

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Case No: 642/2009
Heard: 13 & 20/11/2009
Delivered: 11/12/2009

In the matter between:

DIAMOND CORE RESOURCES (PTY) LTD **Applicant**
(IN LIQUIDATION)

and

RIVER CORPORATE FINANCE (PTY) LTD **Respondent**

**JUDGMENT ON: (A) LEAVE TO APPEAL
(B) COSTS DE BONIS PRORIIS**

KGOMO JP

[1] This is a two-pronged application. In the first, Diamond Core Resources (Pty) Ltd (in liquidation), the respondent in the liquidation application, seeks leave to appeal against my order made on 03 July 2009, and the judgment giving reasons for that order delivered on 07 August 2009, whereby I refused Diamond Core Resources' application to reopen its case before the reserved judgment in the liquidation matter was delivered at 09h00 on Friday 03 July 2009.

[2] In the second stanza of the application Diamond Core Resources seeks to appeal against my order and judgment

delivered on 03 July 2009 placing Diamond Core Resources under final liquidation.

- [3] It need to be pointed out for record purposes that Diamond Core Resources brought an abortive application on urgency on 10 July 2009 (during recess) in which it sought an order:

"That the judgment of his Lordship Kgomo JP delivered on 03 July 2009 placing the Applicant [Diamond Core Resources] in liquidation be suspended pending the Applicant's [Diamond Core Resources'] appeal of the aforesaid judgment."

- [4] There was an allied application which the application in para 3 was contingent to which was brought by BRC Diamond Core Resources Ltd ("BRC"), Diamond Core Resources's holding company. What it sought is best reflected in the order made by Madam Acting Justice Henriques who heard these matters jointly on 10 July 2009 and delivered judgment on 17 July 2009. The order reads:

"1. In application A [the BRC Diamond Core Resources Ltd application], the application to stay and or set aside the winding up order in terms of s354, the application is dismissed and BRC is directed to pay the costs occasioned by such application.

2. In relation to application B [the Diamond Core Resources application], the application to suspend the liquidation order pending an appeal, such application is also dismissed and such costs should form part of the costs in the liquidation."

- [5] It is not necessary to set out in this judgment the numerous grounds of appeal listed in the Notice of Leave to Appeal. I will confine myself to the grounds on which emphasis was laid by counsel or identified as raising important issues or raised for the first, time as a result of which such issues may not be covered or sufficiently covered in the judgments.

THE REFUSAL TO ALLOW DIAMOND CORE RESOURCES LEAVE TO REOPEN ITS CASE.

- [6] In his written Heads of Argument and oral presentation Adv R A Solomon SC, for Diamond Core Resources, discusses the reopening under the following heads: (a) The KIG agreement; (b) the inability of Diamond Core Resources to disclose the KIG agreement prior to hearing argument on 19 June 2009; (c) KIG agreement prejudiced by the liquidation order of 03 July 2009; (d) Diamond Core Resources prejudiced as a result of the KIG agreement being placed on hold; and (e) The date to determine inability to pay.
- [7] There is no need to encumber this judgment by rehashing issues comprehensively addressed in the reopening judgment. As far as the matters raised in 6(a), 6(b) and 6(e) (above) are concerned see paras 13 to 19.4 of the reopening judgment. As far as paras 6(c) and 6(d) go all that need to be said is that it is a natural consequence that an astute KIG, knowing that Diamond Core Resources is under liquidation, would be reticent or even unwilling to throw good money after the bad.
- [8] Mr Solomon argued that the fact that the KIG funding was not going to be paid directly to Diamond Core Resources is not a relevant factor “because the ability of the company to pay its debts may be demonstrated by its ability to obtain the necessary finance from an exterior source.” For this proposition he invoked as authority **Helderberg Laboratories CC v Sola Technologies** 2008(2) SA 627(C) at 632D-E and contended that I misdirected myself in my approach to the agreement between KIG and BRC Diamond Core Resources Limited. Diamond Core Resources was

obviously not a party to this agreement. See paras 15 and 16 of the reopening judgment.

- [9] The **Helderberg-matter** is distinguishable from the case at hand. In that case the court *a quo* held that as the tender and payment of the admitted indebtedness was made by a third party on behalf of first to fourth appellants the latter did not make payment in respect of their admitted indebtedness to the respondent. The court had inferred that therefore first to fourth appellants were themselves unable to pay their debts. The full bench on appeal decided that (at 632 D-E):

"[16] I respectfully disagree with the finding of the court a quo, that the fact that the payment of the admitted indebtedness was made by a third party on behalf of first to fourth appellants, justifies the inference that the said appellants were unable to pay their debts. In my view, the ability of a company or close corporation to pay its debts may be demonstrated by itself making payment or by its ability to obtain the necessary finance from an exterior source. In the latter instance the creditworthiness of the debtor would normally enable it to raise the necessary funds. As submitted by Mr Brusser, the emphasis in determining the ability of a company or close corporation to pay its debts should be on the fact of payment and not on the source of the payment."

- [10] In *casu* Diamond Core Resources had declared on numerous occasions and had been stating in writing for over a year that it cannot pay River Corporation Finance (Pty) Ltd. From Diamond Core's Heads it concedes that the money it seeks to borrow or garner won't be forthcoming. Even if it does there is no suggestion that they would settle their debt with their creditor. Having regard to the eight considerations formulated by the Appellate Division in **Mkwanazi v Van der**

Merwe 1970(1) SA 609(A) at 616G-617D I am satisfied that the application on this point must fail.

THE WINDING UP ISSUE.

[11] There is only one issue which Diamond Core Resources did not raise during the liquidation argument on 19 June 2009 which it is now broaching. It claims that River Corporate Finance (Pty) Ltd's claim against it was discharged due to supervening impossibility. Mr Solomon makes, *inter alia*, the following points in his Heads for this proposition:

- 11.1 That river Corporate Finance's claim against Diamond Core Resources is for payment of R5 066 400.00 of the success fee which River Corporate Finance contends became payable to it on 23 January 2008 (seven working days after Diamond Core Resource's shareholders approved the transaction) in terms of clause 10.2 of the agreement;
- 11.2 That it was common cause that Diamond Core Resource's only assets constitute the shares it holds in its subsidiary companies;
- 11.3. That arising from BRC Diamond Corporation's Consolidated Statements of Operations and deficit for the years ended 31 December 2007 and 2008, prior to the merger, and at the commencement of the 2007 financial year (i.e. on 1 January 2007), BRC Diamond Corporation commenced the year with an operating loss of C\$ 056 027.00 and at 31 December 2007 recorded a net operating loss of C\$1 832 891.00.
- 11.4 The only sources of future funds for further exploration programmes presently available to the company were the sale of equity capital, or the offering by the company of an interest in its properties to be earned by

another party carrying out further exploration, but that there was no assurance that such sources of funding would be available on acceptable terms, if at all;

11.5 Even if commercial quantities of minerals were found on the company's properties, the company did not have the financial resources at the time to bring a mine into production;

11.6 All of the company's properties were in the exploration stage only and none of the properties contained a known body of commercial ore; and

11.7 The company operated at a loss and did not generate any revenue from operations.

12. In the circumstances, Mr Solomon argued, River Corporate Finance was aware that through no fault of Diamond Core Resources it became objectively impossible for it to pay the success fee. Accordingly, as a result of supervening impossibility of performance, the respondent's obligation to pay the success fee to the applicant was extinguished, the submission went.

13. According to Mr Solomon should the Court of Appeal find that the respondent's obligation to pay the success fee was indeed rendered impossible of performance as contended for, it would mean that the applicant has no claim against the respondent which would disqualify it from having *locus standi* to succeed in the winding-up application.

14 Mr Solomons further submitted that the defence of supervening impossibility may be raised for the first time on appeal because:

- 14.1 The material facts underlying the defence were canvassed in the pleadings and arose primarily from the objective facts advanced by the applicant;
- 14.2 There would therefore be no unfairness to River Corporate Finance to contest the point on appeal;
- 14.3 Diamond Core Resource's objective inability to pay River Corporate Finance's success fee is common cause; and
- 14.4 There are no grounds upon which to assert that any other or further evidence would have been produced which could have materially affected the defence.

[15] Adv A N Kruger, for River Corporate Resources, contends that the raising of the supervening impossibility issue is belated, ill-conceived and prejudicial to his client and that the postulated novelty of the question of law raised "lies in its absurdity."

[16] When the liquidation application was launched by River Corporate Finance the indebted Diamond Core Resources should have been candid enough in its papers to adopt the attitude contained in its counsel's submissions adverted to in paras 11 to 14 (above) relating to the defence of supervening impossibility of performance. It should simply have stated: yes there was this agreement; yes the company owes the money claimed; yes it is unable to pay; but the company pleads supervening impossibility of performance, instead of the persistent spurious denial. As matters stand Diamond Core Resources is adopting two conflicting stances. It is blowing hot and cold which a party or litigant is not allowed to do.

- [17] Be that as it may, if Diamond Core resources was impecunious on the occasion of the conclusion of the contract the inescapable conclusion can only be that it acted deceitfully in representing to River Corporate Finance that it is sufficiently solvent to pay the success fee upon due performance by the creditor and has through this subterfuge induced River Corporate Finance to perform its obligation and discharge its mandate. A court cannot countenance such fraudulent conduct.
- [18] I am in any event not persuaded that the scenario sketched by Mr Solomon accords with the applicable principles of our law on supervening impossibility.

18.1 In **Peters, Flamman & Co v Kokstad Municipality**

1919 AD 427 at 434 – 437 the defendant partners contracted with Kokstad Municipality (the plaintiff) to provide it with acetylene gas lighting for a period of years. Whilst the contract had several years still to run the partner defendants were incarcerated as enemy subjects. Their business was ordered by the State (the Treasury) to be wound up. In carrying out this order the liquidator cut off the power supply. The municipality brought an action for damages and ancillary relief. The court held that if a party to a contract is prevented from performing his contract by *vis major* or *casus fortuitus*, under which was included the compulsory winding-up of that party as an act of the State that party is discharged from liability. The rule is that the supervening impossibility has to be absolute.

18.2 In **Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd** 1994(4) SA 26(W) the Head Note at

29G-H captures the principle relating to the impossibility defence in these terms:

"As to impossibility, great difficulty and great expense in performance did not amount to impossibility. (At 82C.) However, given the prohibition of delivery and export of uranium oxide of South African provenance and given the fact that delivery to and export of uranium oxide of non-South African provenance from Durban port would still be subject to potential prohibition by the South African authorities, absolute impossibility had been proved on a clear balance of probabilities. (At 82D, E, G.) Although the general rule was that, if performance was impossible through no fault of the debtor, the debtor's obligations under the contract were extinguished, whether this would in fact be the effect would depend upon the nature of the contract, the relationship between the parties, the circumstances of the case and the cause of the impossibility. (At 82J-83A.) If the causes of the impossibility were in the contemplation of the parties, they were in general bound by the contract; if, however, the causes were such that no human insight could have foreseen them, then their obligations under the contract were extinguished. (At 83B.)

The dictum in Bischofberger v Van Eyk 1981 (2) SA 607 (W) at 610 in I fine -611F approved and applied." (My emphasis)

18.3 In **Unibank Savings and Loans (formally Community Bank) v ABSA Bank** 2000(4) SA 191(W) at 198D-E the Court stated:

"[9.3.1] Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable. Deteriorations of that

nature are foreseeable in the business world at the time when the contract is concluded. Yodaiken v Angehrn and Piel 1914 TPD 254 at 260 and 262; Macduff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573 at 600; and cf Van Diggelen v De Bruin and Another 1954 (1) SA 188 (SWA) at 193D.”

I am therefore satisfied that the supervening impossibility perceived by Diamond Core Resources is genetically generated.

In the premises I envision no reasonable prospect of success on appeal nor that another court may come to a different conclusion.

THE COSTS DE BONIS PRORIIS ISSUE.

[19] I intend to award cost *de bonis proriis* on an attorney and client scale against attorney Stephen Thomson of the firm Thomson-Wilks Inc, Johannesburg, Diamond Core Resources’ instructing attorney. The reasons emanate from the brief history that follows. The costs portion of this judgment must be read in conjunction with paras 1-12, 20 and 22 of the reopening judgment (heard on 03/07/2009 and delivered on 07/08/2009). I will follow the chronology of events for better comprehension.

[20] Having heard the liquidation application on 19 June 2009 I reserved judgment and informed the parties that judgment will be delivered on Friday 03 July 2009. On 30 June 2009 I received a lengthy faxed letter (fully quoted in para 4 of the reopening judgment) written by Mr Stephen Thomson (without knowing the opponent) requesting me not to deliver

the winding-up judgment on 03 July 2009 because Diamond core Resources intended to reopen its case for the reasons stated in that letter.

- [21] Immediate upon receipt of this letter (30/06/2009) I issued this directive to the Registrar of the High Court (also quoted in para 5 of the reopening judgment):

"Registrar,

RE: APPLICATION: RIVER CORPORATE FINANCE (PTY) LTD /
DIAMOND CORE RESOURCES (PTY) LTD: CASE NO. 642/09.

1. *Inform Thomson-Wilks Inc through their Kimberley correspondent attorneys that it is inappropriate for them to have approached me in the manner that they did. Unless a substantive application is brought by Thursday 02 July 2009 at 10h00 the judgment, which is ready, will be delivered as scheduled on Friday 03 July 2009 at 10h00.*
2. *The applicant's [River corporate Fincance's] attorneys must be furnished with a copy of this directive."*

- [22] In the so-called substantive application ostensibly brought on urgency, purporting to comply with the directive in para 21 (above) there was no formulation by Diamond Core Resources of its own rules relating to the time allowed for answering and replies (para 10 of reopening judgment expounds). There was no appearance on 02 July 2009 at 10h00 by Diamond Core Resources either. I summoned the local attorneys of both parties to my chambers and issued the following further directive (see para 11 and 12 of reopening judgment as well):

"Registrar

Following the discussion with Mrs Monica Du Toit (attorney for Diamond Core Resources (Pty) Ltd) and Mr Gerrie Van Der Merwe

(attorney for River Corporate Finance (Pty) Ltd) with you also present I direct as follows:

1. *That the application for the reopening of its case brought by Diamond Core Resources (Pty) Ltd be heard at 09h00 on Friday 03 July 2009.*
2. *It is noted that River Corporate Finance (Pty) Ltd have not yet filed a notice of opposition or an Answering Affidavit to the reopening application.*
3. *If no appearance is made the reopening application will be struck from the roll and the main judgment will be delivered in my Court."*

[23] During the late afternoon of Thursday 02 July 2009 Mr Thomson, who else, undaunted by my prior warning, once more wrote directly to me with no courtesy being paid to the counterpart. The request was that "the urgent" application must stand down indefinitely because his counsel Adv Solomon SC, was abroad. This was another irregular proceeding – an application for a postponement by letter. Even Diamond Core Resource's own counsel, Adv Willem Coetzee, was unaware of the letter and was, understandably, embarrassed.

[24] On the costs issue I remarked in the reopening judgment that the statement in Mr Thomson's letter of 02 July 2009 "*demonstrates, sadly, the attorney's failure to have familiarized himself with the Rules of Court*"; and went on to say: "I am therefore not surprised by Mr Gerrie Van der Merwe's request that this conduct be visited with a cost order *de bonis propriis*." (See paras 12 and 22 of the reopening judgment).

- [25] On the first working day of term (Monday 03/08/2009) an Application for Leave to Appeal relating to the current matter this judgment is dealing with awaited me on my desk. On 05 August 2009 I issued the following directive:

"Registrar,

Inform parties that the Application for Leave will be heard on Thursday 13 August 2009 at 10h00. Short Heads must be prepared. If the date is not suitable then several dates in September must be suggested."

The Registrar transmitted the directive on the same day.

- [26] On 12 August 2009 both sets of attorneys approached me in chambers and intimated that the 13th August 2009 was not suitable. They undertook to revert with new dates.

- [27] On 10 September 2009 Mr Thomson addressed a letter through my secretary to me, in person, para 2 thereof reads:
"2. Kindly provide our offices with dates on which the Honourable Judge will be available to hear the Leave to Appeal. We anticipate being in a position to argue the Leave to Appeal Application during November 2009."

- [28] On my instruction my secretary responded to Mr Thomson as follows:

"The Judge President states that he is not accepting the letter and that you must write to the Registrar.

The Judge President also does not understand why your local correspondent attorneys are being bypassed."

It is immediately noticeable that Mr Thomson's letter (in para 27 above) does not accord with my directive in para 25 (above) or the undertaking by the parties in para 26 above. What is also evident is that Mr Thomson did not communicate with his correspondent attorneys.

[29] On 23 October 2009 the implacable Mr Thomson wrote a three-page letter to me in which he accused me of various things, one of which was tardiness. The tone of the letter, which was inexcusably not copied to the other party, as it is Mr Thomson's wont, is disturbing and contains a number of inaccuracies some of which can be dispelled with a mere reference to the texts of the judgments already delivered with reliance mainly on objective facts pertaining to procedural aspects. In order to avoid emulating the author of the said controversial letters I chose to issue the following directive on 30 October 2009:

" Registrar,

RE: DIAMOND CORE RESOURCES (PTY) LTD v RIVER CORPORATE FINANCE (PTY) LTD (IN LIQUIDATION): CASE NO. 1450/09.

LETTER FROM THOMSON-WILKS DATED 23 OCTOBER 2009:
REF MR S THOMSON/SH/D00050.

1. *The parties' attorneys have not provided me with dates suitable to them as requested. The Application for Leave to Appeal is set down for Friday 13 November 2009 at 09h00. Short Heads of Argument must be filed by not later than 16h00 on Wednesday 11 November 2009. The date and times will not be changed.*
2. *[Thomson-Wilks] wrote a letter to me of the abovequoted reference and date marked "private and confidential" which goes herewith marked "D00050". In light of certain accusations and insinuations levelled against me I direct that you provide the attorneys of both parties with copies thereof. Their counsel must deal in their Heads with the allegations."*

- [30] When the matter was heard on 13 November 2009 Mr Solomon was only prepared to argue that costs should be costs in the winding-up. He contended that there is no justification to call for my recusal and did not share Mr Thomson's views. On being asked to address me on the contents of the letter and the specific allegations Mr Solomon, surprisingly, said he had not received instructions on the contents. Asked why Mr Thomson should not be ordered to pay the costs *de bonis propriis* on account of his untoward conduct he urged that the matter rather be postponed so that Mr Thomson could explain himself. Notwithstanding Mr Kruger's opposition I granted the postponement for a week to 20 November 2009.
- [31] Mr Michiel De Wit who describes himself as the president of BRC Diamond Core Limited deposed to the affidavit (and not Mr Stephen Thomson) and steered well clear of the accusations levelled against me by Mr Thomson in the letter dated 23 October 2009. On 20 November 2009 Mr N B Pye, in the absence of Mr Solomon, argued the costs issue and in essence adopted the same approach as predecessor.
- [32] Mr Pye stated that the letter of 23 October 2009 should not have served before the Court. Pressed on how he proposes the process should have been dealt with, moreso that Diamond Core Resources did not favour River Corporate Finance with a copy thereof, he conceded that there was no other option, but urged that costs be ordered to be costs in the winding-up and that Mr Thomson should rather be reported to his Law Society. It suffices to state that a puerile letter from Mr Thomson dated 02 November 2009 followed the same deprecated channel of communication. Stunning.

- [33] Mr Kruger on the other hand was forthright in his Heads on the costs issue. He had spoken to his Heads on 13 November 2009. On 20 November 2009 Mr Van Tonder stood in for Mr Kruger and essentially reiterated the latter's submissions. These submissions by Mr Kruger commend themselves more to me. I quote them *in extenso*:

"Costs de bonis proriis

61. *Such costs are ordinarily paid by the estate, which leaves less for creditors.*

62. *It is submitted that this case warrants a special order for costs on the scale between an attorney and his own client, payable by Mr Thomson de bonis proriis, on the following grounds.*

62.1 *Mr Thomson is a director of the respondent's holding company and has a personal interest;*

62.2 *He has allowed his personal interest in the matter to cloud his professional judgment as an attorney and officer of the court, which is evident inter alia from:*

62.2.1 *The facts set out in the two judgments;*

62.2.2 *His contradictory evidence in his affidavit supporting this application for leave to appeal. Mr Thomson blows hot and cold on the question of respondent's ability to pay its debts;*

62.2.3 *Mr Thomson's scandalous behaviour in writing the disrespectful 23 October 2009 letter to the learned Judge President and that after being previously admonished in this regard;*

62.2.4 *The reckless disregard of professional ethics and the cavalier approach adopted by Thomson;*

62.2.5 *The patently unfounded allegations in support of the desperate attempt to raise a new defence on appeal.*

CONCLUSION

63. *It is submitted that an order should be made:*

63.1 *Dismissing the application for leave to appeal;*
 63.2 *Ordering that the costs of the application be paid on the scale as between an attorney and his own client, such costs to be paid de bonis propriis by Mr Stephen Thomson of the firm Thomson Wilks of Johannesburg;*
 63.3 *Directing the Registrar to forward a copy of the judgment and order, together with previous judgments and the Thomson letter and these heads of argument, to the Law Society responsible for attorneys practicing in Johannesburg"*

- [34] It must be clearly understood that the costs order that I propose making is not so much about the contents of the "scandalous" letter the contents whereof have not been regurgitated because neither Mr De Wit (deponent) nor Mr Thomson (the offender) or their counsel (Adv Solomon SC and Adv Pye) attempted to justify the contents of the letter. The penalty has more to do with the repeated irregular procedures adopted by Mr Thomson: the persistent flouting of the Rules of Court; See Rules 30 and 6. His conduct also caused at least two more seatings than was necessary: on 02 and 03 July 2009 (if 02 July 2009 can be called that) and 23 and 30 November 2009. Some wasteful expenditure was incurred. Mr Thomson did not care because he banked on Diamond Core Resources (Pty) Ltd (In Liquidation) bearing the costs. He miscalculated. See: **Venter v Bophuthatswana Transport Holdings (Edms) Bpk** 1997(3) SA 374(H) at 390G – 391A; **Jeebhai v Minister of Home Affairs** 2009(4) SA 662 (SCA) at 666E – 668A (para 8 – 15).
- [35] Adv Solomon SC undertook (in court) "to whisper" in Mr Thomson's ear to refrain from further conduct of this nature. I will therefore refrain from reporting Mr Thomson's

shenanigans to his Law Society because the penalty and punitive costs order will address what borders on unprofessional conduct adequately. His directorship in the law firm and the company in liquidation have created a conflictual situation which he may resolve by having himself substituted by a colleague in the law firm if further steps in exhausting the company's remedies are envisaged.

[36] I therefore make the following order:

1. **As to A:** The applications for leave to appeal in respect of both the reopening and the winding-up orders are refused.
2. **As to B:** The costs of hearing of the applications for 13 and 20 November 2009 are to be borne by Mr Stephen Thomson of the firm Thomson-Wilks of Johannesburg *de bonis propriis* on the attorney and client scale.

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

On behalf of the Applicant:

Adv R A Solomon SC (13/11/2009)

Adv. W.B Pye (20/11/2009)

Instructed by:

Du Toit Attorneys

On behalf of the Respondent:

Adv. A.N Kruger (13/11/2009)

Adv A Van Tonder (20/11/2009)

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