asking that information with the view of actually making a decision on whether to enter into a profit sharing agreement or not. . . No, it definitely did persuade us to get into that profit share agreement.'

[14] Despite the fact that Mr Buthelezi's evidence relating to the meeting with Mr Oosthuizen and its inducing effect on the conclusion of the contract had not been foreshadowed in Ruslyn's particulars for trial, no objection was taken to the leading of such evidence then or thereafter at the trial. That such a meeting had taken place was not disputed and in fact Mr Buthelezi was extensively cross-examined with the object of demonstrating that the figures supplied by Mr Oosthuizen had been correct, the justification for the exercise being expressed by counsel for Alexkor as follows:

'Seeing that it is an essential issue of the case as to whether Mr John Oosthuizen gave correct information, it is going to be necessary to examine whether if that was the request to Mr Oosthuizen, whether in fact the answer he [Buthelezi] received was correct.'

[15] After Mr Buthelezi completed his testimony Ruslyn called two expert witnesses before closing its case. Counsel for Alexkor applied for absolution from the instance. According to the judgment what occurred thereafter was as follows:

'After Mr Gess, for Alexkor, had completed his absolution address and when Mr Beyers, for Ruslyn, was at the tail-end of his argument in opposition of the absolution Mr Beyers intimated that he was unable to complete his argument before seeking certain amendments to sustain his argument. As the proposed amendments were substantial and were not going to go through unopposed, the case was postponed for this reason for a substantive application.'

[16] A substantive application was indeed brought and refused by the court a quo. The appellant sought to amend its answers to the requests that I have specified above. It is unnecessary to set out the details of the changes. Suffice it to say that the only proposed amendments of substance are those which seek to place the misrepresentations relied on in paras 18.3.1 and 18.3.2 at a time *after*, instead of *before* the drafting of the mine plan, Annexure "D" to the particulars of claim, and confining its contentions by saying that Mr Oosthuizen and no one else was the representor on each occasion. This was, as I have earlier noted, consistent with the substance of the evidence which had been led by Ruslyn without objection.

[17] The learned judge president refused the application to amend because:

(1) he regarded the explanation for the failure to become aware of the fact and significance of the new evidence as unacceptable and, perhaps, unworthy of credence;

(2) he censured the delay in applying for the amendment until November 2009, after the close of the plaintiff's case, pointing out that notice could have been given at the second pre-trial conference held on 4 February 2009;

(3) he was of the view that the grant of the amendment would have the effect of enabling the plaintiff to present a fresh case at a late stage, a case that the defendant had not come to court to meet;

(4) he found that allowing the amendment would conflict with established principle, referring particularly to dicta in *Greyling v Nieuwoudt* 1951 (1) SA 88 (O) at 91H, *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C-E and *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 637 (D) at 640H.

[18] To deal first with the principle, the cases cited by the learned judge all deal with applications to amend pleadings. Further particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: uniform rule 21(2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action or create a new one (as the trial judge appears to have believed). The purpose of particulars for trial is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case. See for example, *Thompson v Barclays Bank DCO* 1965 (1) SA 365 (W) at 369D-E. Such particulars are only required if and when the other party asks for them and what will be furnished is to a large extent dependent on the skill and foresight adopted in the formulation of the request. Because they are not pleadings, they do not limit the scope of the case being made by the party that supplies them. A party has a right to rely on all and any evidence that is admissible and relevant to his pleaded cause or defence and, save within the parameters set by the purpose of

such particulars in so far as ensuring a fair trial is concerned, no stultification of that right should be permitted. Thus, unless there is clear evidence of bad faith in the furnishing of the original further particulars or in the withholding of the intention to change the thrust of the evidence or irremediable prejudice to the other party caused by reliance on incorrect or insufficient particulars furnished by his opponent, relevant evidence which goes beyond the terms of particulars for trial should be admitted subject to a postponement, if necessary and an appropriate award of costs to cure the element of surprise.

[19] Applications to amend particulars for trial seem to me to be largely inappropriate and unnecessary, particularly once the trial has got under way. It should be sufficient for counsel to notify his opponent at an early stage when he becomes aware that his evidence may depart materially from the information in the particulars for trial. The latter can then take the matter up with the trial court if necessary. In appropriate circumstances (where the contemplated evidence involves great complexity, for example) the court may consider it fair to order the party proposing to lead such evidence to reduce particulars of the changes to writing but that is not a rule.

[20] The present case is an example in point. Counsel for Ruslyn should have drawn attention to his proposed departure from the particulars on record before he led evidence having that effect. However at an early stage of the trial (11 February 2009) when the evidence of Buthelezi exceeded the bounds of those particulars, counsel for Alexkor remained unprotesting, this despite the inference to be drawn from his cross-examination that he appreciated the importance of the evidence. Thereafter he had ample time to consider his client's position and prepare his case to meet the varied thrust of the evidence. It seems to me that by the time that the plaintiff closed its case the horse had long bolted and an application to amend had become superfluous. The learned judge could either have refused to grant an amendment *for that reason* or declined to make an order to that end.

[21] The application being unnecessary, the wasted costs generated by it should have been held to the account of Ruslyn. These however should not include Alexkor's costs of opposition, as it had precipitated the application by its contention that Ruslyn's

case was restricted by the trial particulars and this was aggravated by its determined resistance to the amendment, which not only served no purpose in the circumstances but was predicated upon principles that related to amendment of pleadings.

The application for absolution from the instance.

[22] The test is clear: the plaintiff must make out a prima facie case in the sense that there is evidence relating to all the elements of a claim on the strength of which the court could or might find for the plaintiff at the end of the case. See *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 92E-93A. The plaintiff is at this stage entitled to rely on any reasonable inference drawn from its evidence (ibid at 92 H).

[23] It was sufficient to defeat the application that one basis relied on by the plaintiff in support of claim B might succeed at the end of the case. In revisiting the sufficiency of the evidence my failure to deal with any allegation either in the form of a positive misrepresentation or an omission coupled with a duty to disclose should not be regarded as an expression of opinion for or against the plaintiff's case in that respect. Nor should anything in this judgment be taken as indicating that the claim should succeed. It is confined to the question whether there is evidence upon which the trial court might find for the plaintiff on its pleaded case, whether based on misrepresentations by omission or of a positive nature. In my view there was such evidence and the application for absolution should have been refused.

[24] In relation to the case depending upon omissions to disclose on the part of Alexkor the learned judge was of the opinion that a tenderer who failed adequately to acquaint itself with the information required to prepare its tender created its own risk of failure. He adopted the principle stated in *Felton Skead & Grant v Port Elizabeth Municipality* 1964 (4) SA 422 (E) at 425E-G:

'It seems to follow that it is for the tenderer to satisfy himself as to the nature and extent of the work to be done regardless of the cost and inconvenience involved in thus satisfying himself.

It therefore affords the applicants in this case no argument to say that for them to have had to make an independent and exhaustive investigation into the extent of the work involved for the purposes of submitting a tender would have entailed considerable time, expense and effort. The question is whether they were in this case entitled to rely on the information supplied by

the respondent for the purpose of tender without independent enquiry so as to satisfy themselves as to the nature and extent of the work involved. On the authorities which I have mentioned I hold that they were not. But even if they were their attention was expressly drawn to the distinction between "assessments" on the one hand and "properties" on the other, and the agreement expressly provides that:

"The tenderer, by tendering, shall be deemed to have satisfied himself as to all the conditions and circumstances affecting the tender."'

But that was a very different case from the present. The applicant had tendered to prepare a property valuation record of all properties in the municipality for a fixed price. In the application it sought a declarator that it was entitled to additional remuneration. It did not rely on negligent misrepresentation, but on a *quantum meruit* (at 424H-425A):

'The gravamen of their complaint . . . was that information for the purposes of tender was inadequate in that it failed to disclose and failed to warn that in most wards there were large numbers of vacant sites in privately owned proclaimed townships to which municipal services had not been extended which were lumped together as single units under the item vacant sites. . . The submission then was as I understood it, that these large numbers of vacant sites to which municipal services had not been extended were therefore not included in the contract for which a property valuation record had to be compiled and that because the respondent insisted that they were to be included the applicants are entitled to additional remuneration based on a *quantum meruit*.'

The claim of the present appellant was based on misrepresentation. The law in this regard has long been established: *Sampson v Union and Rhodesia Wholesale Ltd* (*in liquidation*) 1929 AD 468 at 479-80, (quoting first Jessel MR in *Redgrave v Hurd* 1881, 20 Ch D 1 at 13):

'''If a man is induced to enter into a contract by a false representation it is not sufficient answer to him to say 'if you had used due diligence you would have found out that the statement was untrue'." It makes no difference according to our law whether the person who induced the contract knew at the time when he made the representation that it was false. The defendant is entitled to succeed if he can establish that the representation of the plaintiff was a material one and that he entered into the contract on the faith of such representation – *Viljoen v Hillier* (1904 TS 312).'

[25] Alexkor invited Ruslyn to submit a tender on inter alia the basis of a 'revenue-split' agreement and the contract was awarded on that basis. (There is some indication

in the evidence that a ‘revenue split’ was the only form of agreement that Alexkor was interested in despite the invitation to tender on a fixed price per ton basis.) Prima facie such a proposed arrangement is capable of being construed as a holding out to the tenderer that the invitor contemplates the making of a profit which will be shared between the contracting parties. Indeed it was referred to in the evidence as a ‘profit-sharing agreement’. However the evidence adduced by Ruslyn in the form of official reports of Alexkor and from expert analysis of its historical records tended to show that the latter had no reasonable grounds for representing the proposed ‘revenue-split’ arrangement as one likely to turn (or perhaps even capable of producing) a profit for the parties and, particularly, the appellant. That this was so is derived from reasonable inferences drawn from evidence to the effect that:

1) during the two ‘rate per ton’ contracts between the parties Alexkor had either failed to make a profit or such profit as it had made was not such as to render the continuation of those arrangements acceptable to it;

2) the number and grade of diamonds recovered during those contracts had decreased and was likely to continue in that trend;

3) the reason for inviting a revenue split tender (and concluding the agreement on that basis) was to release the substantial risk of the dump clearance operation from the shoulders of Alexkor and transfer it to the successful tenderer.

[26] Alexkor did not inform Ruslyn of any of these matters. It is a potentially reasonable conclusion from the evidence that

1) knowledge of such matters was peculiarly within the knowledge of Alexkor;

2) the appellant did not have access to information necessary to make an informed decision as to the content and viability of a proposed tender on a revenue split basis without the co-operation of the respondent; Mr Fourie testified as follows:

‘My Lord, the only way a contractor could actually assess the effectiveness of the selective mining would be on a very regular basis to receive feedback as to how many diamonds were recovered during this so-called selective mining process. If one were to carry on and not receive this feedback regularly, one will actually never know how successful you are.

. . . as a result determination of the potential profitability of a screening operation in respect of dumps would almost exclusively rely upon past data in terms of carats yielded per 100 cubic metres screened and of course also the volume of material so screened. Without knowing how

many diamonds you get when you screen the head feed, it is impossible to determine whether this will be a profitable operation or not.

. . .

And a prospective tenderer in respect of a screening operation similar to the profit sharing agreement that we are talking about, with this usually being entirely dependent on the mine owner in respect of such information, without which of course the tenderer would not be able to determine the profitability of the profit sharing agreement unless it would allow, as I said earlier on, to determine on its own what would be the profitability of such a venture by doing some exploration or sampling upfront.'

3) that some attempt was made by Ruslyn to garner relevant information but what was furnished only tended towards showing the attractiveness or potential profitability of the venture as for example Exh 166B (the schedule attached to Mr Truter's letter of 9 April 2003, referred to in para 10 above) and Mr Oosthuizen's response to Mr Buthelezi's enquiry.

[27] Further, a reasonable inference may possibly be drawn from the matters referred to in the preceding paragraph that the non-disclosure constituted a material misrepresentation and if the correct information had been disclosed it would have provided reason for Ruslyn not to tender on a revenue-split basis or not to conclude the contract in June 2003. In my view the evidence at the end of the plaintiff's case was such as to render the remarks of Hoexter JA in *Hulett and Others v Hulett* 1992 (4) SA 291 (A) at 310H-311C *mutatis mutandis* potentially applicable (bearing in mind, of course, that even prima facie proof of reliance on an innocent representation was sufficient for the appellant to surmount absolution).

'In the present case a material representation was made which was calculated to induce the appellants to enter into the contract. There is evidence, which appears to be entirely credible, that the appellants were so induced. It seems to me that in these circumstances there arises a fair inference that this is in fact what happened. Mr *Gordon* who, with Mr *Hewitt*, appeared for the appellants, called our attention to one of the judgments delivered by the High Court of Australia in s*Gould and Another v Vaggelas and Others* [1985] LRC (Comm) 497. The following remarks in the judgment of Wilson J (at 517*d-f*) appear to me to indicate the proper approach to the situation here under consideration:

"Where a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be

likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations."
Here the defendant elected to adduce no rebutting evidence and, in my view, there is nothing before us which tends to displace the natural deduction that the appellants in fact relied upon the fraudulent misrepresentation, as JH and Townsend said that they had done.'

[28] In the circumstances the general principles enunciated by Van Zyl J in *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 722F-725G and by Conradie JA in *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) at paras 4, 5 and 9, relating to the establishing of a legal duty to act positively to prevent a loss, could properly be regarded as relevant to the final decision of the plaintiff's claim, and the failure of Alexkor to make disclosure sufficient to enable Ruslyn to reach an informed decision about whether it should enter into the new contract with Alexkor might fairly be regarded as an actionable non-disclosure.

[29] The learned judge also concluded that the appellant had not made a case on the ground of the alleged positive representations. In what follows I shall consider his reasons for so finding.

[30] The court interpreted counsel's attitude to any refusal of the proposed amendment as 'an ineluctable but unexpressed capitulation on the part of the plaintiff that absent the amendment its case is as good as dead in the water'. That led him, I think, to a failure to give full weight to all the evidence presented to him.

[31] The court considered that the failure or inability of appellant to call witnesses such as Messrs Truter, Taljaard and Mr Rusty van Loggerenberg left unbridged gaps in the proof of even a prima facie case. I do not agree. The evidence of Mr Buthelezi

taken at face value provided proof that the mine plan that accompanied and supported the tender was produced by Mr Truter with input from Mr Taljaard. The plan was a detailed projection on a dump by dump basis of what Ruslyn expected to recover during the duration of the contract. While Truter may have possessed certain inside knowledge derived from his recent employment at Alexkor, Mr Fourie testified that it was unlikely that he could have retained the breadth of detail necessary to prepare the plan. It is at least a reasonable inference that he had resort to and obtained from Alexkor information in relation to such matters as the caratage and yield of diamonds from the respective dumps. It is reasonably clear that the projected figures for diamond recovery far exceed either Alexkor's historic records for Ruslyn's operations or its expectations for the future. If information furnished by Alexkor did provide the basis of the mine plan that information was either misinterpreted by Mr Taljaard and Mr Truter or must have been severely misleading. At this stage it is sufficient that the second is a reasonable possibility.

[32] There is some measure of support both for the derivation of the figures from Alexkor and the proper interpretation of such figures. First there are Exhs 166A and 166B. The latter seems to have the stamp of authority as a document emanating from Alexkor. The former is Mr Truter's summary of that document (quoted in para 10 above). The information seems to bear out a caratage of about 950 for the month of April 2003 (after leaving diamonds perhaps attributable to Equilibrium and Gully Diamonds out of account). Second there is Mr Buthelezi's evidence of the meeting with Mr Oosthuizen, who, having been informed that the purpose was to enable appellant to decide whether to enter into the revenue split agreement with Alexkor expressed surprise that appellant had taken so long in deciding to do so and confirmed that the yield of diamonds from appellant's operation during the most recent mining period had been in the region of 950 carats per month.

[33] The learned judge was of the view that only Ruslyn's chief executive, as its deciding mind, could testify to the reliance placed by it on information obtained from Alexkor; as he was not called a lacuna was left in its case. There was, however, direct evidence that, after doubts arose as to the integrity of Mr Truter early in June, Ruslyn's CEO, Mr Rusty van Loggerenberg, instructed Mr Buthelezi to seek confirmation from

Alexkor that the yield on which Mr Truter had based his calculations was ‘authentic’. Only after confirmation was obtained from Mr Oosthuizen did Mr Van Loggerenberg direct Mr Buthelezi to conclude the contract. The learned judge found that Mr Van Loggerenberg had committed the appellant to heavy expenditure on the presumed assurance that Alexkor would award it the contract *before* the Oosthuizen meeting. The judge inferred from this that the die had already been cast in favour of the contract whatever Mr Oosthuizen might say. However an equally tenable and perhaps, at the end of the case, more probable, explanation is that the fall-out with Mr Truter persuaded Mr Van Loggerenberg of the need for caution. That he wished to be satisfied about the data used by Mr Truter before finally committing the appellant was understandable and reasonable in the circumstances. As Mr Buthelezi emphasized the appellant could not have concluded the contract on the prospect of a substantially lower yield such as 575 carats per month. Reliance on a representation apparently emanating from Alexkor whether at the time of preparing the tender or before signature was thus proved as a reasonably possible inference from the evidence.

[34] There was also sufficient in the evidence to justify the conclusion that the representation of an average yield of about 950 carats per month had no foundation in truth. The historical monthly yields for the previous two contracts from the appellant’s operations were about 575 and 429 carats respectively.

[35] To sum up-

1. The application to amend the particulars for trial was strictly unnecessary and for that reason should not have been granted. Alexkor provoked and then opposed the application, but did so on fallacious grounds. In the appeal, time and paper were wasted on the same wrangling. In my opinion it would be fair to order each party to bear its own costs arising from the application at the trial and in the appeal save that the appellant should not be entitled to recover the costs of preparing the record in so far as such bears on the application to amend.

2. The learned judge should not have granted absolution at the end of the plaintiff’s case. The costs of the argument for absolution in the trial should be paid by the respondent. As the appellant has achieved success on this issue in the appeal it should, subject to what I have said earlier in this paragraph, have its costs.

[36] The following order is made:

1. The appeal succeeds.

2. The orders of the court a quo are set aside and replaced with the following:

‘(a) The application for amendment of the plaintiff’s trial particulars is refused. In this regard each party is to pay its own wasted costs.

(b) The application for absolution from the instance is refused with costs.’

3. The costs of the appeal are to be borne as follows:

(a) Each party is to bear its own costs in relation to the application to amend.

(b) Save as aforesaid the respondent is to pay the costs of the appeal not including the preparation of that part of the record containing the application for amendment of the trial particulars.

4. All costs are to include the costs of two counsel where such were employed.

5. The matter is referred back to the court a quo to continue the trial.

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J A Heher

Judge of Appeal

APPEARANCES

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