Reportable: YES
Circulate to Judges: YES
Circulate to Magistrates: YES
Circulate to Regional Magistrates: YES

IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 176/12

In the matter between:

SUPERSTONE MINING (PTY) LTD Plaintiff

AND

DALE LONSDALE HOHNE Defendant

Coram: Lever AJ

JUDGMENT

L Lever AJ

1. This is a claim for damages arising from an alleged theft, over a period of time, of high value rough diamonds from the plaintiff. The business of the plaintiff is the re-processing of mine dumps created by the historic mines of Kimberley. The defendant was employed by the plaintiff as its "Final Recovery Manager". It is common cause that at the material time the defendant was responsible for the final recovery of rough diamonds at the plaintiff's processing plant and in particular the defendant was solely responsible for the final recovery and management of what is

called the Upper Gem Quality Large Diamonds ("UGQLD"). It is alleged that the defendant stole high value diamonds, particularly the UGQLD, from the plaintiff and sold them on the illegal diamond market, primarily for his own benefit. The issue of who may have gotten a percentage of the proceeds and what that percentage was, is not relevant for present purposes.

2. There is a long and voluminous history of associated litigation in this matter. It will not be necessary to deal with or even refer to all of it. For present purposes it is important to note that the defendant faced a criminal prosecution. In that criminal trial the defendant objected to certain evidence being led on the basis that it was obtained by irregular, improper and unconstitutional means. A trial within a trial was held. Bertelsman J., who presided in the criminal trial, found that the evidence was not admissible and that certain evidence that flowed from or followed from information that arose from the evidence that was disallowed was also not admissible, as being the fruit of the poisoned tree. The prosecution thereafter closed its case and unsurprisingly the defendant closed his case without leading any evidence and as the defendant had already pleaded to the relevant charges, was in those circumstances entitled to his acquittal.

3. The admissibility of the evidence rejected in the criminal trial, together with what appears to be certain additional evidence, came to the fore as a preliminary matter in the present trial. The issue was raised by agreement in the form of a pre-trial conference minute. It appears that the pre-trial conference took place on the afternoon before the present trial and that the minute was finalised on the morning of the trial. The relevant portion of the agreement reads:

> "1. Both parties agree that the Plaintiff will lead and present its case as far as the admissibility of the following are concerned:
>
> 1.1 The video recordings of the interview with the Defendant;

1.2 The Defendant's affidavit made to the SAPS on the 15 January 2010;

1.3 The pointing out of the diamonds by the Defendant, which was found in a toolbox at the premises of Douglas Macleod on 15 January 2010;

1.4 The acknowledgement of debt (with annexures) signed by the Defendant on 15 January 2010;

1.5 That should Plaintiff call a witness, the Plaintiff will lead all of the evidence in respect of the particular witness, also in respect of the other disputes.

1.6 The Defendant thereafter if necessary will call witnesses in respect of the admissibility only;

1.7 The Court will then be requested to make a ruling insofar as the admissibility of the evidence is concerned."

4. This matter appears to be unique, in that this appears to be the first time where the question of admissibility of evidence rejected as inadmissible in the preceeding criminal trial has been raised in a subsequent civil matter to consider the admissibility of substantially the same evidence in such civil trial.

5. The question of evidence, in a civil trial, obtained in a manner that infringes on one of the entrenched rights contained in Chapter 2 of the Constitution[1] has been considered only, quite literally in a handful of cases[2]. The majority of these cases can be broadly categorised as

[1] Act 108 of 1996

[2] Fedicks Group (Pty) Ltd and Another v Matus and others 1997 (9) BCLR 1199 (C); Protea Technology Ltd and Another v Wainer and Others 1997 (9) BCLR 1225 (W); Tap Wine Trading CC and Another v Cape Classic Wines (Western Cape) CC and Another 1999 (4) SA 194 (C); Lotter v Arlow and Another 2002 (6) SA 60 (T); Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W).

"restraints of trade" and "unlawful competition cases"[3]. The exception being Lotter's case, which was an unopposed application for a sequestration[4].

6. Jumping slightly ahead of myself, a general statement of the approach that emerges from these authorities is that a two stage method is used in deciding the admissibility of such evidence. First, it is incumbent upon the person alleging the infringement of an entrenched constitutional right to establish such infringement. Second, once such infringement has been established, it is incumbent upon the person seeking to use the relevant evidence to convince the court to use its discretion to admit such evidence.

7. On the facts of the present case, the correct point of departure would be to consider the differences in approach required in a criminal trial as opposed to what is required in a civil trial. What is required in a criminal trial is governed by section 35(5) of the Constitution. Section 35(5) of the Constitution reads as follows: "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

8. In order to properly appreciate the distinction between criminal and civil trials one must also have regard to the rights set out in section 35(1) of the Constitution. The rights set out in section 35(1) operate in favour of an accused person who is arrested for allegedly committing an offence and such person has inter alia the right to remain silent, the right to be informed promptly of the right to remain silent and of the consequences of not remaining silent as well as the right not to be

[3] Protea Technology case, supra.; Fedicks case, supra.; Waste Products case, supra.;
[4] Supra.

compelled to make any confession or admission that could be used in evidence against that person.

9. It is clear from the content and context of section 35(1) and section 35(5) that they apply exclusively to criminal trials. Civil trials are governed by section 34 of the Constitution, where the material portion of section 34 provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or,…". It is clear from the provisions of section 34 of the Constitution that considerations of "fairness" come to the fore in this context. The concept of "fairness" in this context will be dealt with later on in this judgment.

10. In the Fedics case, Brand J. (as he then was), illustrated the importance of and consequences that flow from the distinction between a criminal trial and a civil trial in two separate passages. The first of which reads as follows:

> "On the other hand, there is a fundamental difference between criminal and civil proceedings which is, in my view, of considerable importance in the present context, namely that in a criminal case the accused person enjoys the privilege against self – incrimination. He has the fundamental right to remain silent. The prosecution must prove its case without any assistance from the accused. The accused is under no duty to disclose his defence nor is he obliged to disclose any documents which might strengthen the State's case. In civil proceedings the position is quite the opposite. A litigant is not only obliged to disclose his case, he is also obliged to discover all documents which may damage his own case or which may directly or indirectly enable his adversary to advance his case."[5]

[5] Fedics case., supra., p. 1219., para. 90.

11. The other passage of the Fedicks case which is instructive in the context of distinguishing between criminal and civil trials, reads as follows:

> "Without trying to formulate principles of general validity or rules of general application, the implications of these differences between criminal and civil proceedings in the present context are, in my view, twofold. On the one hand, the litigant who seeks to introduce evidence which was obtained through a deliberate violation of constitutional rights would have to explain why he could not achieve justice by following the ordinary procedure – including the Anton Piller procedure – available to him. On the other hand, the Court will, in the exercise of its discretion, have regard to the type of evidence which was in fact obtained. Is it the type of evidence which could never be lawfully obtained and/or introduced without the opponent's co-operation, such as privileged communications, or the recording of a tapped telephone conversation – or is it the type of evidence involved in this case, namely documents and information which the litigant would or should eventually have obtained through lawful means? In the latter case, the Court should, I think, be more inclined to exercise the discretion in favour of the litigant who seeks to introduce the evidence than it would be in the case of the former. It goes without saying that the Court will, in any event, have regard to all the other circumstances of the particular case."[6]

The importance of this passage is to illustrate the difficulty in trying to formulate a rule of general application and this was why Brand J qualified this passage at the outset. It is evident that both of the considerations he mentions cannot have application on the facts of the present case, because the type of evidence obtained is different and was obtained by different means. The type of evidence is different from that in the Fedics case[7] because in the instant case it amounts to a series

[6] Fedics case., supra., p. 1220., para. 92.
[7] Supra.

of admissions in the context of a civil claim. Broadly speaking, in the instant case, the means by which the relevant evidence was obtained was an interview between representatives of the plaintiff and the defendant.

12. The next step after noting the importance of distinguishing between criminal and civil proceedings is to consider section 34 of the Constitution, the relevant portion of which has already been quoted above. It is certainly superfluous to state that section 34 applies to all civil proceedings. Section 34 places emphasis on the "fairness" of civil proceedings. In the broader context "fairness" in this section includes both the concepts of "substantial justice" to all parties to the dispute as well as "procedural fairness" to be afforded to all parties to the dispute.

13. In the Protea Technology case, Heher J (as he then was) issued a salient warning that one cannot rely on the unrestrained philosophy that the end justified the means[8]. However, he also makes it clear that "Uncovering the truth and exposing the ungodly are not thereby relegated to unimportance. They are, as they ever have been, weights in the scales of justice."[9]

14. Heher J, then goes on to ask the following questions, "Is the exercise of discretion by a court to admit evidence obtained in breach of a fundamental right reasonable or justifiable at all? If it is, how should that discretion be exercised?"[10] Heher J answers these questions as follows: "Privacy is not an absolute right under the Constitution. Nor can it be in practice. That the court should retain the discretion to admit evidence which is relevant is highly desirable provided any fundamental right involved is given its proper weight in a judicial manner."[11]

[8] Protea Technology case., supra., at 1239 D.
[9] Protea Technology case., supra., at 1242 E – F.

[10] Protea Technology case., supra., at 1242 F.
[11] Protea Technology case., supra., at 1242 H.

15. Heher J also concludes, where the breach of a Constitutional right is at play, that the common law position that in civil proceedings all relevant evidence is admissible no matter how it was obtained, subject to the court's discretion to exclude it needs to be formulated differently in order to remain constitutionally compliant. He concludes that if a breach of a Constitutional right is established the complainant is prima facie entitled to have the evidence obtained as a result thereof excluded, subject to the court's discretion to allow it. Heher J states that in exercising this discretion the substance of section 36 (1) of the Constitution must be applied.[12]

16. In my opinion the suggestion in the Protea Technology case that the substance of section 36(1) of the Constitution is the basis upon which the court should test whether to exercise its discretion to allow evidence obtained in breach of a constitutional right is obiter, because I respectfully agree with Heher J that in the context of the particular facts in the Protea Technology case, the first respondent in that case had no legitimate expectation of privacy.

17. The application of the substance of section 36(1) of the Constitution in these circumstances has been criticised by Zeffert and Paizes in their work, THE SOUTH AFRICAN LAW OF EVIDENCE[13]. In the circumstances of this case, it is not necessary for me to consider this controversy.

18. In summary, the approach taken in the Fedics case[14] and the Protea Technology case[15], both contemplate a two stage approach to determining admissibility of evidence obtained in breach of

[12] Protea Technology case., supra., at 1241 J – 1242 D.
[13] Zeffert & Paizes., THE SOUTH AFRICAN LAW OF EVIDENCE., 2nd Ed., Lexis Nexis., pages 773 – 774.
[14] Supra.

a fundamental right enshrined in the Constitution. The first step is to determine if the relevant constitutional right has been breached in obtaining the relevant evidence. At this stage of the proceedings the onus of establishing that such evidence was obtained as the result of a breach of a constitutional right would rest on the person wishing to have such evidence excluded. In these proceedings, this has to be established on a balance of probabilities.

19. If such breach is established, the person seeking to rely on such evidence must convince the court that appropriate grounds exist for the court to exercise its discretion to admit such evidence. This would be so whether the basis upon which the court exercises its discretion is by the application of the substance of section 36(1) of the Constitution or whether the basis upon which the discretion should be exercised is the weighing up of the facts and circumstances of the relevant case against the legal convictions of the community as determined by the court by the application of acceptable means for doing so. As already set out above by virtue of the view I take of the facts of the instant case, it is not necessary for me to consider the second leg of this process.

20. At this point it is worth noting that even in criminal matters, by virtue of the provisions of section 35(5) of the Constitution, the court has a discretion to allow evidence obtained in a manner that violates a right in the Bill of Rights. In a civil trial, and by virtue of the manner in which the provisions of section 34 are set out, a court will at least have a similar discretion to the one provided for in section 35(5) of the Constitution.

21. In the present case the defendant does not rely solely on alleged breaches of his constitutional rights as the basis for excluding the evidence referred to in the pre-trial minute set out above. Defendant also raises what he terms breaches of his "common law rights". Even though the

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[15] Supra.

defendant did not raise these alleged infringements of his common law rights in the pleadings, I have allowed him to canvass these issues. I have done so because I believe it is in the interests of justice to allow the defendant every opportunity to raise every consideration that may impact on my discretion to disallow the relevant evidence. Furthermore, I do not believe the plaintiff was prejudiced by this as the issues were canvassed with the relevant witnesses.

22. The way that these alleged breaches of common law rights were presented on behalf of the defendant was that the breach of these rights should, in and of themselves, preclude the plaintiff from adducing the relevant evidence at this trial. Having regard to the common law rule on the admissibility of evidence in a civil trial, as discussed hereunder, this is clearly an untenable approach. I assume for the benefit of the defendant that what was intended to be argued on the defendant's behalf was that these alleged breaches of common law rights constituted grounds upon which he wishes this court to exercise its discretion to exclude the relevant evidence, in the manner contemplated in the case of Shell SA (Edms)Bpk en andere v Voorsitter, Dorperaad van die Oranje-Vrystaat en andere[16] as well as in the case of Lenco Holdings Ltd and others v Eckstein and others[17]. These "common law" rights and other pertinent legal submissions made on the defendant's behalf will be considered later in this judgment.

23. The factual background against which these issues need to be considered is fairly lengthy, but necessary for a proper consideration of the issues.

24. The defendant was employed by the plaintiff in a senior management position. A great deal of trust was placed in the defendant by the plaintiff. Save for one security door referred to hereunder

[16] 1992 (1) SA 906 (O).
[17] 1996 (2) SA 693 (N).

the defendant held the keys for what was called "the red area", that is the area where diamonds are recovered by the plaintiff. The defendant is related to two directors of the plaintiff, namely Mr JBL Hohne, the Managing Director and Peter Hohne, the Marketing Director.

25. The defendant was responsible for the final recovery of the plaintiff's diamond production, in particular the UGQLD. The plaintiff's recovery plant is almost entirely automated and the system is designed to try and ensure that human hands do not touch the diamonds at any stage of the process. Through each process this plant concentrates diamond material into ever greater concentrations.

26. Without going into details of the process, this culminates in a glass box called the "glove-box". The diamond material is delivered to the glove-box through sealed pipes. Access to the diamonds in the glove box is only through means of sealed gloves. The material that is finally delivered to this glove box is known as "super concentrate". This glove-box has an upper and a lower section. The upper section is itself divided into two sections. The first section deals with the smaller diamonds and the second section deals with the larger diamonds. Each of these sections in turn has two stations with sealed gloves, each is referred to as if it were an individual glove-box. These glove-boxes (stations) on the upper level are numbered consecutively, from left to right when facing the lower section of the glove-box, being glove-boxes 1, 2, 3 and 4. Different work is carried out at each glove-box. Each of these glove-boxes are connected to the lower glass box by chutes. The chutes are also numbered consecutively from 1 to 4. Also from left to right when facing the lower section of the glove-box.

27. The diamond production from each of the glove-boxes on the upper level is delivered to the lower level by means of the chute in each respective glove box. The lower section of the glove box is

one continuous glass box. It also has four glove-boxes. These “glove-boxes” are also numbered consecutively from 5 to 8. Also from left to right when facing the lower section of the glove-box. Different work is also carried out at each of these glove-boxes. For present purposes and for reasons that will become apparent later the UGQLD are delivered down chute 3 into a jar at the bottom of such chute, which is situated in glove-box 7. It was only the defendant, who was at the material time the Recovery Manager of the plaintiff, who dealt with the recovery of UGQLD’s.

28. One side of glove-box 8 is made up of a safe, which has two doors. One of these doors opens into glove box 8 (“the inner safe door”). This door has two keys and a combination lock. The other safe door (“the outer safe door”) opens into another area on the other side of a wall. This area is also secured by a locked steel security door. The safe also has a magnetic switch which only allows one of the safe doors to be opened at any one time. This magnetic switch is contained in an orange box that sits on top of the safe inside the recovery room.

29. The external door which secures the area where the outer safe door is situated cannot be opened by the defendant. In opening this door the defendant needs the assistance of a security officer employed by the plaintiff.

30. The defendant’s duties were, in part, to sort the larger diamonds in glove boxes 3 and 4 and deliver them through chutes 3 and 4 to glove-boxes 7 and 8 respectively. The UGQLD were dealt with in glove-box 3 and delivered through chute 3 to a jug at the bottom of such chute in glove-box 7. Large diamonds of low quality were dealt with in glove-box 4 and delivered through chute 4 to the jar at the bottom of such chute in glove-box 8. The evidence was that it was rare to find a

diamond fitting this description and if one was found it was invariably what was described as boart, which I understand to be an industrial diamond.

31. The large and small diamonds are then combined and washed and rinsed in solvent jars, called "click-clack" jars. The diamonds are then sized through a hand sieve. Diamonds that do not fall through the hand sieve are weighed and diamonds of two and a half carats or more are individually recorded in a register that is kept outside of the glove-box, together with a basic description of each diamond. This was the plaintiff's standard operating procedure at the material time and all diamonds that fell within the said category had to be individually recorded in the register as set out above.

32. The large and small diamonds were again co-mingled and placed together in a special export container that had a facility for affixing a seal. The diamonds in the sealed container were exported from the glove box through the safe. It was the plaintiff's standard procedure that all diamonds had to be exported in this way with the exception of very large and very valuable diamonds, which were dealt with on an ad hoc basis. The exception to the general practice is not relevant on the facts of the present matter and save for the fact that in the process of dealing with very large and very valuable diamonds the defendant was also placed in a position of trust by the plaintiff no more need be said about the exception to the rule.

33. The only way of getting things into and out of the glove-box was through the safe. The contaminated solvent and water in the click-clack jars was also removed through the safe. Fresh solvent and water was also brought into the glove-box through the safe.

34. The defendant was a trusted employee and he himself purchased the click-clack solvent jars that were in use at the material time by the plaintiff, from Game in Kimberley. He purchased them with his personal credit card and claimed the purchase price back from the plaintiff's petty cash. The relevant supporting documents were adduced at the hearing hereof and were not disputed. These click-clack jars had a special feature that was not present in the solvent jars that they replaced. The click-clack jars had a removable diaphragm that sealed the lid of the click-clack jar. This removable diaphragm created a space between the lid of the click-clack jar and the diaphragm, in which things could be concealed.

35. The plaintiff's diamond recovery plant is within a secure fenced area. Access is controlled by way of a locked gate. Both the inside of the recovery room and the outside of the recovery room building are covered by multiple CCTV cameras. The glove-box itself is covered by multiple CCTV cameras.

36. The feed from the CCTV cameras is monitored by a security officer. The defendant was aware of the CCTV security cameras as he was part of the group responsible for placing the CCTV cameras and the commissioning of the CCTV system that operated at the material time.

37. On the 7th January 2010 JBL Hohne received a telephone call from a security officer, Glenda Goldstein, while he was away on a business trip in Johannesburg. Ms Goldstein informed him that she had some video images of the defendant that were of concern to her. JBL Hohne telephoned his brother and co-director Peter Hohne to go and view the video footage. Shortly thereafter Peter Hohne phoned JBL Hohne back and expressed high levels of concern over what he had observed in the video footage. It was then decided to monitor the defendant and obtain further evidence.

38. After JBL Hohne returned from his business trip he reviewed video footage dating back to the 4th December 2009.

39. A meeting of the directors of the plaintiff was called. This meeting was also attended by the plaintiff's legal advisor Ms Lloyd. It was decided at this meeting that they would try to catch the defendant red handed in the act of stealing diamonds from the plaintiff.

40. Various extracts of the CCTV footage showing the defendant's conduct in the glove-box were shown to the court. It showed the defendant on various occasions picking up a diamond out of a Tupperware dish, examining it, but without recording it in the register as required by the plaintiff's standard operating procedure, replacing it in a corner of the Tupperware dish. This process of examining individual diamonds was often repeated. Then defendant would place another Tupperware dish over the first Tupperware dish, thus concealing the diamond or diamonds he had handled in the lower dish. He would then move the sandwiched Tupperware dishes to glove-box 8.

41. Defendant would open the inner safe door and work facing toward the safe. Possibly defendant believed that his shoulder would block the view of the CCTV camera. However, unbeknownst to the defendant, the plaintiff had the lens on the CCTV camera that covered the safe replaced with a more powerful lens and slightly repositioned it to the extent that plaintiff thought would not be noticed by the defendant.

42. In the relevant CCTV video clips, the court observed, that: The sandwiched Tupperware dishes were placed in the safe; the defendant would appear to manipulate something with his hand inside the safe; one of the two click-clack jars would be placed inside the safe without any hesitation; the

second click-clack jar would have its lid manipulated and its diaphragm removed; defendant would again reach into the safe; it appeared as if he retrieved something or things from inside the safe and placed them inside the cavity in the lid of the click-clack jar; the diaphragm would be replaced onto the lid of the click-clack jar and the lid of the click-clack jar would be closed; the second click-clack jar would be inserted into the safe and the Tupperware dishes would be returned to the glove-box; the safe would then be locked. This behavior would occur contemporaneously with the ordinary and legitimate preparations for the export from the glove-box of the plaintiff's diamond production for the relevant period. Thereafter, the defendant initiated the process for exporting the diamonds and the click-clack jars from the safe.

43. On the 15th January 2010 the security officer informed JBL Hohne by telephone that the defendant started preparations for the export of diamonds at approximately 11 am. The plan was that JBL Hohne would telephone the defendant once he had received confirmation that the defendant had locked the click-clack jar containing diamonds concealed in its lid in the safe. JBL Hohne wanted to lure the defendant away from the evidence locked in the safe on the pretext that the defendant was to come to the office of JBL Hohne in order to discuss the defendant's annual salary increment. JBL Hohne planned to meet the defendant downstairs and then ask defendant to accompany him to his home.

44. In anticipation of this arrangement JBL Hohne had purchased a new video camera which he had set up at his home. The explanation given for the breaks in the video recording, referred to hereunder was that this camera recorded on an internal hard drive and JBL Hohne did not know the recording capacity of this hard drive.

45. Ms Goldstein had telephoned JBL Hohne to inform him that the defendant had phoned her to ask her to come and assist with and witness the export procedure with the key to the door that secured access to the outer door of the safe. JBL Hohne asked Ms Goldstein to try and delay the process of exporting diamonds from the safe. Ms. Goldstein reported back that the defendant was not leaving the area outside the recovery room and appeared restless. JBL Hohne decided to send Peter Hohne to the defendant in order to request the defendant to accompany him.

46. Peter Hohne testified that when he approached the gate of the red area, the defendant saw him and rushed back inside the recovery building. Peter Hohne was delayed by the locked gate that controls access to the red area where the recovery room building is situated.

47. What then transpired was observed from CCTV footage. The defendant rushed through two security doors and down to glove box 8, flipped the magnetic switch allowing him to open the inner door of the safe, he then opened the multiple locks on the safe, including a combination lock, grabbed one of the click-clack jars from the safe, removed the diaphragm from the lid, removed certain objects from the lid and placed them in a jug at the bottom of chute 4 in glove-box number 8. These objects were recovered some days later and they turned out to be large high value diamonds (UGQLD’s). The evidence was that these types of diamonds would never be recovered from chute 4 in glove-box 8.

48. After placing these diamonds in the jug under chute 4, the defendant returned the diaphragm to the lid of the click-clack jar. He then closed the click-clack jar and returned it to the safe. Defendant then closed and relocked the safe and exited the recovery building and met Peter Hohne just outside the recovery building. From the video footage it was established that the defendant accomplished the whole process set out above, opening two security doors, opening the

safe removing the click-clack jar, removing the diaphragm, removing the incriminating diamonds from the cavity in the lid of the click-clack jar, placing the diamonds in the jug at the bottom of chute 4, replacing the diaphragm onto the lid of the click-clack jar, closing the click-clack jar, returning it to the safe, locking the safe and exiting the recovery building in two minutes. Despite the defendant's one mistake in returning the UGQLD's to the wrong jug at the bottom of the wrong chute, this was a remarkable feat to observe by any standards.

49. Peter Hohne's evidence was that he requested the defendant to accompany him. The two of them were then joined by Noel Wewege ("Wewege"), the plaintiff's security consultant. Peter Hohne took the defendant's cellphone and they all climbed into Wewege's club cab bakkie and proceeded to JBL Hohne's House.

50. On arrival at JBL Hohne's house the evidence was that the defendant was told that he had been brought to JBL Hohne's house to discuss certain security concerns and he was asked off camera whether he would consent to the interview that was about to take place being videotaped. This question was repeated on camera almost at the beginning of the interview. The defendant consented to the interview being videotaped.

51. The plaintiff's witnesses described this interview as an internal company enquiry. The tone and content of this interview will be discussed insofar as it may be necessary later on in this judgment.

52. The video recording of this interview is not one continuous recording. There were a number of breaks in the recording. Most of these breaks in the recording are of comparatively short duration. One of these breaks is for slightly more than half an hour.

53. The parties have agreed that the transcript of this interview is a correct reflection of the interview in so far as it goes. The parties have also agreed that the video clips themselves are a correct reflection of the interview, insofar as they go. The defendant maintains that during these breaks in the recording certain threats were made to him relating to himself and the welfare of his family. To this extent the defendant maintains the transcript and the video recordings are not a complete record of what transpired at this interview.

54. The first question JBL Hohne asked the defendant was, what would be found in the lid of the click-clack jar in the safe if they if they went back to the safe to recover the said click-clack jar. To which the defendant replied “nothing”. The evidence was that at that stage the directors and representatives of the plaintiff were not aware of the fact that the defendant had removed the diamonds from the click-clack jar after seeing Peter Hohne approach the “red area”. The directors and plaintiff’s representatives became aware of this fact when defendant disclosed it later on in the interview. This was also subsequently confirmed by the CCTV footage and the recovery of UGQLDs in the jar at the bottom of the chute in glove-box 8.

55. The defendant’s initial answer led JBL Hohne to make what was referred to as the “Dirty Dozen speech”. The context, content and tone of this speech is a material part of many of the arguments submitted on behalf of the defendant. For present purposes it suffices to note that this speech essentially adopted the “carrot and a stick” approach. At this point it also needs to be noted that both the “carrot” and “the stick” offered to the defendant in the “Dirty Dozen speech” were attacked in the submissions and arguments made on behalf of the defendant.

56. The interview continued and as set out above it was recorded in various segments with breaks in between such segments. In short, the defendant admitted to taking and selling the plaintiff’s

diamonds. He also stated that he was paid approximately five million Rand for the diamonds he removed from the plaintiff over a period of approximately 10 months.

57. The defendant also disclosed that he spent the money on cars, vehicles and household goods. Defendant then discloses that he still has approximately five hundred thousand Rand at his disposal with which he can repay the plaintiff.

58. In the video recording of the interview the defendant discloses that the five hundred thousand Rand is kept in a safe at his father-in-laws house, who happens to be his next door neighbour.

59. The defendant also makes a list of the assets he purchased with the money received from the sale of the relevant diamonds. This list forms an annexure to an acknowledgment of debt referred to hereunder.

60. In one of the breaks in the video recording the defendant signed an acknowledgement of debt in the amount of five million Rand plus interest. This is the item of evidence referred to in paragraph 1.4 of the pre-trial minute set out above.

61. Defendant also discloses that there are still diamonds hidden in a locked tool box situated in a store room in his father-in-laws house and that they used part of the cash proceeds of the sale of the diamonds to buy “other” diamonds. Defendant estimated that there were some 5 or 6 “other” diamonds involved. It is clear that these “other” diamonds were not removed by the defendant from the plaintiff’s plant.

62. The defendant drew a diagram of his father-in-laws house showing the location of the storeroom where the relevant toolbox was kept. The defendant volunteered to give these diamonds to the plaintiff. A police officer by the name of Neef Van Zyl was summoned to JBL Hohne's home. An arrangement was made whereby the defendant took Peter Hohne and Noel Wewege to his father-in-laws house. The police officer Van Zyl did not participate in this recovery of the tool box but the evidence was that he remained in the background and although it is not clear where he was it is evident that he followed the proceedings to some extent as Peter Hohne testified that when they transported the tool box to the offices of the SAPS diamond and gold branch he observed Van Zyl following them.

63. Peter Hohne testified that when they arrived at the house of the defendant's father-in-law they found the gate locked. The defendant attracted the attention of the father-in-laws gardener who opened the gate for them. He further testified that the door of the house itself was open and that the defendant led them directly to the storeroom and pointed out the relevant toolbox. The defendant could not find the keys to the toolbox and it was decided to remove the toolbox to the offices of the SAPS gold and diamond branch. The defendant assisted Peter Hohne and Noel Wewege to remove this large tool box on castors from his father-in-laws house and assisted in loading this toolbox onto Noel Wewege's bakkie. He and Peter Hohne then climbed on the back of the bakkie and secured the toolbox to prevent it from rolling around while Noel Wewege drove to the offices of the SAPS gold and diamond branch.

64. Defendant then assisted in getting the toolbox into the SAPS offices where in the presence of Van Zyl the locked drawers of the tool box were broken open until they found a small white plastic bottle which contained 23 diamonds.

65. The process of recovering the relevant tool box is the pointing out evidence referred to in paragraph 1.3 of the pre-trial minute set out above.

66. A further police officer, being Superintendent Wilmo Vermeulen, was summoned to the offices of the SAPS diamond and gold branch. Vermeulen and the defendant left Van Zyl, Wewege and Peter Hohne and went to another part of the building where the defendant made and deposed to a statement in front of Vermeulen. Peter Hohne testified that after the defendant left, in the company of Vermeulen, he and Noel Wewege left to go home. Peter Hohne then testified that at about 8:30pm he received a phone call to collect the defendant from the offices of the diamond and gold branch, which he did and returned the defendant to his vehicle which was still on the mine premises.

67. This statement made to Vermeulen is the evidence referred to in paragraph 1.2 of the aforementioned pre-trial minute set out above.

68. Peter Hohne testified that at about 9:30pm on the 15th January 2010 he telephoned the defendant and asked him to return the five hundred thousand Rand that defendant acknowledged in the video interview that he kept in the safe at his father-in-laws house. About 20 minutes later the defendant arrived at Peter Hohne’s house with the five hundred thousand Rand in a box which defendant handed to Peter Hohne. Defendant then signed a document which acknowledged that the five hundred thousand Rand was the proceeds of illegal diamond sales.

69. Peter Hohne then testified that early the next morning he phoned the defendant and asked the defendant to deliver to him the thirty thousand Rand that defendant acknowledged in the video interview was in the safe at his own home. The defendant arrived some 15 to 20 minutes later

with the thirty thousand Rand. Defendant then signed a similar document to the one he signed on the previous evening. The admissions made in the two documents acknowledging receipt of the five hundred thousand and the thirty thousand Rand respectively were not contested at any stage during the hearing.

70. The final piece of evidence whose admissibility is challenged by the defendant is the video recorded interview referred to in paragraph 1.1 of the pre-trial minute set out above.

71. The video tape interview also includes an interview with the defendant that took place on the following Monday 18th January 2010. Where defendant was requested to bring a copy of his statement to the SAPS to JBL Hohne. Ms Lloyd was also present at this interview. The defendant made his way to JBL Hohne's house under his own steam for this interview.

72. It emerges from the heads of argument filed on the defendant's behalf that the defendant alleges that the rights enshrined in sections 12(1)(a), (b), (c), (d) and (e) as well as those enshrined in sections 14 (c) and (d) were violated by representatives of the plaintiff.

73. As set out above, the defendant bears the burden of establishing on a balance of probabilities that these rights have been infringed in acquiring the four items of evidence subject to my ruling on admissibility by virtue of the agreement between the parties set out above.

74. Section 12 of the Constitution reads as follows:

> "12(1) Everyone has the right to freedom and security of the person, which includes the right –
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free of all forms of violence from either public or private sources;

(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way."

75. The relevant portions of section 14 of the Constitution read as follows:

> "14 Everyone has the right to privacy, which includes the right not to have –
> (a)…
> (b)…
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

76. In dealing with the defendant's contention that his rights under section 12(1), (a), (b), (c), (d) and (e), I am driven to the conclusion that defendant simply adopted a shotgun approach hoping that something might work in his favour. The defendant in formulating his argument uses terminology loosely. This is illustrated by the manner in which the submissions made on behalf of the defendant have been articulated. In the heads of argument filed on behalf of the defendant, the argument was formulated as follows:

> "59.3 It is equally clear that his constitutional right to freedom of movement (section 12 (1)(a), (b), (c), (d) and (e) of the Constitution of the Republic of South Africa, Act 108 of 1996) was seriously infringed by the plaintiff and its representatives. (Removing a man from his workplace, his friends, his family and his legal representatives for a period of some nine hours whilst he is badgered and bullied into admissions and concessions must be seen in a very dark light by this Honourable Court."[18]

77. The submissions made on behalf of the defendant appear to conflate the rights in section 21(1) and section 12 of the Constitution. Despite the introduction, clearly the defendant intends to confine his arguments to section 12 of the Constitution.

[18] The defendant was permitted to file 2 sets of heads of argument. The passage quoted above appears in the heads that are entitled DEFENDANT'S ADDITIONAL HEADS OF ARGUMENT RE COMMON LAW AND CONSTITUTIONAL LAW INFRINGEMENTS OF THE DEFENDANT'S RIIGHTS DURING THE INCIDENT OF 15 JANUARY 2010.

78. In the context of the interview that took place on the 15th January 2010 the "freedom" of the defendant must be tested in terms of whether the defendant exercised a choice as to whether he wished to accompany Peter Hohne and Noel Wewege to the meeting at JBL Hohne's house. In addition the court will have to consider whether the defendant retained this right of choice during the three and a half hours that this interview continued. Also the court will have to consider whether the defendant retained the right of choice when the diamonds were pointed out and recovered from the defendant's father-in-laws house. The same applies to the statement that was given to the police. The defendant himself would have been the best person to have given evidence on his state of mind at the material times of this process. The defendant chose not to testify. Accordingly, these questions will have to be decided on the facts as established and the probabilities they reveal.

79. The evidence was that on the 15th January 2010 JBL Hohne telephoned the defendant after it had been confirmed that the process for exporting the diamonds had been completed and that the defendant had phoned the security officer to request her assistance in finalising the procedure for exporting the diamonds from the glove-box. In this telephone conversation JBL Hohne invited the defendant to come to his office in order to discuss the defendant's annual salary increment. JBL Hohne admitted that this was a ruse to draw the defendant away from the incriminating evidence that was then in the locked safe. The ruse did not work, the security officer reported to JBL Hohne that the defendant was not leaving the vicinity of the recovery room building and that the defendant was looking anxious. JBL Hohne then implemented a back-up plan and asked Peter Hohne and Noel Wewege to go and ask the defendant to accompany them.

80. Peter Hohne testified that on approaching the red area he came around a dump and saw the defendant peeping around the corner of the building. Once the defendant caught sight of him, the defendant rushed into the recovery building. Peter Hohne was delayed at the gate of the red area.

81. Some two minutes later Peter Hohne met the defendant in the red area and asked the defendant to accompany him as JBL Hohne had some questions for him.

82. Clearly, the defendant had concealed diamonds in the cavity of the lid of the click-clack jar. This conclusion is supported by the following facts: The plaintiff's process of recovering diamonds was designed to exclude human hands touching the diamonds; The super concentrate of diamond material was delivered to the glove-box; The elaborate processes adopted by the defendant and witnessed in the CCTV footage would make no sense if the defendant was not removing diamonds from the plaintiff; The defendant's action in rushing back and removing the incriminating evidence from the lid of the click-clack jar confirms that the defendant was taking the plaintiff's diamonds; and diamonds were recovered from the place where the defendant said they would be found which was confirmed by the CCTV footage.

83. Furthermore, later on in the evening of the 15th January 2010 and on the morning of the 16th January 2010 the defendant returned five hundred thousand Rand and thirty thousand Rand to Peter Hohne. On both occasions the defendant signed a document that stated that he was returning the respective amounts "…from the proceeds of illegal diamond sales…"[19]. The said documents indicate that Peter Hohne received such sums as the representative of Ekapa Mining. The evidence was that Ekapa Mining is the plaintiff's holding company. The defendant never disputed his signature on these documents nor did defendant claim at any stage that these documents were inadmissible. The question that arises from these documents is why would the defendant return

[19] Bundle A., pp. 86 – 87.

the respective sums of money to the plaintiff and acknowledge that the funds he returned to the plaintiff via its holding company were the proceeds of illegal diamond sales if he had not taken diamonds from the plaintiff. The cumulative effect of all of these facts shows that on the probabilities, the defendant was stealing diamonds from the plaintiff.

84. With the background fact established on the probabilities that defendant was taking the plaintiff's diamonds, the defendant's reaction to the sight of Peter Hohne clearly shows that the defendant was no longer under the misapprehension that he was going to JBL Hohne's office to discuss his annual salary increment. A director of a company does not come to collect an employee for discussions on his annual salary increment. Also, from the manner in which Peter invited the defendant to accompany him, being that JBL Hohne has some questions for him, the defendant must have known that it was no longer about his annual salary increment. The presence of Noel Wewege, the plaintiff's security consultant, at the material time must have indicated to the defendant that his activities were at least arousing suspicion. The alternative of refusing to accompany Peter Hohne to JBL Hohne would have confirmed any suspicions the plaintiff may have had and the defendant must have appreciated that any such refusal would have had consequences.

85. There was no question of physical force being used to force the defendant to accompany Peter Hohne and Noel Wewege and this was not even suggested to Peter Hohne during his extensive cross-examination by Mr Pretorius on behalf of the defendant. On the probabilities the only reasonable inference that can be drawn from these facts was that the defendant suspected that his activities had been discovered and believing that he had disposed of the immediately incriminating evidence he decided to accompany Peter Hohne and Noel Wewege to see how much the plaintiff knew and possibly talk his way out of any difficulty.

86. At no stage during the recorded portion of the interview did the defendant indicate that he wished to leave. The witnesses who testified on behalf of the plaintiff all testified that the defendant was not forced to remain at the interview. They all testified that if the defendant had asked to leave he would have been free to do so. This evidence was not materially undermined in cross-examination.

87. Peter Hohne testified that the defendant was not forced to accompany himself and Noel Wewege to the house of his father-in-law to point out and recover the tool chest containing the diamonds that had not yet been disposed of.

88. Peter Hohne also testified that the defendant was not forced to accompany them to the offices of the SAPS gold and diamond branch.

89. The statement was made to a senior police officer. The defendant was alone with the police officer when he made such statement. Peter Hohne testified that when the senior police officer and the defendant left their presence he and Noel Wewege went home. He only returned when he was asked to come and fetch the defendant. In these circumstances there was nobody compelling the defendant to make that statement. What is more the defendant on the following Monday when asked by JBL Hohne to bring him a copy of the statement to the police the defendant under his own steam brought the statement to JBL Hohne and consented to a further video interview.

90. As already indicated above the defendant bears the onus of establishing that this constitutional right has been violated. The argument tendered by Mr Pretorius on behalf of the defendant was that the defendant was offered two choices either co-operate and the plaintiff will seek immunity

from prosecution on behalf of the defendant or fail to be honest and fail to co-operate and be prosecuted and accept all the consequences that flow from such prosecution.

91. The witnesses who testified on behalf of the plaintiff testified that the defendant was not deprived of his freedom and he was not detained. They testified that if he had asked to leave he would have been free to do so. Their evidence was that defendant never asked to leave at any stage. They testified that defendant's cell phone was taken to stop him contacting the persons he was selling diamonds to, as the plaintiff intended to trap them in a sting operation and they didn't want the defendant to warn such persons that the game was up.

92. The plaintiff's witnesses testified that if the defendant wished to use his cell phone he would have been allowed to do so. The assertion made on behalf of the plaintiff was substantiated by the fact that at some point in the day the defendant's girlfriend sent defendant an SMS. Peter Hohne testified that at the time the defendant's cell phone was in his possession, that he asked the defendant to retrieve the SMS and saw it was the defendant's girlfriend enquiring about the defendant's whereabouts. Peter Hohne suggested that the defendant telephone his girlfriend and inform her that he had problems at work. The defendant duly took this opportunity to phone his girlfriend under the supervision of Peter Hohne.

93. As already stated, the defendant chose not to testify. This evidence given on behalf of the plaintiff was not materially shaken when the plaintiff's witnesses were cross-examined. The evidence given on behalf of the plaintiff cannot be said to be inherently improbable.

94. When considering the defendant's contentions that his constitutional rights set out in section 12 of the Constitution were infringed it is also important to bear in mind that at the time of the

interview on the 15th January 2010 the plaintiff had reasonable grounds to believe that the defendant was stealing diamonds from the plaintiff. The defendant as an employee had an obligation to account to his employers and the plaintiff had a corresponding right to call the defendant to account.

95. The transcript of the interview which took place on the 15th January 2010 and the short sequel that took place on the 18th January 2010, must be read as a whole and in its proper context. Despite the threat and initial harsh words contained in the "Dirty Dozen speech", if it is read in this manner I do not believe that, in and of itself, such transcript establishes the alleged breaches of the defendant's constitutional rights under section 12 of the Constitution in acquiring the disputed evidence.

96. In dealing with the alleged infringement of defendant's rights under section 14(c) and (d) of the Constitution, the defendant made the following submission:

> "59.4 His right to privacy (section 14(c) and (d)) was also seriously infringed in that the Superstone quartet forced him under threat of disemboweling him financially to illegally sign away all the possessions he had, in that PJH (Peter Hohne) determined who the Defendant would phone, how he would and even what he was to say to the person when he phoned. In addition, PJH arrogantly and in total disrespect of the Defendant and his pregnant girlfriend's right to privacy, sat and listened to the conversation, thereafter immediately removing the cell phone from the defendant."[20]

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[20] The defendant was permitted to file 2 sets of heads of argument. The passage quoted herein appears in the heads that are entitled DEFENDANT'S ADDITIONAL HEADS OF ARGUMENT RE COMMON LAW AND CONSTITUTIONAL LAW INFRINGEMENTS OF THE DEFENDANT'S RIIGHTS DURING THE INCIDENT OF 15 JANUARY 2010.

97. Whatever the defendant's Counsel meant in the above submission the alleged breach of the defendants section 14(c) and (d) constitutional rights can be dealt with by simply noting that the defendant never established that the alleged breach of the these rights ever played any role in acquiring any one of the 4 pieces of evidence referred to in the relevant pre-trial minute.

98. In the first leg of the enquiry set out above relating to the admissibility of evidence attained as a result of a breach of a constitutional right, the defendant bears the onus of establishing such breach of the relevant constitutional right. This includes establishing that the relevant evidence was attained as a result of such breach. In the instant case, the defendant has not discharged that onus. In these circumstances it is not necessary to proceed to the second leg of the enquiry related to the alleged breach of the defendant's constitutional rights.

99. In the arguments submitted on behalf of the defendant there was a great deal of overlap between constitutional rights and common law rights and often very little effort to distinguish between them. The substantive consideration of rights already dealt with in the context of the alleged infringements of constitutional rights will not be repeated in the context of considering the defendant's common law rights.

100. The defendant argued that his common law rights had been infringed. The defendant identified these common law rights as follows:

100.1. The right to remain silent;

100.2. The right not to incriminate himself;

100.3. The right to an attorney; and

100.4. The right to contact someone to assist him.

101. The plaintiff's witnesses characterised the interview with the defendant that took place on the 15th January 2010 as an internal company enquiry. The defendant tried to colour this interview as something much more sinister. The point is that in relation to considering whether the common law rights referred to in paragraphs 100.1 to 100.4 actually exist and if they were infringed or not, the only evidence available is that such interview was an internal company enquiry. The alleged common law rights and breaches thereof have to be considered in that context.

102. The right to remain silent and the right not to incriminate oneself need to be considered in relation to the fact that defendant was a senior employee of the plaintiff who worked in a position where the plaintiff placed a great deal of trust in the defendant. The very nature of this contractual relationship between the plaintiff and the defendant gives the plaintiff the right to call the defendant to account. This contractual relationship between the plaintiff and the defendant imposes upon the defendant a corresponding obligation to account to his employer. There is thus no obligation on the employer to explain to the employee that he has the right to remain silent or not to incriminate himself. This does not mean that the defendant cannot remain silent if he so chooses. In which case the defendant must accept the consequences that would flow from not accepting the opportunity to explain his actions to the plaintiff, the employer.

103. At the stage of the interview, the plaintiff had reasonable grounds to believe that the defendant was stealing high value diamonds from it. In these circumstances I find that the plaintiff had a right to call the defendant to account, there was no obligation on the plaintiff to explain to the defendant that he had the right to remain silent and not to incriminate himself. This was not a criminal proceeding, it was not even a disciplinary proceeding and the defendant could choose to

remain silent and not incriminate himself if he wished. This was not a right at common law under those particular circumstances.

104. The alleged right to an attorney and the right to contact someone to assist the defendant also falls to be considered in the context of an internal company enquiry. In these circumstances there is no common law right to an attorney or even to contact someone to assist him.

105. Mr Pretorius contended on behalf of the defendant that any admissions the defendant made had to be freely and voluntarily made. It was argued on behalf of the defendant that the admissions made by the defendant in the relevant sources of evidence were not freely and voluntarily made as a result of the infringement of the defendant's common law rights and the duress the defendant was placed under.

106. I requested Mr Pretorius to provide me with authority for the contention that in civil proceedings admissions against one's interest must be voluntarily made. No direct authority was provided on behalf of the defendant. What was submitted on behalf of the defendant was an argument by way of analogy. This argument went as follows: An acknowledgement of debt is essentially an admission and it has to be entered into voluntarily. Therefore, he submitted, all admissions made in civil proceedings have to be made voluntarily. This argument ignores the fact that an acknowledgement of debt is a contract and it is subject to the law relating to contracts. The law of contract is not applicable to ordinary admissions made against interest, which may be relevant to civil proceedings.

107. The requirements in relation to admissions in civil and criminal proceedings have been considered and set out by Zeffert and Paizes in their work THE SOUTH AFRICAN LAW OF EVIDENCE[21]. The learned authors state that there are four requirements for admissions to be received as evidence. These requirements are: Firstly, all informal admissions have to be relevant in the legal sense; Secondly, the admission must be made by the person against whom it is tendered; Thirdly, in the context of criminal trials only, there must be compliance with the relevant statutes such as the Criminal Procedure Act and the common law; Fourthly, also in the context of criminal trial only, there must be compliance with constitutional provisions relating to criminal trials such as those contained in section 35 of the Constitution. The learned authors make it clear that the first two requirements relate to both criminal and civil proceedings and the last two relate only to criminal proceedings. There is accordingly no general requirement that admissions against interest in a civil trial must be shown to have been voluntarily made.

108. Furthermore, Mr Pretorius argued on behalf of the defendant that once the threat of prosecution (the stick) and the promise that plaintiff would seek indemnity for the defendant (the carrot) had been put before the defendant, the defendant's conduct in relation to creating all of the above sources of evidence should be seen as one continuous act where the defendant acted under the same threat, which constituted duress.

109. As set out above, in and of itself, duress is not a ground to exclude an admission in a civil trial. Nonetheless, it will go into the scales when I consider whether the defendant has made an appropriate case for me to exclude the relevant evidence under the common law.

[21] Zeffert & Paizes., THE SOUTH AFRICAN LAW OF EVIDENCE., supra at pp. 479-480.

110. It was also submitted on behalf of the defendant that the promise of non-prosecution was contra bonos mores on the grounds that it constituted compounding on the authority of the case of AREND AND ANOTHER v ASTRA FURNISHERS (PTY) LTD.[22] Mr. Pretorius in making this submission relied on a selective reading of the transcript of the video footage and in particular singled out the promise made by JBL Hohne that if the defendant was 100% honest the plaintiff would not prosecute him. Within a page of this first promise made to the defendant Ms Lloyd made it clear to the defendant that the final decision on immunity from prosecution lay with the prosecuting authority. JBL Hohne repeated the promise of non-prosecution and Ms Lloyd also repeated her clarification to the defendant. The police officer Van Zyl also made it clear that the prosecutor had the final say on whether the defendant would be offered immunity. Reading the transcript as a whole I do not believe that it constitutes compounding. In the circumstances I do not regard the offer made to the defendant to be contra bonos mores.

111. In relation to the acknowledgement of debt specifically, it was contended that this agreement was void ab initio on two grounds. Firstly, that it was entered into by the defendant under duress. Secondly, that it contained provisions in such agreement that amounted to parate executie.

112. Although it was not articulated in that way, I assume for the benefit of the defendant that that the emphasis on the acknowledgement of debt being void ab initio is that if that were the case it could be argued that the acknowledgement of debt is not relevant and therefore inadmissible. This would in my opinion not be the case if the contract was merely voidable at the instance of the injured party.

[22] AREND AND ANOTHER v ASTRA FURNISHERS (PTY) LTD 1974 (1) SA 298 (C)

113. Christie[23] deals with when a contract can be considered void ab initio. On the authority of Voet 4 2 1 the learned author states that it is only when it can be said that vis absoluta was applied that the contract would be void ab initio. The learned author states that vis absoluta would be very rare and that he could not find a case in our modern law which was decided on vis absoluta. It is clear that on the facts of the present case that vis absoluta does not apply. Accordingly, the acknowledgement of debt in the present case would be voidable at the instance of the defendant. Therefore, for present purposes the acknowledgement of debt is relevant and is also therefore admissible. This does not mean that the defendant cannot seek to have the acknowledgement of debt declared unenforceable at the appropriate time in these proceedings.

114. Clearly then the first ground set out above being duress, vis absoluta being absent, does not render the acknowledgement of debt void ab initio.

115. Dealing with the second ground on which the defendant submits the acknowledgement of debt is void ab initio, being that certain provisions of the acknowledgement of debt amount to parate executie, the doctrine of parate executie would render the offending portions of the acknowledgement of debt agreement unenforceable. It would not render the entire agreement void ab initio.

116. It was also argued on behalf of the defendant that in entering into the acknowledgment of debt in the manner that it did, the plaintiff attained some advantage that it was not entitled to. Dealing with this ground, Mr Pretorius relied on the authority of AREND AND ANOTHER v ASTRA FURNISHERS (PTY) LTD[24]. The Court in the ARENDS case did not consider the question of admissibility at all. It considered the question of enforceability in the context of an application for

[23] RH CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA., 3rd Ed., pp. 337-338.
[24] 1974 (1) SA 298 (C).

summary judgment. Even if the plaintiff received some advantage which it was not entitled to from the defendant signing the acknowledgement of debt, that in and of itself does not render the acknowledgement of debt inadmissible It might render the acknowledgement of debt unenforceable, but that question is not before me now.

117. Defendant also criticised the conduct of Ms Lloyd in the manner in which she secured the defendant's signature on the acknowledgement of debt and other documents. The other documents are not relevant to the present enquiry by virtue of the terms of the pre-trial agreement set out above. Ms Lloyd was criticised for not advising the defendant to obtain the assistance of his own attorney before signing the acknowledgement of debt. She was also criticized for not explaining the terms of and consequences that flow from the said acknowledgment to the defendant. The acknowledgement of debt was signed during one of the breaks in the video recording. Ms Lloyd testified that she did explain the terms of the acknowledgement of debt to the defendant. As stated the defendant did not testify. In my view the complaints against Ms Lloyd have no direct relevance to the question of the admissibility of the acknowledgement of debt.

118. The defendant's attorney filed a rule 36(10) notice on the 19th July 2013 in respect of the video recording of the interview with the defendant and the transcript of such video recording. Mr Pretorius was explicitly asked to deal with this issue and he was informed that prima facie, on the court's reading of this rule, as the plaintiff had not objected and the court held the view that it did not matter which party produced the evidence of the video tape or transcript thereof, it would be received into evidence upon its mere production under the provisions of Rule 36(10)(b).

119. In fact the last paragraph of the defendant's Rule 36 (10) notice indicates that the defendant's attorney must also have read the Rule in the same way. The relevant paragraph of the said notice reads as follows:

> "BE PLEASED TO TAKE NOTICE FURTHER that failing receipt of plaintiff's notice of its objection to the production of the video footage of the interview with Dale Hohne (2 disks) and the transcription of the video footage of the interview, within 10 (TEN) days from receipt hereof, the video footage of the interview with Dale Hohne (2 disks) and the transcription of the video footage of the interview <u>shall be received in evidence upon their mere production and without further proof thereof."</u> (my emphasis)

120. I deal with the defendant's Rule 36(10) notice at this stage of the proceedings, because while I believe it is a relevant consideration, in circumstances where breaches of constitutional and common law rights are alleged, I believe the correct point of departure is to deal with the substance of the claims relating to the infringement of constitutional and common law rights first, before considering the implications of notices issued by a party under the Rules.

121. In respect of the video footage of the said interview and the transcript thereof, the defendant's Rule 36 (10) notice by implication contains the following admissions: that the defendant admits the accuracy and authenticity of the video footage and the relevant transcript as far as they go, even if he contends that due to the breaks in the recordings it is not a complete record; that the defendant accepts that the video footage and the transcript thereof are relevant to the proceedings at hand; and that the defendant accepts that the video footage and the transcript thereof are admissible in these proceedings.

122. The defendant did not bring an application to withdraw the admissions implicit in his Rule 36(10) notice.

123. On behalf of the defendant Mr Pretorius made two submissions. Firstly, that the relevant Rule 37 minute of the pre-trial meeting held on the 12th August 2013 superseded the defendant's Rule 36(10) notice. In support of this submission Mr Pretorius argued by agreeing to the said Rule 37 minute the plaintiff acknowledged that the admissibility of the video footage and the transcript were in issue. Secondly, that defendant issued the Rule 36(10) notice for the purpose of proving his case in respect of the breaches to his constitutional and common law rights.

124. Dealing with the first issue raised by Mr Pretorius, I believe that on a proper reading of the relevant pre-trial minute, what the plaintiff agreed to was that the court would rule on the admissibility of the four disputed sources of evidence after consideration of all of the relevant facts and circumstances, including the defendant's Rule 36(10) notice.

125. Dealing with the second submission made by Mr Pretorius, a piece of evidence once admitted as evidence in any proceedings is evidence for all relevant purposes in those proceedings. In the ordinary course the defendant cannot pick and choose the purposes for which evidence he accepts as admissible should be used. Accordingly, this submission has no substance.

126. While some might argue that the Rule 36(10) notice is by itself decisive. In the circumstances of this case I will not approach it in that way. It will merely be one more factor placed in the scales when I consider whether to exercise my discretion as to whether I should exclude the disputed evidence or not.

127. Before considering the discretion under the common law that this Court has to exclude the relevant evidence, there is one more piece of evidence that I must refer to. JBL Hohne testified that there had been a major crash in the European and Indian diamond markets around December 2008. That the plaintiff had to restructure or face bankruptcy. There was a meeting of all the staff and they were asked to forego their year-end bonuses and take an across the board ten percent cut in salary, which they did. The plaintiff also called for volunteers for retrenchment and twenty three percent of the plaintiff's staff took voluntary retrenchment under these circumstances. The defendant on his own admission started taking diamonds from the plaintiff in February 2009.

128. The defendant in his plea also contends that the admissions that appear from the disputed evidence are made up and inaccurate. Reference is made to one passage in the transcript of the video interview where the defendant says words to the effect let me tell you the other half and forget everything before. The defendant does change his version, but only in respect of how he came to be involved in the first place and who the middlemen were and how the relationship between himself and the middleman and the buyers worked. Defendant did not at this point change his versions of his modus operandi. Similarly, other elements of the defendant's story as set out in the video interview were not materially changed.

129. Nevertheless, important and material admissions made in the video interview were corroborated. The pointing out of the unsold diamonds at his father-in-law's house is important corroboration of the defendant's statements. The physical evidence of the click-clack jars themselves is corroborated by the CCTV footage and confirms the modus operandi disclosed by the defendant in the video interview. The behavior of the defendant witnessed from the CCTV footage when he caught sight of Peter Hohne approaching the red area corroborates portions of the video interview. The defendant in this "new version" disclosed in the video interview did not change his estimate

of the amount of money he received as a result of the sale of these diamonds. In these circumstances I find there is no substance to the defendant's plea that he made up all of the admissions set out in the transcript of the video footage and his statement to the police.

130. The defendant has the onus of establishing grounds for this Court to exercise its discretion under the common law.

131. In weighing up the discretion this Court has, I take into account that the Managing Director of the plaintiff, JBL Hohne candidly admitted that he threatened the defendant in the "Dirty Dozen speech". I weigh this against the fact that defendant was committing a delict against his employer. Evidence external to the disputed evidence exists to show on a balance of probabilities that the defendant was stealing high value diamonds from the plaintiff. In this regard I refer to the CCTV footage of what transpired in and around the glove-box in the plaintiff's recovery room. Together with the acknowledgments the defendant signed when he returned both the five hundred thousand Rand and the thirty thousand Rand to Peter Hohne. The defendant does not contest these acknowledgements nor does he contend that they should also be inadmissible. Furthermore, the defendant never contested the evidence given by JBL Hohne that the plaintiff was under severe financial pressure at the end of 2008. Defendant must have known of these financial difficulties experienced by the plaintiff. Defendant was employed in the management of the plaintiff. The evidence was that a meeting was called by the plaintiff to discuss the financial difficulties of the plaintiff with all of the staff. The defendant never contested this evidence.

132. On these facts I do not believe that the legal convictions of the community compel me to exercise my discretion to exclude the disputed sources of evidence under the common law. Accordingly,

on the facts and circumstances of this case I will not exercise such discretion in favour of the defendant.

In the circumstances I make the following ruling and Order:

1) The video recordings of the interview with the defendant are admissible.
2) The defendant's affidavit made to the SAPS on 15th January 2010 is admissible.
3) The evidence of the pointing out of the diamonds by the defendant found in a toolbox at the premises of Douglas Macleod on 15 January 2010 is admissible.
4) The acknowledgement of debt (with annexures) signed by the defendant on the 15th January 2010 is admissible.
5) The question of the cost of these proceedings to date are reserved to be considered together with the other outstanding issues in this matter.

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Lawrence Lever AJ

Dates of hearing: 13 – 22 August 2013, 30 September 2013 and 11 November 2013

Date of Judgment: /02/2014

APPEARANCES:

Counsel:

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