REPORTABLE

STANMARKER MINING (PRIVATE) LIMITED
versus
METALLON CORPORATION LIMITED

HIGH COURT OF ZIMBABWE
OMERJEE J
HARARE, 30 May to 3 June 2005, 6 February to 9 February 2006 & 22 March 2006

Civil Trial

JC Andersen SC, with him G Mutha-Valla, for the Plaintiff
CE Puckrin SC, with him R Bhana, for the Defendant

OMERJEE J: This matter first came before the court by way of an ex parte chamber application, for an order, *inter alia*, confirming jurisdiction of this court. The application was dismissed in case HH 55/03. Plaintiff appealed against this decision and the Supreme Court in case SC 51/03 set aside the High Court order and confirmed jurisdiction of this court. Consequently, the plaintiff issued summons against the defendant for payment in the sum of US$12 000 000 (twelve million United States Dollars), representing the damages allegedly sustained by reason of defendant's breach of a contract entered into between the parties.

The background facts:

The Plaintiff is a mining company registered in terms of the laws of Zimbabwe, and the Defendant is a South African domiciled company having its registered office at Johannesburg, South Africa.

In or about December 2001 Plaintiff, on its own initiative entered into a confidentiality agreement with Lonmin (Plc) Ltd ("Lonmin") with a view to acquiring Lonmin's shares in Independence Gold Mining (Pty) Ltd ("IndepGold"), a Zimbabwean registered company which owned five gold mines in Zimbabwe – How Mine, Shamva Mine, Arcturus Mine, Mazowe Mine and Redwing Mine.

At the relevant time IndepGold was a wholly owned subsidiary of Cableair (Pty) Ltd ("Cableair"), a private limited company incorporated in the United Kingdom. Cableair was, in turn, a wholly owned subsidiary of Lonmin, a public limited company, incorporated in the United Kingdom. Lonmin was, therefore, the holding company of Cableair, which was the sole beneficial shareholder of IndepGold.

Lonmin wished to dispose of its shares in Cableair and, consequently its interest in IndepGold and the five mines it owned in this country.

Separately and at its own initiative Defendant, in or about April 2002, also entered into a confidentiality agreement with Lonmin, couched in similar terms as that entered into by Plaintiff.

In or about June 2002 Plaintiff and Defendant met and resolved to work together, in a joint bid to acquire the shares in Cableair.

In this regard Plaintiff and Defendant ("The Parties") on 24 June 2002 (being the signature date) entered into an agreement, which was in the form of written Heads of Agreement ("HOA"). Under the heading "Status of the Heads" clause 2.2 provided as follows –

> *"These Heads set out the main principles upon which the parties will negotiate the detailed written agreements referred to herein. These Heads (save for 2.3, 9, 10 and 11) accordingly do not constitute legally binding rights and obligations on the parties hereto. These Heads will fall away and be of no force and effect upon the signing of the detailed written agreements and them becoming unconditional in accordance with their terms."*

It is clear that the only legally binding rights and obligations entered into by the Parties were those stipulated in clauses 2.3, 9, 10 and 11. Put differently it cannot be disputed that the four clauses constituted the legally binding agreement between the Parties.

These four clauses form the core of the dispute that arose between the Parties. It is, therefore, necessary to set them out in full.

Clause 2.3 provided that –

"The parties undertake with effect from the signature date and until the expiry of three months thereafter that they will negotiate with each other in good faith in respect of the detailed written agreements and that subject to 3.5, they will not negotiate with Lonmin or any other person in respect of any matter relating to the acquisition of all or part of the share capital, assets or business of Independence or its immediate holding company."

Clause 3.5 referred to in Clause 2.3 provided that –

"Metallon shall, on behalf of Newco, negotiate with Lonmin and make an offer to acquire Independence or its immediate holding company for the amount of approximately US$12million or such other amount agreed on between the shareholders."

Clause 9.1 provided that –

[Stanmarker shall use its best efforts to procure that]

"all interested parties, relevant government officials and authorities are favourably disposed to Newco's acquisition of Independence or its holding

company such that the acquisition of Independence or its holding company is not unduly hampered, obstructed and/or delayed in any manner whatsoever..”

Clause 11.1 provided that –

“From the signature date and for a period of three months thereafter, neither party shall, without the prior written consent of the other party, engage in or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate holding company and/or engage in or enter into discussions with any other party desirous of achieving similar objectives than, or competing with Newco.”

The plaintiff’s cause of action is premised upon the alleged breach of a partnership agreement created by these clauses.

In its declaration dated 30 March 2004, Plaintiff alleged that the Parties entered into a written agreement to, *among other things*, submit a joint bid for the acquisition of the shares in Cableair. It was then alleged in paragraph 10 of the declaration that -

"In breach of the agreement and during the period of three months, Defendant made a bid for Independence for itself and pursued negotiations with Lonmin for the acquisition of Independence without Plaintiff's prior written consent, pursuant to which it acquired ownership of the shares in Cableair and effective control of Independence for itself to the exclusion of Plaintiff."

On the fourth day of trial the Plaintiff filed a notice to amend its declaration and by consent order of 3 June 2005 the amendment was effected. This amendment, in so far

as it is relevant to the issue under consideration, added the following paragraphs to paragraph 10 -

"10A Alternatively, and in the event of Defendant having initiated negotiations on behalf of the parties prior to 24 September 2002:

10A.1 Defendant accepted a mandate to act on behalf of the parties to secure the acquisition of the shares in Cableair in terms of clause 3.5 of the agreement between the parties.

10A.2 Properly construed Defendant's mandate in terms of the agreement remained in force in respect of any negotiations instituted prior to 24 September 2002 until such time, as the negotiations had been successful or had lapsed.

10A.3 Any negotiations instituted by Defendant prior to 24 September 2002 on behalf of the parties had not lapsed prior to 28 October 2002.

10A.4 In the premises Defendant unlawfully and in breach of the agreement between the parties, acquired ownership of the shares in Cableair for itself to the exclusion of Plaintiff on 28 October 2002."

Paragraph 11 (also after the amendment) then alleged as follows -

"11. But for the Defendant's breach of the agreement and had it acted in good faith towards Plaintiff, as was its duty, the shares in Cableair would have been acquired by *the parties jointly or if not by the parties jointly* Plaintiff would have been the owner of 40% and Defendant 60%."

When regard is had to the declaration, as amended, it is obvious that Plaintiff has cast the net widely in an endeavour to establish its claim for breach. Principally the Plaintiff predicates its claim, on two different *albeit* alternative grounds. Plaintiff has thus alleged that -

(a) Defendant (during the three months restraint period) and in complete disregard of its legal obligations, arising out of the agreement between the Parties, proceeded to make a bid for Independence and pursued negotiations for the acquisition of the shares in Cableair for itself, as a consequence of which it acquired the shares in Cableair, to the exclusion of the Plaintiff.

ALTERNATIVELY

(b) If Defendant in pursuance of the agreement had (during the three months restraint period) instituted negotiations on behalf of the Parties, it accepted a continuing mandate to pursue such negotiations until such time that they either were successful; had failed; or the Parties had formerly terminated their binding legal relationship.

The Plaintiff thus contends that Defendant breached the binding agreement created by the HOA, as a consequence of which, it is entitled to certain damages. On the otherhand the Defendant contends that it did not breach the said agreement and therefore disavows any liability.

When regard is had to the opposing arguments advanced on behalf of both parties to the dispute, it becomes obvious that the question of the real nature of the agreement entered into between the Parties is of importance. In this respect Plaintiff contends that the agreement constituted a partnership agreement, whereas Defendant contends otherwise.

As correctly submitted by *Mr. Andersen* for the Plaintiff *"It is for the Court to interpret the agreement between the parties and, in particular, the obligations which arise from it"*.

Indeed this submission was not contradicted by the Defendant as in its own submission it said - *"Although it is the task of the court to interpret an agreement and the task of the court alone the court is always entitled to take into account background circumstances known to the parties at the time in order to interpret the agreement"*.

The Court, therefore, will examine the agreement as constituted by the aforementioned binding clauses taking into account the admissible background facts, with a view to determining the real nature of the relationship it created. Put simply whether the agreement created a partnership or some other relationship between the Parties.

The applicable law:

It is trite that "if certain essential features are present in a contract between two or more persons, then that contract constitutes a partnership agreement whatever the parties thereto may call it - unless there are clear indications in the terms of the agreement that it is not a partnership. *Purdon v. Muller 1960 (2) SA 785 (E.C.D.) at 795F*. On subsequent appeal this statement of law received affirmation from the Appellate Division which assigned the following meaning to it - 'although the presence in an agreement of the four essentials will, *prima facie*, establish the existence of a partnership, such presence is not necessarily conclusive but must yield to contrary intention as revealed in the agreement itself read in light of the other admissible evidence'. Reference *1961 (2) SA 211 (A.D.) at 218A-B*

Principally there are three essentials that must be present in order for an agreement to create a partnership. These are –

1. that each of the partners brings something into the partnership or binds himself to bring something into it, whether it be money, or labour or skill;

2. that the business should be carried on for the joint benefit of both parties; and

3. that the object should be to make profit or for some other gain.

The so-called fourth essential as identified in the leading case of *Rhodesia Railways & Ors v. Commissioner of Taxes 1925 A.D. 438 at 464-5*, namely, that the contract between the parties should be a legitimate contract, was in subsequent years held not to be an essential peculiar to contracts of partnership but common to all contracts and strictly speaking not, therefore, essential to the definition of a partnership. *Bester v. Van Niekerk 1960 (2) SA 779 at 784 (A.D.)*

It is necessary to apply this law to the present case and in particular to the aforesaid binding clauses, in order to determine whether these requirements are present in the agreement entered into between the Parties.

Firstly in accordance with the agreement clause 3.5 which is expressly mentioned in clause 2.3, *prima facie*, obliged the Defendant to "….. *negotiate [on behalf of Newco] with Lonmin and make an offer to acquire Independence or its immediate holding company…."*

It cannot be in dispute that the Defendant, by the terms of this provision, brought something or undertook to bring something into the partnership. In fact the evidence placed before the court establishes that between 24 June 2002 and 24 September 2002 *(the restraint period)* Defendant through one Peter Gain, was engaged in vigorous negotiations with Lonmin in respect of the intended acquisition of the shares in Cableair. Whether or not these negotiations were being done on behalf of the Parties is immaterial

as regards the present issue. What is material is that, by the terms of the agreement Defendant undertook to bring something into the partnership.

What of the Plaintiff? It will be recalled that clause 9 was one of the legally binding clauses of the "HOA". In particular clause 9.1 provided as follows –

[Stanmarker shall use its best efforts to procure that]

> *"all interested parties, relevant government officials and authorities are favourably disposed to Newco's acquisition of Independence or its holding company, such that the acquisition of Independence or its holding company is not unduly hampered, obstructed and/or delayed in any manner whatsoever.."*

The terms of this provision required the Plaintiff to employ its best endeavours (labour and skill) to facilitate the creation of a favourable climate aimed at ensuring that the Government of Zimbabwe supported or at the very least seriously considered accepting the proposed acquisition of IndepGold by the Parties. The Plaintiff bound itself to bring something into the partnership.

In regard to the second requirement it cannot be gainsaid that a factor that motivated the Parties to enter into the agreement was, *inter alia*, to minimize competition and maximize the chances of successfully acquiring, for themselves, the shares in Cableair. It therefore, was a deliberate business-venture entered into for the joint benefit of both parties.

The third and final essential of a partnership agreement is that the object must be to make profit or for some other gain. In this regard, it is important to be reminded of some of the relevant admissible background facts of this case.

The evidence establishes that initially each party separately and autonomously was interested and involved with the pursuit to acquire the Cableair shares and consequently the interests in IndepGold. Their individual commitment and dedication to be the successful bidder admits of no doubt. As separate contenders each had taken what appear to be meaningful steps toward fulfilling that objective. However, on or about the 24 June 2002, the Parties agreed to come together in a joint endeavour aimed at securing the Cableair deal, which, as already alluded to, they had hitherto independently pursued. When regard is had to these background facts it becomes apparent that in joining forces the object of the Parties was to strengthen their bid of acquiring shares in a commercial gold mining concern - Cableair.

It thus is clear that all the essentials for a valid contract of partnership are present in the agreement between the Parties. The inquiry, however, does not end here, as the law requires the court to investigate further and determine whether on a correct construction of the agreement a contrary intention is revealed. De Villiers, J.P. in the case of *Purdon v. Muller (supra) at 794C-D* put it thus -

> *"I say that it is clear that all the essentials of a valid contract of partnership are present in this agreement. The question then is, is there something in the agreement which clearly indicates that it is not a partnership, because as the authorities say I must hold that it is a partnership in the absence of something showing that it is not?"*

Mr. Puckrin, for the defendant, submits that the HOA is anything but a partnership. In support of his submission he urges, firstly, that when properly construed clause 3.5 of the HOA does not create any obligations on the Parties. In paragraph 6 of the defendant's written argument it is presented thus -

> *"In our submission clause 3.5 on its own does not create separate self standing legal obligations on the Parties. Clause 3.5 is an exception to the restraint in clause 2.3".*

The defendant has thereafter sought to present argument whose main thrust is that the binding clauses of the HOA created what was in effect an Agreement to Agree and not a partnership. That it was an agreement to negotiate and concur on detailed future shareholders agreements which would culminate in the incorporation of Newco and nothing more.

I find myself unable to accompany this line of reasoning. It seems to me that in order to appreciate the true nature of the agreement, as created by the binding terms of the HOA, it is important to be wary of the temptation to view these clauses in isolation of each other. Put differently, it is imperative to construe the clauses not as stand-alones but in conjunction with and in the context of one another. It is my view that the real intention of the Parties can only be deduced by looking at the agreement as a whole as opposed to considering its component parts in isolation of each other.

Furthermore, it must not be overlooked that clause 3.5 is expressly mentioned in clause 2.3 and therefore it necessarily must be construed in that light. I will, in the course of this judgement deal in more detail with this point. Suffice to state that, in my view clause 3.5 when properly construed created legally binding obligations and was not merely an exception to the restraint in clause 2.3.

Secondly, I understand the defendant to be submitting that the HOA had as its object the negotiation and conclusion of a future agreement. In particular, that what was envisaged by the HOA, was a future shareholders agreement. To the extent that the future agreement envisaged was a shareholders agreement presents no difficulty. However, I am

not persuaded by the defendant's further contention as expressed in paragraphs 13 and 14 of its written argument, namely -

Para. 13

> *"Once it is understood that the future Agreement is nothing more than a Shareholders Agreement it is clear that the HOA is an interim arrangement between parties who may become Shareholders in the future to regulate their conduct during the period of their negotiations".*

AND

Para. 14

> *"The Plaintiff's contention that the HOA constitutes a Partnership is exposed as an absurdity once it is appreciated that the future Agreement is a Shareholders Agreement. We say it is an absurdity because this contention seeks to suggest that the HOA creates a Partnership and yet it is clear that parties will be negotiating a Shareholders Agreement within an incorporated company. It is nonsensical to suggest that in the interim a Partnership comes into existence which then somehow is miraculously transformed into an incorporated Company regulated by a Shareholders Agreement."* (emphasis added)

It is my view that the partnership agreement, being alleged by the Plaintiff, is not predicated on any envisaged future plans of the parties. Once it is accepted that clause 2.3, 9, 10 and 11 of the HOA created legally binding rights and obligations - the question that necessarily requires answering is: What was the true nature of the relationship created between the parties? What would eventually occur in the future is of little consequence in as far as the true nature of the relationship, that came into being at the

stage the parties bound themselves to the terms of the HOA is concerned. For the avoidance of doubt, I am of the view that the future legal relationship as contemplated

viz. Shareholders Agreements does not detract from the fact that a particular recognisable legal relationship was created as a consequence of clause 2.3, 9, 10 and 11 of the HOA.

Mr. Puckrin submitted that it was nonsensical to suggest that in the interim a partnership comes into existence which then somehow is miraculously transformed into an incorporated company regulated by a Shareholders Agreement. I find that the evidence does not support this argument. In my view, the intention of the Parties was that upon the occurrence of certain events, namely, the concluding of the detailed written agreements, the HOA was to fall away in toto. This included the interim legal entity born out of clause 2.3, 9, 10 and 11. Thus the interim legal entity having fallen away, it would be replaced (not by metamorphosis) with a company to be incorporated. That this was the express intention of the parties is revealed by the terms of clause 2.2 that -

> *"…… These Heads will fall away and be of no force and effect upon the signing of the detailed written agreements and them becoming unconditional in accordance with their terms."*

The further point advanced by *Mr. Puckrin* in contending that there was no partnership agreement, was that on the evidence placed before the court the essentials of a partnership where absent and in particular that *"Save for the bald allegation in its replication that the relationship between the parties constitutes a partnership the Plaintiff has neither pleaded nor proved the essentialia of a partnership.."*

In regard to the first essential he argues that as clause 9 merely required the plaintiff to use his best efforts as opposed to imposing a positive commitment on it, that 'this undertaking *[was]* so insignificant that it cannot be construed in any way as a substantive contribution manifesting in money, labour or skill toward the acquisition of

Cableair…'. I entertain grave doubt that the law requires the contribution of a party to be what amounts to a "substantive contribution". In the present case the plaintiff in actuality achieved the mandate imposed by clause 9 in that it secured governmental support for the

joint venture. Reference is here made to a letter dated 9 September 2002 addressed to IndepGold and signed by the Secretary to the Ministry of Mines and Mining Development. It reads -

> *"The Ministry of Mines and Mining Development is aware of a joint bid submitted by Metallon of South Africa and Stanmarker of Zimbabwe. We have a copy of the heads of agreement between the two companies signed on 24th of June 2002.*
>
> *In line with the shareholding structure therein, the Ministry of Mines and Mining Development is in full support of this bid as this shareholding structures reflects the indigenisation of Independence Gold Mines which is in line with the Government Policy." (emphasis added)*

Furthermore, it should not be overlooked that, Plaintiff also contributed significantly by making available to the joint venture, the technical due diligence report it had undertaken. It goes without saying that the due diligence exercise involved labour, skill and expenditure of money. As a result of this contribution the defendant did not embark on it's own technical due diligence exercise.

It has not escaped my mind that *Mr. Puckrin* submitted that the aspect of the due diligence exercise should be disregarded as it is provided for in clause 5, a non-binding clause of the HOA. I am unable to accede to this line of reasoning as it seeks to unduly prevent the court from having regard to the surrounding circumstances and facts to enable it properly construe the real nature of the agreement in question. The court is entitled to look at the surrounding circumstances in determining the real nature of the agreement between the Parties.

Nothing much turns on the second essential. As to the third and last essential *Mr. Puckrin* has presented a rather novel argument. Firstly, that it is a requirement that for there to be a partnership agreement the object should be for the making of profit or gain

and that **such profits must be the immediate** (as opposed to future) **aim** of the parties. That in the present case the immediate aim was to form a company and become directors of the company even though the parties intended that the ultimate aim was to make profits through the company. As stated earlier, if regard is had to the background facts of this case it is obvious that the immediate object of the parties when they entered into the agreement was to acquire the Cableair shares and consequently to gain interest in an already established commercial gold mining concern.

The second rung of *Mr. Puckrin's* argument is that '*[a]* partnership cannot be established with the sole aim of acquisition as opposed to the sharing of profits'. I do not agree. The object or aim of a partnership is not restricted to making of profit, in the sense of commercial profits, but also includes obtaining some other gain. *In re Arthur Association for British, Foreign, and Colonial Ships (1875) 10 ChD 452 at 545 Jessel MR had this to say -*

> *"…. Now, if you come to the meaning of the word 'gain', it means acquisition. It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word 'pecuniary' so as to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not 'gains', but 'gain', in the singular. Commercial profits, no doubt, are gain, but I cannot find anything limiting gain simply to a commercial profit. I take the word as referring to a company which is formed to acquire something, or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything…."*

In the present case the aim or object of the Parties was to gain something in the sense of acquiring the shares in Cableair.

It is my considered view, that the agreement entered into between the Parties was, amongst other things, to submit a joint bid for the acquisition of the Cableair shares. A joint venture even in respect of a single transaction, as *in casu*, is still a partnership, if the three essentials already mentioned are present. *Bester v. Van Niekerk (supra); Pezzutto v. Dryer & Ors 1992 (3) SA 327.*

Accordingly and for the aforementioned reasons, I come to the conclusion that the agreement entered into between the Parties, when considered as a whole, reveals all the necessary elements of a partnership and an intention by the Parties to enter into a partnership.

The issue of breach:

In order to succeed with its claim the onus is on the Plaintiff to show, on a balance of probabilities, that Defendant breached the agreement in one or either of the ways alleged. I propose to deal separately with each of the Plaintiff's allegations.

(a) On the evidence has the Plaintiff established that during the restraint period i.e. between 24 June 2002 and 24 September 2002 -

(i) Defendant made a bid and negotiated, for itself and to the exclusion of Plaintiff for the acquisition of the shares in Cableair.

AND/OR

(ii) Defendant failed to fulfil or carry out its legal obligations arising from the agreement entered into between the Parties on 24 June 2002 (being the date of signature).

Defendant denies that it made a bid for itself but that, as a matter of fact, it fulfilled its mandate and submitted a bid for and on behalf of the Parties.

In its defence as contained in the founding affidavit deposed to by one Nambita Sinazo Bam the defendant averred that -

> "…it acted at all times in terms of the heads inasmuch as any and all negotiations between the Defendant and Lonmin for the acquisition of Independence during the restraint period were engaged in for the purposes of acquiring Independence for the benefit of the parties."

At the trial, Peter Gain ("Gain") testified on behalf of Defendant. In his evidence he stated that during the period under review he worked for a company called Micofin Corporate Services, as its Managing Director and that he specialised in offering corporate advisory services to clients. He had joined Micofin in May 2000 and left in August 2004 to take up employment with Defendant until September of 2005. That during the relevant time the defendant through Mzi Khumalo ("Khumalo") engaged Micofin to negotiate with Lonmin, in regard the possible acquisition of Cableair by Newco. Khumalo was the Chairman and CEO of Defendant. According to him, his mandate was to initiate and pursue negotiations for and on behalf of Newco, through the defendant's *nominee* styled First Gold Proprietary Ltd ("First Gold"). The ultimate aim being to bid for and make an offer for the acquisition, by Newco, of 100% of the shares in Cableair. He testified that this is precisely what he did, culminating in First Gold submitting an offer to Lonmin on 20 June 2002. (Although the signature date of the HOA was 24 June 2002, the parties had already orally agreed on the joint bid and Defendant had on its part signed the HOA on

20 June 2002). It was his testimony that at this stage, he was aware of the existence of the HOA.

The Plaintiff, on the otherhand, refutes this contention and has urged me to find that Defendant failed to make an offer or negotiate for and on behalf of the Parties,

thereby breaching the agreement. In support of its submission Plaintiff has drawn my attention to the following points: That –

1. None of the documents relating to the negotiations with Lonmin made any reference to the partnership or Plaintiff or a company to be formed. They all contained the name of one of Defendant's associates or nominees.

2. On the evidence there is nothing to show that Khumalo disclosed the existence of the agreement to those who acted for him. If he had done so, as contended by Gain, one would have expected that the name of the purchaser (i.e. Newco) would have otherwise been cited in some of the documents relating to the negotiations.

3. Khumalo's failure to attend and give evidence at the trial raises the necessary inference that he would not have stood to scrutiny, on the witness stand, in regard the claim that the negotiations by First Gold (during the restraint period) were being carried out for and on behalf of the Parties.

In order to resolve this matter, I shall have regard not only to the documents relative to the negotiations, but also to the evidence of Gain and one, John Neil Robinson. In this regard I have already made reference to the evidence of Gain.

<u>The evidence of John Neil Robinson ("Robinson")</u>

On 3 June 2005 and at the instance of the Parties, I caused a formal written request to be directed to The Senior Master of the Queen’s Bench Division of the High

Court of Justice of England and Wales. The request was made pursuant to the provisions of The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Paragraph 5 set out the scope of the request as follows –

> *"The trial of the Action has commenced on 30 May 2005. This Court considers that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties in the Action that you cause the following, who is resident within your jurisdiction, and who appears to this Court to have knowledge and information relevant to the issue in the Action, to be examined and to answer such questions viva voce as the agents of the parties in England shall desire to ask in respect of the topics set out below and to produce and permit copies to be made of the documents set out below:*
>
> > *John Neil Robinson,……, who is and was at all times material to the Action an Executive Director and Chief Financial Officer of Lonmin, to be examined in respect of the following topics and to produce and permit copies to be made of the following documents which are or are likely to be in his possession, custody or power."*

The request proceeded to set out the topics for examination, the documents to be produced and further asked that Robinson be examined on oath or affirmation before a judicial officer or an examiner appointed by the High Court of Justice of England and Wales and that such examination be reduced to writing. A written record ("London Transcript") was filed with this court and forms part of these proceedings.

The main trial was adjourned on 2 June 2005 to facilitate for the examination in London and it resumed on 6 February 2006.

Not surprisingly, at the London examination *Mr. Andersen* for the Plaintiff, traversed at length the issue of whether Defendant's conduct was such that it showed that the negotiations it had conducted was on behalf of a joint bid for the Parties.

Robinson in response to questions put to him by *Mr. Andersen*, testified that during the relevant period he had either directly or indirectly dealt with a number of entities in respect to the sale of the Cableair shares. In this regard he had had dealings with Mawenzi Resources and Finance, Micofin Corporate Services, First Gold Proprietary (Pty) Ltd and Pemberton International (Pty) Ltd. That in as far as he was aware these four entities were associated with and only represented Khumalo. As to whether he was, at that time, aware of an agreement between the Parties, relating to a joint bid for the Cableair shares - his testimony was to the effect that as far as he could recall Khumalo had, in a short conversation, intimated that he had some sort of arrangement with Hove. He divulged no details as to the terms or nature of this arrangement. Thabani Lloyd Hove is the CEO of Plaintiff. Robinson throughout his evidence, maintained that as far as he was aware none of the entities mentioned above made an offer or bid for and on behalf of Hove or any of his *nominees*. Asked whether he had ever been appraised of a joint venture or any form of partnership between Hove and Khumalo, he remained adamant that apart from Khumalo having made mention of some sort of arrangement between the two of them, he was not aware of the existence of a joint venture or any other form of partnership between them.

The Defendant in its defence contended that, the initial offer submitted through First Gold, dated 20 June 2002, had in its paragraph 9 a nomination clause to the effect that -

> "First Gold shall have the right, by written notice given to Lonmin within 30 (thirty) days after the signature Date, to nominate any person (including a company, close corporation or unincorporated joint venture) ("the Nominee") as

purchaser of the Sale Shares and Sale Claims in terms of the Share Sale Agreement. On delivery of such notice to Lonmin, together with written acceptance by the Nominee of such nomination, the Nominee shall substitute First Gold as purchaser of the Sale Shares and Sale Claims and as a party to this offer

and the Share Sale Agreement and any reference to First Gold in those agreements shall be deemed to be a reference to the Nominee."

Put simply First Gold had reserved the right to nominate another entity to substitute it as party to the offer and subsequently as purchaser of the shares in Cableair.

Secondly and additionally that it was in this context that within days of the submission of the initial offer Plaintiff, through Hove, was talking to Robinson in the knowledge that the bid was for and on behalf of the Parties. And that, on his part, Robinson entertained and kept Hove informed at all times, in relation to the First Gold bid. As a result, in its written argument, Defendant contended that -

"Para 136. What all this demonstrates is that there was no breach of the HOA:

136.1 Metallon negotiated with Lonmin (through First Gold) with Hove's full knowledge in terms of the HOA.

136.2 All the Parties (Metallon and Stanmarker) regarded the First Gold bid to be in terms of the HOA. Had this not been so Hove would immediately have objected (before 24 September 2002). Thus there was no breach of clause 2.3 nor 3.5 (to the extent that that created binding obligations which we have submitted it did not)".

The following relevant points are revealed by the evidence before me - that Plaintiff and Defendant arrived at an understanding that Defendant was to negotiate and make a joint bid for and on behalf of the Parties; that subsequent to this, Gain, was engaged by Defendant to negotiate and make a bid through First Gold for the acquisition of the shares in Cableair; that on 20 June 2002 First Gold submitted an offer to Lonmin for the acquisition of 100% shares of Cableair and thereafter Gain pursued

negotiations with Lonmin aimed at sealing a deal in that regard. For the purposes of the question under consideration these negotiations continued as from 20 June to 24 September 2002.

It is not in dispute that during this period Plaintiff and Robinson were in communication via e-mail messages and telephonically. In this regard no less than five e-mail messages were produced as part of the bundle of documents for the court's consideration. The contents in the e-mail messages are supportive of Defendant's contention that, in their knowledge First Gold's offer was for and on behalf of the Parties, hence Hove within days was talking to Robinson and Robinson, in turn, was entertaining him in relation to the First Gold bid. For instance, in relevant part, the message from Hove to Robinson of the 1 July 2002 read -

> *"….We submitted our bid jointly with Metallon as Mr. Khumalo may have explained to you.*
>
> *What is of concern to us are the rumours in the market that the completion date was extended to 3rd of July. I write this to seek your clarification as to whether this is true or not. I hope you will appreciate our concern as our offer is already known in the market".*

In response Robinson wrote -

"Thank you for your fax and e-mail of today's date. I had assumed that your colleagues who are working with Mr. Khumalo would have kept you informed as to the present position after my meeting with them last Friday afternoon. However I can tell you that we now have told all parties that there is a Board meeting here on Thursday at which the various offers will be considered. I left it with your colleagues on Friday that if they want to

revise the terms of their offer before Thursday they were at liberty to do so."

Then the message of the 1 & 2 August 2002 from Hove and Robinson respectively read -

"…. I have been trying to get hold of Mr. Khumalo in the last two days without much success. I would like to find out the outcome of your executive meeting held in Jo'burg and to know the current status".

Robinson responded -

"I sent a letter to Mzi yesterday along with the other parties. If you cannot get a copy from him then please let me know".

The message from Hove to Robinson of 6 September 2002 in relevant part read:

"I would like to find out the outcome of your meeting with Mzi on Wednesday. I have been trying to get hold of him but believe he is now in the USA.

I have with me a letter from our Ministry of Mines and Mining Development confirming their support of our potential acquisition of

Cableair. Should you need a copy of this for your records, please send me your fax number so I can fax it to you".

In response Robinson wrote -

"The meeting was constructive but I am still awaiting for Mzi to remit the funds he promised in order to grant him exclusivity for a limited period to complete the contract negotiations.

A copy of the letter from the Minister would be most helpful …".

Finally the message from Hove to Robinson of 9 September 2002 read -

"Please confirm if you received my fax on Friday. As soon as you have received the money promised by Mzi please let me know….".

Robinson responded -

"…. I did receive your fax on Friday and the initial deposit was received on Friday…..".

When regard is had to these messages it is clear that at the very least both Hove and Robinson proceeded on the basis that the bid made by First Gold was for and on behalf of the Parties. Significantly the letter from the Ministry of Mines referred to in the messages of 6 and 9 September 2002, expressly spells out that Plaintiff and Defendant had entered into an agreement to submit a joint bid for the acquisition of Cableair. Robinson received a copy of this letter. It is for this and other reasons that I find

Robinson's professing of ignorance of the precise nature of the arrangement between Hove and Khumalo, rather unconvincing.

In my considered view although the documentation relating to the negotiations did not make any reference to Plaintiff or Newco, the probabilities of this case favour the finding that Defendant, through First Gold, negotiated and made an initial offer on behalf of the Parties. Put differently, I, find that Plaintiff has failed to discharge its onus to show,

on a balance of probabilities, that Defendant negotiated for itself and made a bid to the exclusion of Plaintiff.

Furthermore, Plaintiff has contended that Defendant was in breach of its obligations under clause 3.5 of the agreement. Defendant on the contrary contends that clause 3.5 relied upon by Plaintiff did not create any legally binding obligations on it and therefore it cannot be said that it breached any obligations.

In amplification, Defendant contended that the only legally binding obligations of the agreement are found in clause 2.3,9,10 and 11 and that clause 3.5 was not one of these obligations. It is further argued that of relevance to the current inquiry the obligations that have to be scrutinised are clause 2.3 and 11. In its written argument Defendant then placed the following construction on clause 2.3 -

> "Para 18.1.2 During the restraint period, and in terms of clause 2.3 two separate obligations co-existed:
>
> 18.1.2.1 The parties undertook to negotiate with each other in respect of endeavouring to conclude the detailed written agreement (the final agreement).

18.1.2.2 The parties further undertook that neither would negotiate with Lonmin or any other person in respect of the acquisition of Independence or its immediate holding company (Cableair) - this was subject to one proviso…

Para 18.1.3 In relation to the first obligation - the negotiation in good faith - we say at the outset that the Court must not be misled by the use of the words good faith in this clause. The good faith obligation in clause 2.3 is not a general good faith obligation but one that requires the negotiation relating to the final Agreement to be in good faith".

Earlier in paragraphs 6 and 7 respectively, Defendant contended that clause 3.5 on its own did not create separate self-standing legal obligations on the parties.

That whilst clause 2.3 allowed for the exception in clause 3.5, clause 3.5 did not of itself create an obligation and hence Defendant did not have an absolute or 'out and out' obligation to negotiate with Lonmin on behalf of Newco or to do the other things set out in clause 3.5. Put simply clause 3.5 did not create a mandate and a positive obligation on Defendant to negotiate with Lonmin on behalf of Newco.

It seems to me that the construction sought to be placed by the Defendant on clause 3.5 regards it as a stand-alone clause or in isolation to the other clauses of the agreement. Earlier in this judgement, I pointed to the need to guard against the temptation of viewing the clauses in isolation of each other, but rather to construe them in conjunction with and in the context of each other. It is true that clause 2.2 does not expressly mention clause 3.5 as one of the legally binding obligations of the HOA. However, it must not be overlooked that clause 3.5 is expressly mentioned in clause 2.3 and therefore it forms part of the binding obligations of the HOA.

It is important to remember that clause 2.3 is made subject to 3.5. This means that 2.3 is the dominant provision and 3.5 is subservient to it. It is trite that in law the terms of a dominant provision prevail over that which it is made subject to. The phrase "subject to" has received judicial interpretation - recently the Supreme Court in Attorney General v. James Chafungamoyo Makamba SC 30/05 held that -

> *"The phrase 'subject to' defines which provision is dominant and which is subordinate or subservient - that to which a provision is 'subject' is dominant - In the case of conflict it prevails over that which is subject to it."*

If regard is had to the above principle it would appear that Defendant's argument ignores the fact that clause 3.5 is made a binding obligation by virtue of clause 2.3 which as already mentioned is the dominant provision. It, therefore, follows that to unduly restrict the "duty of good faith" in 2.3 as applying only to negotiations relating to the final Agreement cannot be a proper construction of the obligations imposed by it. Thus on proper construction clause 3.5 (which is subservient) must necessarily be looked at, in the light and context of the binding obligations created by 2.3 the dominant provision. Simply put the positive obligation to act in "good faith" created by clause 2.3 permeates and extends to Defendant's mandate in clause 3.5. This means that Defendant had an express contractual obligation to act in good faith, when negotiating on behalf of the Parties, in relation to the acquisition of the Cableair shares.

The Defendant has also argued to the effect that - even if the provisions of clause 3.5 were mandatory in the sense that they obliged it to negotiate with Lonmin on behalf of Newco they do not assist Plaintiff in that they do not create the mandate between Metallon and Stanmarker that the Plaintiff seeks to create from the terms of the agreement. In this regard it is argued that, to the extent that clause 3.5 imposed any

obligation, Defendant was mandated to negotiate on behalf of Newco. Since Newco was not in existence then and is still not in existence, no breach can be talked of.

This submission does not find favour with me. When properly construed and in the particular circumstances of this case, clause 3.5 mandated Defendant to negotiate on behalf of the Parties referred to in clause 2.3 and not for Newco, an entity which was not in existence at that stage. This, in my view, is the logical and more preferable construction of the binding clauses. It should not be overlooked that courts have

traditionally preferred to place a construction which would leave in place an enforceable agreement rather than a nullity, save where the intention of the parties is to the contrary. If the Defendant's contention were to be embraced this would mean that the Parties entered into an agreement which obliged Defendant to negotiate for itself, as there was no other party in existence to whom it owed any obligations.

It must, again, be reiterated that *in casu* the Parties deliberately entered into an agreement to jointly make a bid for the acquisition of the shares in Cableair. It, is therefore, obvious that Plaintiff did not agree to be a mere passenger who had placed his fate to the whims of Defendant. That this was the case is supported by the fact that Defendant, by its own actions, accepted the mandate imposed by clause 3.5 and proceeded through First Gold (during the restraint period) to negotiate and make a bid for and on behalf of the Parties. I, therefore, find that clause 3.5 imposed a positive obligation on Defendant to act in good faith with regard to the Plaintiff.

Separately and additional to this contractually created "duty of good faith", there existed a common law "duty of good faith. As has already been determined the real nature of the agreement between the Parties constituted a partnership agreement. In this regard once such an agreement exists, by law, the "duty of good faith" automatically comes into being. In this connection *Mr. Andersen* for the Plaintiff referred the court to

Marais & Anor. v. Kennedy & Anor 1996 (2) ZLR 610 (H) at 632 - 633 where in relation to the "duty of good faith" Bartlett J stated as follows -

> "There is clearly a duty of *uberrima fides* between partners. The duty of utmost good faith,….., involves the highest standards of honour. See, Lindley on Partnership 15 ed pp 480 - 1 where the learned author states as follows:
>
> > *"…if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be*
> >
> > *required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour … This obligation to perfect fairness and good faith … also extends to persons who have dissolved partnership but who have not completely wound up and settled the partnership affairs; and most especially is good faith required to be observed when one partner is endeavouring to get rid of another, or to buy him out."*
>
> I am quite satisfied that these expressions of a partner's duty are equally applicable to the Roman Dutch Law."

What becomes necessary, therefore, is to determine whether the Defendant fulfilled its legally binding obligations arising from the agreement, including the duty to act in good faith.

The evidence shows that during the three months restraint period the Defendant, whether intentionally or otherwise, failed to communicate or disclose to Plaintiff any material information relative to the negotiations or the bid made through First Gold. Hove testified on behalf of Plaintiff that he had made several attempts, during the restraint period, to communicate with Khumalo, with a view to finding out the progress of the

negotiations. He was largely either unable to speak to him or on the few occasions he managed to get hold of him, he was made to believe that all was well. This testimony, to a large extent, is corroborated by the e-mail messages between Hove and Robinson already referred to. Moreover, the only person who was in a position to contradict this evidence is Khumalo, who it must be pointed out did not make himself available to testify at the trial.

In casu, another aspect relevant to the duty of disclosure and therefore, the duty of good faith, owed by one partner to another arises from the evidence of Gain. Gain, whom it has been accepted, was mandated by Defendant to negotiate on behalf of the Parties,

was unable to indicate or give any good reason as to why he did not at any stage appraise Hove about the progress or status of the negotiations.

The evidence shows that during the period between 20 June and 24 September 2002 Gain was involved in critical and important aspects of the negotiations that required Defendant, acting in good faith, to have communicated the progress or otherwise, to its partner. Such communication or disclosure would have enabled Plaintiff to reassess its standing *vis-à-vis* its continued participation in the partnership.

On 20 June 2002 Defendant through First Gold submitted an initial offer to Lonmin, but up until the trial discovery process, it neither availed nor communicated a copy of this document nor its terms to Plaintiff. Lonmin, on 27 June 2002, responded to this offer document through a letter addressed to Khumalo wherein it made crucial comments having a bearing on the offer. In paragraph.2, for instance, it was stipulated that –

> *"In relation to the financial terms, we would be looking for a price for the shares of Cableair and the benefit of the inter-company loan owing by Cableair to Lonmin together with an amount equal to the inter-company loan outstanding*

from Independence to Cableair (currently approximately US$ 962,000) and a further amount in respect of current year profits of Independence"

In paragraph 4, Lonmin reacting to the provision of warranties as contained in the offer document indicated its complete unwillingness to give extensive warranties, save for a limited warranty relating to the title to the shares being sold.

It will be observed that paragraph 2 clearly had an impact on the offer price submitted, as it was aimed at adjusting the share price upwards. Paragraph 4 had a tendency of exposing a purchaser to unknown risks/liabilities. Gain in his evidence admitted that this was of great concern to him. In specific reference to paragraph 4 he said –

"That was of grave concern to me as an adviser to the transaction…. when one buys a company which is operating mines, which has been in operation for 40 years, and the seller is not prepared to warrant their conduct in how they have kept their affairs, be they tax returns,…environmental liabilities, the pension fund being fully funded, their financial records whether or not they are in breach of any legal agreements, to warrant absolutely nothing, is finally unusual".

Even with this realisation neither Gain nor Khumalo appraised Plaintiff of this clearly worrisome development.

In my view, it appears that from very early in the negotiations Defendant failed to disclose or communicate important information and this stance was maintained throughout the three months restraint period. In fact, Gain, in his testimony admitted that he did not disclose to Plaintiff any matter relating to the negotiations he was carrying out. In response to questions by *Mr. Andersen* he stated that he had never spoken to Hove

prior to the commencement of these proceedings, neither had he been provided with Hove's contact details nor asked, by Defendant, to keep Hove abreast of the transactions.

Taking the above and the other evidence into consideration, I find that the conduct of Defendant, if considered against the duty of *uberrima fides* and the highest standards of honour, does not stand or bear scrutiny. In otherwords, in my view the Defendant was in breach of its duty of good faith as created by the agreement it entered into with Plaintiff.

The alternative claim based on a continuing mandate:

It is Plaintiff's further contention that over and above the aforementioned breach, Defendant was also in breach of its obligations after the three months restraint period. In particular that, if it is found, that during the three months restraint period, Defendant instituted negotiations on behalf of the Parties, it means that Defendant accepted a continuing mandate to pursue such negotiations until such time that they were either finalised or terminated in another lawful way.

Defendant on the otherhand argues that in accordance with the express terms of the agreement, the legally binding obligations between the Parties had a three months life span, being the restraint period, at the expiration of which such obligations came to their natural end. Therefore, Defendant, in the circumstances of this case, cannot be adjudged to have breached any binding obligations after the three months restraint period had elapsed.

In view of the conclusions and findings already made, I will not concern myself with a forensic analysis of the arguments advanced by either party, but instead I propose to firstly set out the relevant law and thereafter apply that law to the circumstances that occurred prior to and after 24 September 2002.

I have found already that the agreement between the Parties, in express terms, imposed a duty of good faith and in addition the real nature of this agreement was a partnership which, by law, imposed the duty of *uberrima fides* on the parties. The duty of good faith whether arising out of the express terms of a contract or by operation of law covers a wide range of conduct between contracting parties and/or partners. In this regard, in addition to what has already been quoted above, Lindley on Partnership states at page 489 that -

> *"A partner who continues in business after the dissolution of a partnership and makes use of either the former partnership's assets or a business connection*
>
> *derived out of the former partnership assets or connection is accountable to his former partner or partners for the profits attributable thereto.*

By parity of reasoning it follows that any transaction or business conducted or instituted by one partner on behalf of the partnership, during its subsistence, does not terminate or cease on the exfluxion of the partnership. At the same page the learned author continues -

> *"Thus, in Robert Watte Pathirana v. Ariya Pathirana, the plaintiff and the defendant were partners in a petrol service station business in Ceylon. Following a dispute, the defendant gave notice terminating the partnership and, before the notice expired, he obtained the renewal of certain petrol supply agreements in his*
>
> *sole name, and, after the determination of the partnership, carried on trading from the same premises in his own name. The Privy Council held that he was accountable to the plaintiff for a share of the profits attributable to the new petrol supply agreement."*

It is clear, therefore, that unless and until the prior commenced business of a partnership has either terminated or otherwise been concluded, a partner is by law, under an obligation to account, to his erstwhile partner, all benefits that are derived from such business or transaction. In short the duty of good faith in respect to unfinished partnership business continues beyond the *de facto* termination of a partnership agreement.

I propose to apply the above law to the particular facts of this case. I already have found that on 20 June 2002, Defendant in pursuance of the agreement instituted negotiations for and on behalf of the Parties by submitting an initial offer in the name of First Gold, for the acquisition of the Cableair shares. Through these negotiations, on or about 15 August 2002, Defendant secured, on behalf of the Parties, an exclusivity agreement with Lonmin. By this agreement Lonmin undertook *"not to participate in, or*

continue with, any discussions or negotiations or enter into any contract with any third party relating to the sale of Cableair and/or its wholly owned subsidiary, Independence, during the period" but on certain specified conditions. It is pertinent to mention that this exclusivity agreement was subject to several amendments in respect to the dates when Defendant (on behalf of the Parties) was required to fulfil the conditions set therein. The signed and final exclusivity agreement, dated 27 August 2002, read in relevant parts -

> "You have asked for a period of exclusivity within which to arrange the funding necessary to complete this transaction.
>
> Subject to receiving from First Gold Proprietary Limited or its nominee ("First Gold") the sum of US$ 1 million (the "Deposit") into our bank account in New York….on or before the close of business (New York time) on 2 September 2002,
>
> which monies we will hold on the terms of this letter, we will grant you exclusivity on the following basis:

1. We will not participate in, or continue with, any discussions or negotiations or enter into any contract with any third party relating to the sale of Cableair and/or its wholly-owned subsidiary, Independence, during the period from receipt of the deposit into our bank account until 19 September 2002 *or*, if completion of Cableair to First Gold ("Completion") has not taken place on or before 19 September 2002 but, on or before such date, we have received written confirmation addressed to us from a bank of international standing (the "Bank"), in form and substance reasonably satisfactory to us, that the Bank holds the sum of not less than US$ 14 million at your disposal for the purposes of this transaction (the "Bank Letter"), 26 September 2002.

2. If completion has not taken place on or before 19 September 2002 and the Bank Letter has not been received by us on or before the close of business (New York time) on 19 September, 2002, then the Deposit and all interest earned thereon will be forfeited and will belong to us entirely.

3. ……..

4. If the Bank Letter has been received by us on or before the close of business (New York time) on 19 September 2002 and completion takes place on or before 26 September 2002 (or such other date as may be agreed between Lonmin and First Gold in writing), then:

   (a) the Deposit and all interest earned thereon (net of tax) shall be applied towards the purchase price of the shares in and shareholders' claims against Cableair (the "Purchase Price");

and

(b) First Gold irrevocably undertakes to procure that the Bank transfers such sum of money to Lonmin as is necessary to complete payment of the Purchase Price, having taken into consideration (a) above."

The important aspects of the exclusivity agreement were that - a deposit of US$ 1 million was to be lodged with Lonmin by 2 September 2002, following which the balance of US$ 14 million was to be deposited or alternatively Lonmin was to receive by 19 September 2002 an acceptable "Bank Letter" guaranteeing that the bank held not less than US$ 14 million at Defendant's disposal. Failure to satisfy this last condition would entitle Lonmin to wholly forfeit the

US$ 1 million deposit, but if satisfied the deposit would be applied toward the final purchase price.

There is no dispute that on or about Friday 6 September 2002, Lonmin received the US$ 1 million deposit as partial fulfilment of the conditions set out in the exclusivity agreement. Notwithstanding this late disbursement, Lonmin by letter of 18 September 2002 agreed to treat the deposit as having been received on 2 September 2002. Additionally, by the same letter Lonmin agreed to further extend the deadline for receipt of the Bank Letter to 24 September 2002.

The evidence shows that on 24 September 2002 being the deadline set for the Bank Letter and incidentally also the last day of the three months restraint period, Deutsche Bank AG London, made available to Lonmin a letter couched in the following terms -

"Re: USD 15,000,000 Financing for Mawenzi

We confirm that ourselves and our nominees hold sufficient assets which are pledged for the benefit of Mawenzi Resources and Finance (Pty) Limited ("Mawenzi") such that we would be able to advance an amount of up to USD 15,000,000 to Mawenzi for the purchase of Cableair Limited ("Cableair").

This would be subject to the fulfillment of the following conditions:

1. A signed agreement in respect of the sale of Cableair between Lonmin PLC and Mawenzi or its nominee acceptable to Deutsche Bank AG, and the fulfillment of the suspensive conditions contained therein;

2. Deutsche Bank AG Credit approval; and

3. Compliance with South African Exchange Control regulations.

This letter does not constitute a legally binding offer to finance or guarantee any obligation of Mawenzi……".

It must, at this point, be stated that all the transactions narrated above formed part of the negotiations conducted by Defendant, for and on behalf of the Parties, but the details of which were not communicated to Plaintiff.

The Deutsche Bank letter, was considered entirely unacceptable and Robinson communicated Lonmin's position in this regard to Gain at a meeting held on 24 September 2002. According to Gain - Robinson's attitude was that Defendant had failed to demonstrate to his (Robinson's) satisfaction that the funding as required in terms of the exclusivity agreement, was available and that accordingly, the deal was off. It was Gain's belief that the US$ 1 million deposit was at that stage forfeited. The next matter of significance is that Gain communicated this new development to Khumalo who immediately traveled and arrived in the UK on the morning of 26 September 2002.

Sometime later that same day a meeting was convened between Gain, Khumalo and Hunter representing Metallon and Robinson respectively, representing Lonmin. Further negotiations took place which, finally culminated in an agreement on 28 October 2002.

It is against this background that Defendant contends that the initial negotiations lapsed on 24 September 2002 and in accordance with the HOA, the binding obligations between the Parties likewise lapsed. Accordingly that because Defendant was no longer obligated to Plaintiff, at the meeting of 26 September 2002 it opened completely new and separate negotiations with Lonmin.

As already stated the duty of good faith transcends beyond the *de facto* termination of a partnership. It is therefore a requirement that a partner account to his erstwhile partner in relation to partnership business that was initiated but had not yet been

wound up. As stated by Lindley – *"…most especially is good faith required to be observed when one partner is endeavouring to get rid of another, or to buy him out."*

Applying this principle to the present case, it is obvious that Defendant through First Gold initiated and carried out negotiations with Lonmin during the three months restraint period. During this period US$ 1 million was deposited to secure exclusivity in negotiations for the Parties. On the Defendant's version of events on 24 September 2002 being the final day of the restraint period, difficulties arose in the negotiations. Why then, one wonders, did Defendant not bring to the attention of Plaintiff this sudden turn of events, if it intended to fulfil its obligation of good faith? Defendant, instead, kept this to itself and without any warning decided that as the restraint period had come to an end on that very day, it would exclude Plaintiff and negotiate for itself for the shares in Cableair.

In my view the conduct of Defendant does not pass the good faith test. In this regard, I am in agreement with *Mr. Andersen's* submission that "one would have thought that come 24 of September, if it intended to break ranks that somebody representing the Defendant would have got hold of Hove and said: Hove, we really have to tell you in all

fairness that we now regard this agreement *[terminated]*, we regard ourselves as being free to do as we wish and you of course are free to do the same".

As already stated, Gain's evidence was to the effect that, the prior negotiations carried out on behalf of Newco lapsed on 24 September 2002. That as far as he was concerned the US$ 1 million deposited on behalf of the Parties was forfeited in accordance with paragraph 2 of the exclusivity agreement. It was, on the basis of this development and the fact that the 3 months restraint period had lapsed that on 26 September 2002, other negotiations not involving Plaintiff were initiated. These new and separate negotiations finally resulted into the Share Sale Agreement of 28 October 2002, between Lonmin and a nominee of Defendant styled Pemberton International, a private company registered in the territory of the British Virgin Islands.

What transpired after 24 September 2002, however, does not support Gains' evidence that the prior negotiations had lapsed on 24 September 2002.

In particular it was Hove's uncontradicted evidence that, having failed to communicate with Khumalo from 23 September 2002 he managed to speak with him on 3 October 2002. Hove inquired from Khumalo about the progress made in respect to depositing the balance of the purchase price, which was to have been effected by close of business (New York time) by the 19 September 2002. Khumalo intimated that he was working on it and would soon be able to pay the balance. He promised Hove that as soon as he made that payment he would be in contact to arrange a meeting to finalise their earlier arrangement.

If, therefore, Defendant truly believed that the obligations under the HOA had lapsed upon the expiry of the restraint period - Why is it that on 3 October 2002 Khumalo did not simply tell Hove that he was not prepared to discuss anything with him, as the binding agreement between the Parties had already lapsed. Instead he elected to deceive Hove by making him believe that he was working towards paying the balance of the

purchase price to Lonmin. The evidence further shows that on or about 7 October 2002, Hove discovered from an associate of Khumalo's that Khumalo was experiencing some difficulties with obtaining authority from the Reserve Bank of South Africa, in respect to the transfer of the balance of the purchase price. As a result Hove on or about 9 October 2002, sent a facsimile message to Khumalo suggesting a possible bridging financing arrangement with money that could be sourced from one of his UK associates. Again one wonders why Hove would have behaved in such manner, if the agreement between the Parties had lapsed on 24 September 2002.

The next matter of significance is that on or about 28 October 2002, Khumalo communicated with Hove, inviting him to a face to face meeting in South Africa. The meeting took place on 30 October 2002, where for the first time ever, Khumalo informed Hove that Defendant had acquired the shares in Cableair for itself. It is again a matter of

mystery why, if Defendant regarded the agreement between the Parties to have lapsed on 24 September 2002, Khumalo elected to wait in excess of a month before advising Hove of this fact.

In my humble view, the most probable explanation for the Defendant's conduct is that it capitalised on what it believed to be the *de facto* lapsing of the three months restraint period to eliminate Plaintiff from being a contender in the possible acquisition of the Cableair shares. Afterall, contrary to Gain's evidence to the effect that negotiations had lapsed, it is abundantly clear from the evidence that this was not the position. Robinson in his evidence testified as such and as it later transpired the US$ 1 million earlier deposited was never forfeited but was instead applied, in accordance with paragraph 4(a) of the exclusivity agreement, towards the final purchase price, that was paid by Pemberton, to acquire the shares in Cableair.

No doubt, by its deliberate conduct Defendant succeeded in excluding Plaintiff from being a contender in the race towards the acquisition of the Cableair shares. However, it must be emphasised that the duty of good faith, which Defendant owed,

transcends beyond the *de facto* end of a partnership and requires that one partner accounts to another, in respect to all prior commenced but unfinished partnership business. It should further be emphasised that the duty of good faith does not permit one partner to outsmart the other partner, as appears to have happened *in casu*. *Purdon v. Muller 1960 (supra) at 797 H.*

Having carefully considered the above, it is my conclusion that Defendant was in breach of its continuing mandate imposed on it by the duty of good faith. Accordingly the Plaintiff has established, on a balance of probabilities, that Defendant apart from breaching the agreement during the restraint period also breached it in respect to the continuing obligations it owed Plaintiff.

The question of Damages:

Having established that Defendant breached the agreement, the next question for determination is whether or not Plaintiff is entitled to damages.

Defendant contends that Plaintiff is not entitled to any damages in that Plaintiff "*[was]* unable to prove that it suffered any damages insofar as -

Its claims for damages is predicated on the anticipated value of 40% of Newco.

And;

It has failed to plead or prove the incorporation of Newco or any obligation on the part of Defendant to procure the incorporation of Newco due to the failure of the suspensive conditions".

The Defendant, therefore, contends that the agreement between the Parties was subject to suspensive conditions and as there was neither waiver nor fulfillment of the

conditions, Plaintiff cannot prove the damages claimed, even if there was breach of the agreement.

The point to first note, is that clause 8 of the HOA which, stipulated the suspensive conditions does not form part of the binding obligations of the agreement. Secondly and more importantly, it is trite that for a term in a contract to be properly regarded as a suspensive condition, its effects must be to suspend the operation of the agreement or part of it until the happening of some uncertain future event. *Tamarillo (Pty) Ltd v. B N Aitken (Pty) Ltd 1982 (1) SA 398 A at 417.*

If one looks at the agreement entered into between the Parties, it contained no express provision that its operation was to be suspended until the incorporation of Newco. On the contrary the terms of the agreement as per clause 2.3 read with 3.5

mandated Defendant to commence negotiations with Lonmin immediately upon the coming into effect of the agreement i.e. upon the signature date of the HOA.

Even if there were any doubts as to whether the operation of the agreement was suspended, the Defendant's contentions are totally inconsistent with the conduct of the Parties. The evidence establishes that both treated the agreement as binding and operational. It must, in this regard, be remembered that immediately upon entering the agreement Defendant through First Gold submitted an initial offer, on behalf of the Parties, for the acquisition of the Cableair shares. I have already found that the object of the agreement entered into between the Parties was to submit a joint bid, and not for the formation of Newco. It follows that with or without the successful future formation of Newco, had the contract been fulfilled the Parties would have each acquired a stake in Cableair. Besides it is clear that during the subsistence of the agreement Defendant itself did not regard the question of incorporating Newco as important - Defendant never asked the Plaintiff, at any stage, to effect incorporation of Newco failure of which it would consider itself free of any obligations.

It is therefore my view that there is no substance in the Defendant's contention that because of non-fulfillment of the suspensive conditions Plaintiff is not entitled to damages regardless of any breach.

Assessment of damages:

The plaintiff's case is that Defendant's conduct constituted a breach of contract which entitles it to claim damages from Defendant in lieu of the 40% shares it would have acquired and owned, but for the breach.

Following the amendment of 3 June 2005 paragraph 12 of Plaintiff's declaration read –

> "In consequence of the loss of the shares in Cableair and thereby Independence and its mines, Plaintiff has suffered damages in the sum of US$ 12 million being the value the shares would have had at the material time."

The claim of US$ 12 million referred to above represents 40% of US$ 30 million which, in accordance with Hove's unchallenged evidence, is what Khumalo and himself had agreed, at their meeting of 17 June 2002, to be the real value of the shares in Cableair.

This figure of US$ 30 million was subsequently revised by agreement as is reflected in paragraph 8 of the consent order of 3 June 2005 which reads –

> "8. The parties agree for the purposes of this matter that the fair and reasonable value for Cableair Limited, at the time of the alleged breach on 28 October 2002, was USD 18.5 million. The aforegoing does not preclude the Defendant from leading evidence to the effect that a loan of

> USD 15.5 million was realised by the purchaser (Pemberton International) for the purchase of Cableair Limited. The Defendant also reserves its rights to argue any issues arising out of the Metallon/Stanmarker Agreement, including the issue of whether any alleged damage suffered by the plaintiff was in fact a US Dollar loss".

Quite clearly an additional consequential amendment to paragraph 12 of Plaintiff's declaration was inadvertently omitted, namely, the quantum of damages allegedly suffered by the plaintiff should also have been amended to read US$ 7.4 million, being 40% of US$ 18.5 million.

Defendant, in its defence, submits that although by agreement of the Parties US$ 18.5 million was the fair value of the Cableair shares, Plaintiff *'still has to prove what the value of the shares in Newco and a corresponding 40% value in Newco would be worth'*.

That in deciding what value to place upon the shares in Newco, cognisance should be taken of the fact that Newco would have had to assume a liability of US$ 15.5 million in order to have financed the purchase of the shares in Cableair. The US$ 15.5 million represents the share purchase price that was subsequently agreed to between Lonmin and Defendant in their final Share Sale Agreement, which according to Defendant, it financed through a loan.

In order to arrive at what damages are due to Plaintiff, it is therefore, important for me to determine what the value of the shares in Newco would have been at the material time. However, before dealing with this question, the following comments and observations, which in my view are pertinent to the question require mention.

On a proper interpretation of the agreement, the clear and unambiguous intention of the Parties was that, upon the successful acquisition of the Cableair shares, Defendant would be entitled to own 60% whereas Plaintiff would be entitled to own 40% of the acquired shares. This arrangement constituted the underlying intention of the Parties with

or without the future formation of Newco. Simply put, the Parties intended the share ownership ratios of 60%: 40% to obtain regardless of whether or not Newco eventually came into existence. It follows that if the contemplated future detailed agreements did not materialise, as happened *in casu*, each party would still maintain ownership of its respective ratio of shares, with a consequent entitlement to do with them as it pleased, be it disposing of them or retaining them.

It is also important to note that Cableair, at the material time, was the beneficial owner of all the issued share capital of IndepGold, as a consequence of which it held 100% interest in all the five gold mines in the IndepGold portfolio. This means that the sole assets owned by Cableair, were the five gold mines under the control of IndepGold. In reality therefore these five mines were what the shares in Cableair represented. It thus goes without saying that, whoever owned a share certificate of 40% in Cableair, also

enjoyed or owned an equivalent stake in the five gold mines (the underlying assets - as a going concern) owned by IndepGold.

What then, at the material time, was the value of the shares in Newco, bearing in mind that Newco was never formed?

Where a dispute arises, the law adopts the "willing-seller-willing-buyer" criterion to try and determine the value of shares in an entity that was not formed.

In *Scott & Anr v. Poupard & Anr 1971 (2) SA 373 (A) at 381* the principle was stated thus -

> *"What has to be determined is what the actual value of the shares would have been had the company been formed in accordance with the agreement and had the appellants acted as they were required to do. The ultimate criterion in regard to evaluation of the shares of the company on that hypothesis, and bearing in*

mind that the shares would not be quoted on the market, is what a willing purchaser would, at the given time, have been prepared to pay to a willing seller for such share; and in considering that question it is necessary to attribute to such imaginary purchaser reasonably detailed knowledge of the company, its management, its assets and liabilities, its potential and other relevant factors which might have a bearing on the company's prospects of flourishing and paying a dividend". (emphasis added)

Defendant contends that if account were to be taken of the actual loan of US$ 15.5 million that Defendant used to finance the purchase of the shares in Cableair, the maximum value of the shares in Newco, at that time, would have been US$ 3 million. That is that *'the balance sheet of Newco as at the relevant date (which is October 2002) would indicate a net asset value of US$ 3 million'.*

I am not persuaded by this contention. In my view using the balance sheet value or the net asset value would be the correct and acceptable approach if dealing with a company that is being dissolved or being wound up. In such circumstances, the hypothetical willing seller would place a value that was adequate to offset the loan owed as well as recoup a marginal profit. Different considerations, however, apply when one is dealing with a going concern - as was clearly spelt out in *Scott & Anr v. Poupard & Anr (supra)*.

In casu the shares under consideration related to a going concern, with assets in the form of five operational gold mines. Thus in arriving at the sale value of the shares a hypothetical “willing-seller and willing-buyer” would have regard to …… *"the company, its management, its assets and liabilities, its potential and other relevant factors which might have a bearing on the company's prospects of flourishing and paying a dividend".* Factors such as the following would therefore be considered -

1. The company’s history

2. It's current balance sheet.
3. The assessment of its future economic viability, taking into account the assets it owns e.g. five operational gold mines.
4. The assessment of the company's income stream to see if it is capable of servicing existing liabilities, including loans.

A reasonable willing buyer, would thus do as Plaintiff did, namely, conduct a due diligence exercise and commission an independent valuation of the assets to be done, before determining what he would be prepared to pay to a willing seller for the shares.

It is my view that when regard is had to the above, it is improbable that the imaginary prudent "willing seller" would accept US$ 3 million as the value of the shares nor would the imaginary "willing buyer" expect to successfully acquire shares in a going concern of this nature for US$ 3 million. *In casu*, the court will also have regard to the following factual basis in determining what value to place on the shares in Newco.

(a) Hove and Khumalo, on 17 June 2002, agreed that the real value of the five gold mines was, at that time, US$ 30 million.

(b) The above value was to a large extent confirmed by the two valuations and the critique done at the instance of Hove. These valuations used the net present value (NPV) and the discounted cash flow (DCF) methods, which are in line with the principle enunciated in *Scott & Anr v. Poupard & Anr (supra).*

(c) Lonmin and Defendant, as willing seller and willing buyer respectively, agreed at a final share sale price of US$ 15.5 million, which it must be added was a gross under valuation of the asset as

admitted by Defendant in a press statement quoted in the Business Day of 30 October 2002.

I am mindful that in determining what the value of the shares would have been at that time, I must not be influenced by subsequent events. Nonetheless this does not mean that, in order to put the matter in correct perspective I am barred from having regard to the subsequent events that have a direct bearing to the question at hand. These are important but not decisive factors to be taken into account. It is in this light that I merely mention that a few months after acquiring the Cableair shares, Defendant negotiated with and sold 30% of the shares it now owned for a sum of US$ 9 million to a willing buyer called Manyame Consortium. I note that US$ 9 million translates to exactly 30% of US$ 30 million the figure earlier agreed by Hove and Khumalo as the true value of the assets.

For the above reasons it is my determination that the value of the shares in Newco, at the relevant time, was US$ 18.5 million agreed to by the Parties as the fair and reasonable value of the shares in Cableair on 28 October 2002 being the date of breach. Thus in order to restore Plaintiff to the position he would have been had the contract been performed, he is entitled to an award of damages in the sum of US$ 7.4 million being 40% of US$ 18.5 million.

Defendant has further contended that Plaintiff, in the first instance, should have claimed damages sounding in Zimbabwe Dollars and secondly that, even if Plaintiff stipulated its claim in United States Dollars, on the evidence it failed to lay a proper and adequate foundation, as is required by law, showing why it is entitled to damages sounding in the legal currency of the United States of America.

In amplification Defendant, in its written submissions, advanced the following -

"Para. 205 The first enquiry, therefore, is whether a plaintiff is entitled <u>at all to claim his loss in foreign currency.</u> The enquiry postulated in Makwindi Oil must therefore be undertaken by the court to see whether the currency in which the loss was effectively felt or borne was US Dollars or Zimbabwean Dollars …….

205.1 Stanmarker had incurred no losses or expenses whatever in foreign currency. Its expenses in regard to the University of Zimbabwe were in Zimbabwean Dollars and all of its expenses in Zimbabwe relating to the …claims for directors meetings and the like were in Zimbabwean Dollars;

205.2 Newco was to be a Zimbabwean company with its issued share capital being in Zimbabwean denomination;

205.3 The true underlying asset in Newco was a Zimbabwean venture, namely the mining business owned by Independence;

205.4 Most importantly, the business of Stanmarker was in Zimbabwe and its normal currency use is clearly Zimbabwean Dollars. There is no evidence whatever that Stanmarker owns any foreign currency at all;

205.5 Stanmarker would have earned dividends from Newco in Zimbabwean Dollars. That is abundantly clear and it would have been a contravention of Exchange Control regulations for it to have been paid its dividends in any other currency;

205.6 Most importantly, had Stanmarker elected to sell its shareholding in Newco as at October 2002 it would inevitably, ….., have had to receive the value for its shareholding in Zimbabwean Dollars. Accordingly the loss was *"felt"* in Zimbabwean Dollars and *"borne"* in Zimbabwean Dollars (as at October 2002 as pleaded)."

In this country it is settled law that a court can award judgement sounding in foreign currency. The controversy as to whether or not this were permissible was settled in the leading case of *Makwindi Oil Procurement (Pvt) Ltd v. National Oil Company of Zimbabwe 1988 (2) ZLR 482 S*. At page 492 E-F the Supreme Court made the following pronouncement -

> *"Fluctuations in world currency has justified the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date*
>
> *when leave is given to enforce the judgement. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgement. Since the execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement."*

The following principles are discernible from the *Makwindi case.* Firstly, that a court order may be expressed in units of foreign currency. Secondly, that a court may, in its order, provide that the units of foreign currency be converted into the local currency at the rate prevailing as at the date of enforcement. In the second principle it was accepted that in regard to execution of its judgement, a Zimbabwean court, may not levy this aspect in units of foreign currency but that where necessary, a conversion into local

currency, at the rate obtaining on the date of execution, may be ordered just for that limited purpose.

Another important principle in regard judgements sounding in foreign currency is that it is the Plaintiff's prerogative to claim in a currency that will most truly express his loss and accordingly most fully and exactly compensate him for that loss. However, in order to succeed, a claimant is required to lay a foundation that supports his claim.

Applying these principles to the present case the issue is whether the Plaintiff is entitled to an award in damages sounding in units of foreign currency?

I find that the first ground of objection raised by Defendant ignores the rule that 'when a contract is broken the injured party should if possible be indemnified for the breach, that is, should be placed as nearly as possible in the same position as he would have occupied if the contract had been performed, subject to the qualification, that in the absence of circumstances of aggravation, such as fraud, the party in default is only liable

for the damages which may fairly be considered to have been within the contemplation of the parties.' *Dennill v. Atkins & Co 1905 TS 282 at 289.* Claims for damages emanating from contractual breach are, therefore, not restricted to recompensing a plaintiff for actual expenses or losses incurred prior to the breach. *In casu* the focus should be: What position would Plaintiff have been had the contract been performed? I have already found that Plaintiff would have acquired and owned 40% of the shares in Cableair. As to the second ground of objection, raised by Defendant, I am not entirely satisfied that the Parties had agreed to restrict themselves to incorporating Newco in Zimbabwe. Hove's uncontradicted evidence is that Khumalo had initially suggested that Newco be incorporated in Zimbabwe, but the Parties never conclusively decided this. This led the Parties to agree that the domicile of Newco be left open. This position is corroborated by the definition of “Newco” in the HOA. In clause 1.7 Newco is defined as -

"…a private company with limited liability to be incorporated in Zimbabwe or such other country agreed upon by the parties, and which shall be named by agreement between the parties in writing."

Be that as it may, whether or not Newco was to be incorporated in Zimbabwe is of little significance. The underlying asset in which it sought to acquire an interest was a corporate entity which owned five operational gold mines, whose main product - Gold, is priced and traded internationally in United States Dollars. Furthermore, it must not be overlooked that Newco was to acquire 100% shares in a UK registered entity (Cableair). Newco was therefore going to own IndepGold through a UK registered entity and whatever dividends were to be declared would have been declared in the accounting currency of that entity, namely, United States Dollars. That such dividends would be transmitted to Newco, a Zimbabwean registered company, does not detract from the fact that the dividends would be in units of foreign currency. The subsequent requirements of satisfying the Zimbabwean foreign currency laws are of little consequence in this regard. On this basis alone, it is my view that Plaintiff felt its loss in United States Dollars and is entitled to an award of damages in that currency. There are, however, additional factors

that persuade me that the damages should be awarded in foreign currency. These are that, Lonmin as from the initial stage was selling the Cableair shares in United States Dollars. All references to currency in the HOA is expressed in United States Dollars. Last but not least, a subsequent sale of the shares by either of the Parties would have been in United States Dollars. This is precisely what transpired a few months after Defendant acquired the shares when it sold 30% thereof to another Zimbabwean entity called Manyame Consortium in United States Dollars totalling to US$ 9 million.

In conclusion, therefore, I also find that Plaintiff has laid a satisfactory and adequate foundation establishing its entitlement to damages sounding in the legal currency of the United States.

The rate of interest:

As is obvious from the foregoing, the court has decided to award judgement sounding in units of foreign currency. The rate of interest thus applicable cannot be that prevailing in Zimbabwe but that applicable in the country where the currency is the home currency. The principle in regard the applicable rate of interest in circumstances such as the present was authoritatively laid down by this court in the case of *Industrial Equity Ltd v. Walker 1996 (1) ZLR 269 H at 307*, where Bartlett J stated as follows -

> *"….where a judgement is given sounding in a foreign currency the rate of interest should follow the rate of interest applicable in the country where the foreign currency is the home currency. This is because…. one of the basic criteria in setting prescribed rates of interest is the prevailing economic conditions in the country to which the currency relates."*

This principle was later reaffirmed by the Supreme Court in the case of *AMI Zimbabwe (Pvt) Ltd v. Casallee Holdings (Successors) (Pvt) Ltd 1997 (2) ZLR 77 S.*

In casu, neither of the Parties adduced much evidence or information as to what level or percentage of interest should apply, in the event that I found in favour of the plaintiff. However, Counsel had no difficulties with my suggestion that. At the material time, the applicable rate of interest in the United States of America was in the range of between 2% - 4%.

Accordingly it is ordered as follows:

(1) On the claim for breach of agreement, the Plaintiff is awarded damages in the sum of US$ 7.4 million with interest thereon from 28 October 2002 to the date of payment at the rates prevailing, from time to time, in the United States of America.

(2) Costs of suit are awarded to the Plaintiff. I am, however, not satisfied on the evidence before me, that the request for an order of costs in respect to the expenses incurred, arising from the valuations prepared at the instance of Plaintiff, can justifiably be granted. That aspect of the Plaintiff's claim is disallowed.

Kantor & Immerman, plaintiff's legal practitioners
Gill, Godlonton & Gerrans, defendant's legal practitioners